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A Problem of Power: The Impact of Modern Sovereignty on the Rule of Law in Comparative and Historical Perspective

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A Problem of Power: The Impact of Modern Sovereignty on the Rule of Law in Comparative and Historical Perspective

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I. INTRODUCTION

Sovereignty may be seen as the essential ground or origin of legal authority; the sovereign is that person or group whose will must be expected to prevail.¹ Important concrete principles and practices flow from this assumption. One cannot sue the sovereign because this would give courts the power to command their superior, undermining the sovereign’s role as supreme lawgiver.² National governments can only be bound by treaties to which they have given their assent, lest their sovereign self-mastery be denied.³ According to this view, there must be a source of law above the law or there is no real, full law of any kind, only conflict over what the law ought to be.⁴

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¹ BLACK’S LAW DICTIONARY 1524 (9th ed. 2009).
² Paul F. Figley & Jay Tidmarsh, The Appropriations Power and Sovereign Immunity, 107 Mich. L. Rev. 1207, 1212 (2009) (“Because the King’s courts were constituted by, and therefore regarded as inferior to, the King himself, the notion that courts could as a routine matter entertain suits against the King was unimaginable.”).
⁴ CRAWFORD YOUNG, THE AFRICAN COLONIAL STATE IN COMPARATIVE PERSPECTIVE 20–21 (1994); see also LON FULLER, THE LAW IN QUEST OF ITSELF 109 (1966) (reviewing Thomas Hobbes’
This Article argues that the seemingly absolute attribute called “sovereignty” has—or at least should have—very considerable limits, and that attempts to maintain the modern, absolutist view of sovereignty are highly dangerous to the rule of law and the rights liberal constitutionalism seeks to protect. Liberal constitutionalism itself depends on restriction of the state by constitutions and other laws, in effect placing the sovereign under the law, and a person or institution that can decide on its own when to violate the law is not under it.\(^5\) To be sovereign in the modern sense is to be unlimited in power.\(^6\) Moreover, the liberal attempt to square sovereignty with rights by declaring the people sovereign faces inevitable questions of legality and force. Not all liberals have been willing to recognize a right to revolution on the part of the people, despite recognizing that this is the only mechanism clearly adequate to maintenance of their rights in the face of a recalcitrant state.\(^7\) In addition, such a formulation surrenders the substance of law—juridical procedures that replace force and violence. Few will be willing to pay the cost of such a formulation, which is not in the best interest of the law itself. In practice, then, the liberal democratic state remains sovereign and its rhetoric of popular sovereignty remains a fiction—in all but the most extreme circumstances.

Recent legal and constitutional developments may be taken as recognition of the dark side of sovereignty. For example, the European Union (“EU”) has subjected nation states to super-national human rights rules. But the drive for mastery continues. A drive for reconstitution of (supra) national sovereignty is countering promising moves in the EU. This would form a larger, more distant sovereign no less absolute and even less dependent than nation states on those who are subject to its power. This Article cautions against this latter trend by highlighting sovereignty’s inherent tendency to foster overreaching that undermines the rule of law, as well as the peaceful enjoyment of human rights.

This Article presents three highly diverse examples of the destructive force of modern sovereignty: the original growth of that sovereignty in early

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\(^5\) Richard L. Sklar, *On the Study of Constitutional Government in Africa, in Constitutionalism and Society in Africa* 43 (Okon Akiwa ed., 2004) (“Constitutional government is a form of limited government based on a prescribed division of powers among public officials. Its leading principles, by which it is often defined, is known as the rule of law, which signifies that no political authority is superior to the law itself.”) [hereinafter Constitutionalism and Society in Africa].

\(^6\) 3 THOMAS HOBBES, *Leviathan, in The English Works of Thomas Hobbes* 194–95 (William Molesworth ed., 1839) (“[T]hat king whose power is limited, is not superior to him, or them that have the power to limit it; and he that is not superior, is not supreme; that is to say not sovereign.”).

\(^7\) 1 WILLIAM BLACKSTONE, *Commentaries* *^*157 (stating that human laws cannot suppose the possibility of a right to revolution and so Parliament is “absolute and without control” so long as the English constitution lasts).
modern Europe, the attempt to enforce that sovereignty by the British on their American colonies, and the current, chaotic situation among “sovereign” nations in Sub-Saharan Africa. The first, early modern example shows the roots of modern sovereignty in state violence and the drive to eliminate jurisdictions competing with the central (royal and often arbitrary) state. The second, Atlantic example shows how the drive for supranational (in this case imperial) sovereignty can breed violence and disintegration when the objects of domination defend themselves against that authority and its claims. The third example shows the tragic mistake of commentators arguing that the state in Sub-Saharan Africa is insufficiently sovereign, pointing out that the absolutist legacy of colonialism, according to which European sovereigns were entitled to act arbitrarily in regard to the colonies, continues to undermine attempts at forming stable democratic governments abiding by the rule of law.

This Article begins with a discussion of the modern conception of sovereignty. It then sets forth each of the examples in turn. Following cautionary examples this article critiques current trends in the formation of EU constitutional structures with an eye toward the dangers of reconstituting modern sovereignty on the supranational scale. This Article ends with a brief conclusion noting the central, extra-legal flaw in modern sovereignty: its tendency to undermine habits of law-abidingness among rulers and so undermine the legitimacy and efficacy of law itself.

II. MODERN SOVEREIGNTY

Sovereignty, as currently understood, is a modern development. In Medieval Europe a “sovereign,” whether a monarch or ruling council of a city-state, was merely one who did not recognize a superior; that is, while a sovereign would not simply bow to another ruler, it might have equals with which it had to bargain, including equals who considered themselves its superiors (e.g., a king or emperor dealing with a Pope). The result was competition among sovereigns—and the jurisdictions in which each was dominant—that produced a significant level of sometimes violent conflict. But this conflict itself produced substantial benefits in the form of limitations on power: individual rights grew from the ability of persons and communities to play one jurisdiction (e.g., ecclesiastical or royal) off against another; judicial efficiency and the rights of plaintiffs grew from competition for litigants among court systems; and procedural norms central to the rule of law

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8 See generally Joseph Canning, A History of Medieval Political Thought (1996).


10 See Daniel Klerman, Jurisdictional Competition and the Evolution of Common Law, 74 U. CHI. L. REV. 1179 (2007) (arguing that jurisdictional competition through the medieval and early modern era produced greater efficiency and pro-plaintiff holdings throughout the English legal system).
developed in large measure from the efforts of various groups to defend and enforce charters granted by their monarchs.11

In contrast, the modern conception of sovereignty owes its inception to legal theorists such as Jean Bodin, who defined it as “that absolute and perpetual power vested in a commonwealth.”12 Externally, the sovereign state must have control, which in the international context means autonomy from outside or “foreign” law.13 The result is insistence on the unquestioned ability of the nation state to abide only by its own rules.14 To allow international law to supersede its own, on this view, would put the nation in the position of giving up control over the definition and maintenance of the legal order within its territorial boundaries, thereby destroying it.15

Some view the nation state’s dominion over its subjects as unlimited.16 Control over land, conscription of citizens, taxation of goods and services, and mere existence all are rights belonging to the sovereign state.17 This is not to say that modern sovereignty, particularly in its liberal form, leads inevitably to totalitarianism. But modern liberalism (especially the legal positivism of 19th Century Austinian and succeeding jurisprudence) rests on the insistence that we simply cannot have positive law without an underived authority.18 Law, on this view, must come from somewhere and is by nature a command. Therefore, a commander must issue the laws and to do so must be in a position subservient to no one, or absolute.19 As positivist scholar Hans Kelsen put it, a:

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12 YOUNG, supra note 4, at 28. Adding to Bodin’s modern concept of sovereignty, Young indicates that the infiltration and secularization that encompassed the modern nation state are two developments that helped spark modern sovereignty. Id.

13 Id. at 33–34.

14 Id.; see also Schooner Exch. v. McFaddon, 11 U.S. 116, 136 (1812) (“The Jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible to no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source would imply a diminution of sovereignty.”).


16 YOUNG, supra note 4, at 28.

17 Id. at 30.

18 Id. at 20–21 (“The Austinian doctrines of jurisprudence, which argued that positive law could only exist in conjunction with a determinate locus of power, an underived authority.”); see also Heinrich A. Rommen, The Natural Law 110, 136 (1998) (distinguishing between two types of positivism—the first denoted “world view positivism” according to which human law is merely a projection of a legal force that is the command of a sovereign, with the sovereign’s decree resembling the forces of nature and history; the second denoted “methodological positivism” being concerned to study and describe the law essentially as it is).

19 YOUNG, supra note 4, at 20–21.
scientific theory of the State is not in a position to establish a natural limit to the competence of the State in relation to its subjects. Nothing in the nature of the State or the individuals prevents the national legal order from regulating any subject matter in any field of social life, from restricting the freedom of the individual to any degree.\textsuperscript{20}

Even under this theory of sovereignty modern liberals do not see themselves as espousing a theory of absolutism. Indeed, central to liberalism is protection of the individual through bills of rights and other legal mechanisms. Advocates of liberal regimes see themselves as embodying the rule of law by operating within legal limits (e.g., written constitutions). However, such limits come from the sovereign itself, in that they are embodied most prominently in constitutions that act as contracts between the state and civil society.\textsuperscript{21} “By legal compact, substantial limits are placed upon state power. A state is rendered subordinate to its own public law; a degree of autonomy is guaranteed to civil society through the interdiction of state action that intrudes on defined individual and group rights.”\textsuperscript{22}

Why can the U.S. Congress not pass an \textit{ex post facto} law? Because the Constitution forbids it.\textsuperscript{23} In Great Britain there is no such restriction on the legislature, yet the British “constitution” is considered legitimate. Flaws in a constitution—its failure to protect certain fundamental rights, for example—may call for amendment or even opposition, but they do not, within liberal ideology, affect the sovereign right of rulers to violate such extra-constitutional rights. There are no extra-constitutional rights assertable against the sovereign within the legal system.\textsuperscript{24} Thus, within modern sovereignty, questions regarding what rights citizens ought to have are non-legal, relating only to the regime’s legitimacy rather than its legal jurisdiction. The result is not merely logical consistency, but the loss of law’s ability to control force and violence. Sovereignty separates questions of legitimacy (what rights the constitution ought to protect) and law narrowly conceived (what rights the constitution does protect), which tends to reduce legal debates to sterility while promoting extra-legal or even illegal conflict over the power to control the law. This conflict favors those already controlling the means of violence.

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\textsuperscript{20} Id. at 29. \textit{But see} Fuller, \textit{supra} note 4, at 69 (showing that Kelsen viewed sovereignty more as a logical postulate than a real person or thing).
\textsuperscript{22} Young, \textit{supra} note 4, at 30.
\textsuperscript{23} U.S. CONST. art. I, § 9, cl. 3.
\textsuperscript{24} Phillip A. Hamburger, \textit{Natural Rights, Natural Law, and American Constitutions}, 102 YALE L.J. 907, 956 (1993) (arguing that during the American founding era it was understood that natural rights existed within civil society only to the extent constitutional provisions and/or laws protected them).
\end{flushright}
Unfortunately, the view that questions of legitimacy are extra-legal leaves those who raise such questions without the crucial support of law or law’s own legitimizing force as a form of social control and order. Such questioners are seen as advancing mere preferences that may be appropriate subjects for legislative debate, but lack the authority of claims of right embedded in jurisprudential orders. For example, in the international context, a central barrier to humanitarian intervention potentially preventing genocide, such as that perpetrated in Rwanda, is the all-but-absolute requirement that the nation involved consent to said intervention, either directly or retroactively on account of the nation’s consent to relevant international agreements.25

The modern international human rights regime seeks to provide a legal basis for objecting to acts of national sovereigns.26 Whether entrenched in international agreements, conventions, and courts, or asserted as customary law due to its wide acceptance, human rights norms are put forward as appropriate legal bases for international protection of the rights of individuals and groups from overreaching states.27 There is significant opposition to use of this law, however, which is rooted in the claims of national sovereignty and the concomitant right to autonomy. This is particularly true if the state at issue has not explicitly signed on to the treaty, standard, or norm at issue.28 Such criticisms derive particular force from the central role of modern sovereignty in contemporary legal discourse. Whether reflecting wide acceptance or not, how can mere agreements bind sovereigns who have not explicitly agreed to be subject to them?29

Partly as a model answer to the problem of enforcing human rights within a system of sovereign states, scholars propose a centralized European Union as an important progression from the nationalist system.30 The European Convention on Human Rights grants hearings and protection of the civil rights of individuals throughout the EU, even at the expense of the particular law or policy of the Member State in contention.31 Before

26 Frohnen, supra note 11, at 42.
27 Id. at 43–45 (describing debates over attempts to propagate “instant custom” in the international arena).
29 This article does not delve into arguments rooted in jus cogens because, while jus cogens consists of principles seen as transcending any national law or international treaty, its enforcement remains highly questionable.
30 David J. Bederman, Diversity and Permeability in Transitional Governance, 57 Emory L.J. 201, 202–07 (2007); see also Clavier, supra note 15, at 8–11.
31 Bederman, supra note 30, at 215 (“The European Convention on Human Rights, as interpreted by the European Court of Human Rights, has, de facto, become the fundamental civil rights law
evaluating these attempts to modify or transcend modern sovereignty, however, this article will analyze that sovereignty itself. By looking at its origins, development, and applications in a comparative and historical context, one can see the extent of modern sovereignty’s destructive force in regard to human rights and the rule of law. Such analysis is necessary in light of the view that centralized territorial sovereignty in the modern sense was the fundamental premise and font of human rights and the modern community of nations. 32 Leaving to one side the wealth of evidence that rights developed earlier and in a more balanced context than is often thought, 33 this Article turns next to the actual development of modern national sovereignty through violence and the drive for arbitrary, supra-legal power.

III. THE ORIGINS OF MODERN SOVEREIGNTY

The modern world has been presented as originating in a necessary break with the theocratic communalism of the medieval era, in which individuals found themselves swallowed up by various undemocratic groups failing to recognize human rights. 34 In particular, liberal theorist John Locke’s doctrine of natural rights, since superseded, was necessary for the development of human rights properly understood, and itself required the emptying out from society of various guilds, churches, nobles and other bearers of feudal rights. 35 Over time, the nation state eliminated or subsumed local sources of power and lawmaking as well as the separate, ecclesiastical jurisdiction in favor of exclusive territorial jurisdiction. 36 The unification of power and jurisdiction is presented as a positive development in which rational structures rooted in public utility replaced the backward-looking traditionalism of church and local law, with their emphasis on the legal imperative of theology, custom, and status. 37 Scholars praise such

for all of Europe, supplanting the formal and informal constitutional regimes of almost all European nations."

32 Id.


35 Id.

36 Clavier, supra note 15, at 17.

37 Sabine & Thorson, supra note 34, at 492–98; see also William Hard, The Spirit of the Constitution, 185 Annals Am. Acad. Pol. & Soc. Sci. 11, 11–12 (1936) (arguing that the American Constitution embodies an open, free spirit on account of the rejection, in the Declaration of Independence, of the previously oppressive role of religion in the lives of the American people); Robert Nisbet, The Quest for Community: A Study in the Ethics of Order and Freedom 96 (2000) (presenting Rousseau’s argument that the modern state freed individuals from the shackles of the social and religious institutions that had enslaved them, replacing the enervating power of custom and authority with the political expression of will enshrined in law).
consolidation for bringing peace and order out of the chaos of local baronial tyranny. In early modernity, the result was mixed in terms of human rights, with monarchs often violating rights but also setting up programs of education and social betterment necessary for human flourishing and the development of democracy. The crucial change began in the late 18th Century, when public opinion and consent, along with declarations of human rights, came to be widely seen as the font of legitimacy, helping bring about national democratization and the growth of human rights protections.

Unfortunately, on this view, the 19th Century saw the rise of certain chauvinistic ethnic and nationalist movements, particularly in Germany. This was an extreme and perverse form of nationalism. Indeed, the late formation of the German nation has been blamed for the rise of racism as embodied in the Nazi Party and its genocidal Final Solution. Moreover, the “mature” nationalist system has been tamed through its own proper development; globalization has reduced state autonomy, and an international human rights regime points to possible future transcendence of the nation state.

The problem with this rosy view of the march of progress through jurisdictional consolidation is that it does not reflect historical reality. The transition from medieval polyarchy to modern national sovereignty was not merely bloody, but counterproductive for the rule of law. It undermined rights and the rule of law by buttressing the power of rulers to act outside and above the law.

Early modern monarchs gained greater control over their demesnes through the extension of central power from the local court through itinerant judges and then through establishment of mechanisms of adjudication at the local level. Monarchs were increasingly able to exert their power through


39 Id. at 12–13, 378–91. See also Sabine & Thorson, supra note 34, at 538. Rousseau’s philosophy centered around the notion that, “[h]uman beings must be made citizens before they can be made men, but in order that they may be citizens, governments must give liberty under the law, must provide for material welfare, and remove gross inequality in the distribution of wealth, and must create a system of public education by which children are ‘accustomed to regard their individuality only in its relation to the body of the state.” Id.


41 Id. at 270–71.

42 Id.

43 Id. at 278–91.

44 Bederman, supra note 30, at 204.

officials directly reliant on and loyal to them, rather than through local nobles, bishops, and/or municipal bodies with their own interests and jealously guarded rights. This extension of power was increased exponentially by a single factor partially influenced by law, ideology and politics, but exerting a massive and destructive influence of its own: war. As Charles Tilly observed, “war made the state, and the state made war.”

Though many point to the Protestant Reformation and the Catholic reaction thereto as being the seedbed of modernity, it was the destructive capacity of war and its effects on legal jurisdiction, taxation, and administration that forged the modern state, beginning well before the so-called wars of religion got underway.

In the 14th Century there were 1,000 or more political entities in Europe; by 1500, there were fewer than 500; by 1789, the number had shrunk to fewer than 350; and by 1900, only twenty-five nations remained. This astounding contraction in political diversity was the product of an equally astounding expansion of the power of the victorious rulers, in both geographical reach and exclusivity of control over particular territories. But it is a process too often overlooked by lawyers and legal historians because it clearly was not led or produced by legal, but rather by military, exigencies. Decades before the wars of reformation, gunpowder and field artillery had already made war much more destructive and costly, thus forcing massive requirements in taxes and troop mobilization upon those fully engaged in the fighting—requirements that caused monarchs to set about usurping, co-opting, or destroying rights that obstructed efficient military administration.

Rulers sought to increase taxes in order to pay for the ever-expanding military establishments. These taxes required ever-larger, and more forceful, bureaucracies to collect them, resulting in greater mobilization and regimentation of the people, whose resistance brought only further oppression. Competing sources of law and constitutional authority—including localities, status groups such as the nobles, and whole jurisdictions like the ecclesiastical—were destroyed, often in part through violent means. In most of Europe, a combination of pressures at home to centralize

46 Id.
48 SABINE & THORSON, supra note 34, at 294–296.
49 PORTER, supra note 47, at 6.
50 Id. at 12.
51 Id.
52 Id. at 14.
53 Id. at 28.
administration and power for military purposes—to centralize for war—and severe reductions in the supranational jurisdiction of the Holy Roman Emperor and the Catholic Church increasingly made the monarchy and its formal state the focus of legitimacy and power.\textsuperscript{54} The process was long, drawn out, and uneven, but was widespread and fundamental within the European world.\textsuperscript{55} And law, while not the driving force in this conflict, was both a tool and a field of battle.

In the case of France, as early as the late 15th Century the monarchy was attempting to revoke municipal rights, forcing new constitutions (or charters) on municipalities that put in place oligarchies dependent on the king.\textsuperscript{56} Early in his rule, Louis XIV (1643–1715) took to rescinding and then reselling charter rights to French towns as a means of raising revenue, treating charters as gifts rather than binding constitutional agreements.\textsuperscript{57} By 1692, French municipalities definitively lost the right to elect their own leaders.\textsuperscript{58} Local rights in France, like those in England and elsewhere in medieval Europe, had been extensive. The town of Angiers, for example, held jurisdiction over disputes between employers and employees within its limits.\textsuperscript{59} More generally, local judicial officials were charged with making local regulations until this power was, over time, taken over by the center.\textsuperscript{60}

Over the course of the 18th Century, the French monarchy gathered most local rights to itself through the institution of the \textit{Conseil du Roi} (“Royal Council”). This administrative institution exercised jurisdiction over local judicial officials, overriding their regulations at will.\textsuperscript{61} It also took cases from the regular courts at will and exempted its own decrees from their jurisdiction.\textsuperscript{62} The Royal administrative courts took the trials involving public officials and/or their interests and, relying on the royal prerogative power, vindicated said officials and interests, in effect placing them above the law, as

\textsuperscript{54} See Porter, supra note 47, at 69.

\textsuperscript{55} Id. at 71–72, 123 (pointing out that at the time, the Treaty of Westphalia more or less quelled the overt warfare of the reformation, numerous tiny German principalities retained the power to declare war and even the French king was not in full control of “his” territory and that it was only over the course of the 18th Century that the people’s loyalty began to shift from village and church to the state as its structures became the focus of public life and its borders came to define the people; in effect, the state created the nation, but only over generations).

\textsuperscript{56} 1 Alexis De Tocqueville, The Old Regime and the Revolution 272 (Alan Kahan trans., 1998).

\textsuperscript{57} Id. at 125 (explaining that this was done seven times over an eighty year period).

\textsuperscript{58} Id. at 124–25.

\textsuperscript{59} Id. at 274.

\textsuperscript{60} Id. at 123.

\textsuperscript{61} Tocqueville, supra note 56, at 123.

\textsuperscript{62} Id. at 132.
they had not been before.63 The Royal Council also took on administrative duties: for example, it instituted and recruited the six-year militia, thus overriding feudal rights, including nobles’ (often abused) control over the peasantry, where such rights interfered with the interests of the French war machine.64

This is not to say that the Royal Council eliminated all feudal rights (and duties) prior to the French Revolution. Taxes, rights to labor from peasants, and even ecclesiastical tithes and benefices all remained part of the French legal landscape; but they became irritating abuses with no constitutional role.65 In France these rights were particularly hated by the common people, but not because they weighed more heavily there—they weighed far more heavily, for example, in Germany where many serfs remained tied to the land.66 Rather, the decline of local rights—of the medieval constitutional structure—made remaining feudal rights and duties seem illegitimate. Local nobles in particular had lost their judicial function to the crown, along with their right to rule, retaining only financial rights, which they exercised zealously against the peasants without providing formerly customary services in return.67 Additionally and crucially, the ecclesiastical jurisdiction lost its constitutional status due to the French crown’s mastery over the court system, its refusal to recognize any temporal authority of the Pope, and its control over appointment of bishops and use of revenues from vacant bishoprics within the realm.68

The French Revolution is credited with sweeping away the residue of medieval Europe. And the Revolution did bring declarations of the end of ecclesiastical and feudal rights.69 But the absolutist dynastic states that faced revolutionary France themselves were “modern” in the sense that they were centralized machines for making war—most of their income was devoted to supporting standing armies.70 Modern sovereignty was a crucial element in these states; the Code, which Frederick the Great of Prussia drafted (1740–1786) and his successor promulgated, declared the king to be sovereign and, as such, to embody the state and represent in his own person

63 Id. at 134–35.
64 Id. at 122.
65 Id. at 111–18.
66 Tocqueville, supra note 56, at 111.
67 Id. at 115.
68 Catholic Dictionary: Gallicanism, CatholicReference.NET (1999) http://www.catholicreference.net/index.cfm?id=33692 (last visited Dec. 28, 2011) (Gallicanism, a group of religious opinions and policies that for many years were peculiar to the Church of France, or the Gallican Church, restrained the pope’s authority over the Church in favor of bishops and the temporal ruler).
69 Tocqueville, supra note 56, at 111–12.
70 Porter, supra note 47, at 116.
the whole of his realm—making him the “omnipotent agent of society.”71 This declaration of sovereignty found its parallel in that of the revolutionary French National Assembly, which declared that the French feudal system, the existing court structure, and all the privileges formerly attaching to nobles, clergy, provinces, and localities throughout the land were at an end.72 The point concerns not whether the old system deserved to be abolished, but the absolute, sovereign power of an assembly abolishing it with a single decree.

The war with Napoleon finally undid the dynastic monarchies and their societies’ legal structures.73 The Napoleonic example shows war’s ability to transform law. At the time of Napoleon’s rise to power there had been over 400 separate European legal codes. Determined to rationalize the law, Napoleon presided over the drafting of a single Code Napoleon and imposed it on most of Europe.74 During the Napoleonic era a single state governed the bulk of Western Europe with its single administrative and military apparatus, bringing about the final unraveling of the feudal order.75 Many, of course, have applauded Napoleon’s efforts as bringing legal order out of the welter of medieval rules, rights, and jurisdictions. But it is important to note the cost imposed by this program to obliterate the vestiges of medieval legal pluralism: traditional liberties, privileges, and constitutional forms were destroyed by warrior states that killed tens of millions of people.76

The corporate relationships that made up the constitutional structure of medieval kingdoms relied upon a multiplicity of reciprocal rights rendering efficient extraction of money and troops from an unwilling kingdom impossible. In France, for example, taxes had been taken to be rooted in sets of treaties among the estates of the realm, requiring renegotiation if they were to be raised.77 Like the English Parliament, the French Estates General originated in calls by monarchs for meetings with those from whom they sought funding; meetings at which those supplying funds were able to extract

71 Tocqueville, supra note 56, at 261–62.
72 Décret portant abolition du régime feudal, des justices seigneuriales, des dimes, de la vénalité des offices, des privileges, des annates, de la pluralité des benefices, etc. du 4, 6, 7, 8 et 11 août 1789 [Decree abolishing the feudal regime, manorial courts, tithes, sale of offices, privileges, first fruits, plurality of profits, etc. of August 4, 6, 7, 8 and 11, 1789], 1 COLLECTION COMPLÈTE DES LOIS, DÉCRETs, ORDONNANCES, RÈGLEMENTS, ET AVIS DU CONSEIL D’ÉTAT (J. Duvergier & L. Bocquet) [Duv. & Boc.], 1824, p. 39, translated in 2 Readings in European History: From the Opening of the Protestant Revolt to the Present Day 404–09 (James Harvey Robinson ed., 1906), available at http://history.hanover.edu/texts/abolfeud.html.
73 Porter, supra note 47, at 138.
74 Id. at 135–36.
75 Id. at 140–41.
76 Id. at 297–98.
77 Bertrand de Jouvenel, Sovereignty 223 (1998).
concessions in exchange for support.\footnote{Id. at 213.} Monarchs’ early modern establishment of their own tax-generating bureaucracy meant they did not need these meetings anymore. The result was utter decrepitude for the Estates General\footnote{Id. at 214 (pointing out that in 1614 the third (popular) Estate actually sought to impose a theory of non-resistance to monarchical power on the French nation).} and long lulls in Parliamentary assertion until the English Civil War.

The English Civil War itself was the product of a somewhat different situation in England. The English monarchy was no less desirous of arbitrary power than the French, only less successful in achieving it. In justifying its drive to control or eliminate competing jurisdictions, the English crown portrayed its constitution as that of an absolute monarchy.\footnote{See James I, The Trew Law of Free Monarchies, in The Political Works of James I (1918) (arguing that the monarchy in England is “free” in that kings are free from any earthly restrain on the exercise of their powers).} An early example of such claims was Henry VIII’s attack on local charters as “gifts” he deemed to have lessened his rightful power, hence requiring revocation.\footnote{Jurisdiction in Liberties Act, 1535, 27 Hen. VIII., c. 24 (Eng).} In this way, Henry VIII sought to undo the work accomplished several centuries before, when Edward I, in an exhaustive set of \textit{quo warranto} actions, established his right to revoke charters for various administrative violations, but at the same time admitted the legal validity of such charters and the relevant subjects’ rights to enforce them, even against the king.\footnote{Bruce P. Frohnen, The One and the Many: Individual Rights, Corporate Rights and the Diversity of Groups, 107 W. Va. L. Rev. 789, 818 (2005).} Henry was less successful than Louis XIV, however, managing only to reduce and limit, rather than eliminate, local charter rights.\footnote{James II in the 16th Century would himself fail to bring the municipalities fully to heel. See \textit{infra}.}

Prerogative courts in Tudor England also played a similar, if less successful, role to that played by the Royal Council in France.\footnote{R.H. Helmholtz, Roman Canon Law in Reformation England 46 (1990).} A variety of prerogative courts, including England’s High Court of Commission, took over jurisdiction from common law and ecclesiastical courts in certain cases, suppressing the procedural rights such courts provided for the accused, with the explicit aim of vindicating the “rights” of absolute monarchs and eliminating dissent.\footnote{Id.} Repression went beyond matters of political and theological dispute into intimate details of personal conduct. After the Tudor centralization of morals control, churchwardens began to be prosecuted if they failed to bring charges for crimes such as dressing in the clothes of the opposite sex, encouraging drinking and dancing among young people, being
overly idle, and saying “amen” after prayers in a manner deemed too scoffing and loud.\textsuperscript{86} Thus churchwardens became subject to fines and imprisonment if they failed to present charges against parishioners; the state was now holding church officials accountable for enforcing morals legislation.\textsuperscript{87}

The Court of High Commission was abolished as a result of the conflicts of the Civil War.\textsuperscript{88} That war was brought about by the existence in England of a sufficiently powerful counter-claimant to monarchical sovereign power. England was a partial exception to the early modern rule of consolidated power and loss of the rule of law that was prevalent on the continent because of resistance made possible by the survival of local rights, and the militia in particular.\textsuperscript{89} As late as 1688, when James II abused his right of \textit{quo warranto} to eliminate local charters as part of a scheme to pack Parliament, reaction was so violently negative that he restored the charters before his eventual flight from England.\textsuperscript{90} As important were the persisting rights of subjects to bear arms and serve in the militia, a military force which had political and military significance in Great Britain because of the relatively small standing armies amassed by the Stuart kings in the early 17th Century.\textsuperscript{91} However, the conflicts that this relative equality of forces facilitated were exacerbated during the 17th Century by competing claims to absolute sovereignty. Henry Parker, an opponent of Charles I and a defender of parliamentary supremacy, claimed that “two supreames cannot bee in the same sence and respect. . . . There is an Arbitrary power in every State somewhere.”\textsuperscript{92} Results included civil war, regicide, and Cromwell’s military dictatorship.

It may be the case that modern constitutionalism has placed limits on the sovereign powers of rulers, but these powers were increased exponentially by sovereignty itself. Modern attempts to bind sovereigns were made exponentially more difficult by the absolutism of early modernity, itself intimately tied to claims regarding sovereignty that have persisted through the liberal era. It was the early modern liberal Thomas Hobbes, who referred to sovereignty as “an artificial soul, as giving life and motion to the whole body.”\textsuperscript{93} Hobbes drew the logical conclusion from this absolutist view of the

\textsuperscript{86} \textit{Id.} at 107–08.
\textsuperscript{87} \textit{Id.} at 106.
\textsuperscript{88} \textsc{Dudley Julius Medley}, \textsc{A Student’s Manual of English Constitutional History} 593 (1902).
\textsuperscript{89} \textsc{Lois G. Schwoerer}, \textsc{No Standing Armies} 142 (1974).
\textsuperscript{90} \textsc{J.R. Jones}, \textsc{The Revolution of 1668 in England} 263 (1972) (detailing the struggle between King and Parliament over control of the militia and its role in fomenting the English Civil War).
\textsuperscript{91} \textsc{Thomas Pitt Taswell-Langmead}, \textsc{English Constitutional History} 193 (1905).
\textsuperscript{92} \textsc{Henry Parker}, \textsc{Observations upon Some of His Majesties Late Answers and Expresses} 1, 8 (2d ed. 1642), \textit{quoted in} \textsc{The Varieties of British Political Thought, 1500–1800} 152 (J.G.A. Pocock et al. eds., 1993).
\textsuperscript{93} \textsc{Hobbes}, \textit{supra} note 6, at ix.
sovereign, that it was the creature of a social contract between individuals, but not a party to it, and so not liable to any of its rules or their breach. Thus, on Hobbes’s reading, the choices under modern sovereignty are submission to an unlimited ruler or maintenance of unlimited power among the people, leaving no final authority of any kind to judge when a breach of promise has occurred and returning the people to questions of power and violence rather than law. “No sovereign, no peace,” seems to have been the view. But what if the sovereign does not want peace?

IV. COLONIALISM AS THE EXTENSION OF SOVEREIGNTY

By the end of the 17th Century, claims to absolute sovereignty on the part of the English Crown and Parliament had been compromised. The Revolution of 1688, during which James II was chased from power, produced the English Bill of Rights, establishing a constitutional system in which the King’s powers were both limited and checked by Parliament, most importantly by ensuring annual sessions of that body. The Bill of Rights established a limited government in which modern, absolute sovereignty could be claimed by neither Parliament nor King. For the purpose of “vindicating and asserting their ancient rights and liberties,” Parliament made a series of statutory declarations. They made parliamentary consent necessary for the king to dispense from or suspend laws. They also declared illegal royal attempts to tax without parliamentary consent, to keep a standing army, to forbid petitions to the King, to forbid the keeping of arms, to control parliamentary elections, to limit parliamentary freedom of speech and debate, to impose excessive bail and fines, and to neglect the calling of frequent parliaments; but they made no attempt to abolish the monarchy.

The English, represented in their corporate capacities in the Bill of Rights Parliament, looked to a conception espoused by theorists such as Johannes Althusius and David Hume, and put into practice in the Netherlands, rather than looking to the absolutist theories of sovereignty that had proved victorious on most of the continent. Hume’s theory denied

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94 Id. at 161.
95 Id.
96 E. S. Creasy, The Rise and Progress of the English Constitution 293 (1886).
97 Bill of Rights, 1688, 1 W. & M., sess. 2, c. 2 (Eng.), reprinted in The American Republic: Primary Sources 106–09 (Bruce Frohnen ed., 2002).
98 Creasy, supra note 96, at 107.
99 Id.
100 Id.
101 Id. at 106 (declaring that the lords temporal and spiritual and commons represent “all the estates of the people” of the realm).
102 See Donald W. Livingston, The Founding and the Enlightenment: Two Theories of Sovereignty, in Vital Remnants: America’s Founding and the Western Tradition 246–55 (Gary L.
the indivisibility of sovereignty. Hume pointed out that the Roman republic maintained two sovereign legislatures—each able to veto the laws of the other.\(^{103}\) He went so far as to reserve the term “free government” for those in which power is partitioned “among several members” such that social orders endowed with the right of corporate resistance might prevent concentration of arbitrary power.\(^{104}\) At the settlement of 1688, the King, Lords, and the Commons were viewed as checking the powers of one another to prevent descent into arbitrary government.\(^{105}\) The rights of the people, in their localities and in their persons as recognized by the common law, were seen by those in as well as those out of government as binding on those who governed. But how far did these rights extend? And to what extent was the sovereign truly bound? These questions would prove crucial in the age of colonization.

It is easy to condemn European states for their brutality in subjugating the bulk of the non-European world. This article’s central aim is to highlight the role the modern conception of sovereignty played not just in justifying this brutality, but also in fomenting violence and breakdown within the Atlantic world. The assertion of the right to national self-determination, valid as it is, may obscure the point: insistence on sovereign power can bring resistance and disintegration. Examining the American War of Independence from the British perspective demonstrates that it is not merely the drive for dominance, but also and more fundamentally the underlying assumption and assertion of sovereign juridical authority that can cause loss of constitutional connections that might be saved; connections that might serve as models for a productive constitutional means to deal with diversity even today.

The American side of the revolutionary debate is relatively well-known. Britain’s American colonists revolted because they refused to accept that Parliament had the right to govern their colonies without reference to established rights.\(^{106}\) Debates over “external” versus “internal” taxation in particular rested on the American insistence that their relationship with Britain was a limited one, governed by the provisions of colonial charters and by historical precedent, which had established that the colonies would be self-governing.\(^{107}\) The colonies saw themselves as subject only to the powers

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103 Id. at 249.
104 Id. at 250.
106 See The Declaration of Independence (U.S. 1776) (listing grievances against the British government and justifying American independence).
specifically granted to the crown and the more general requirement that their laws not be repugnant to the laws of England. 108

The doctrine of sovereignty played a crucial role in fomenting rebellion and, from the British perspective, losing an important part of its empire, as well as the possibility of governing that empire in a manner more humane and less arbitrary than continued to be the case well into the 20th Century. The problem was both summed up and exacerbated by one piece of legislation: the Declaratory Act of 1766. This parliamentary statute declared the American colonies to be “subordinate unto, and dependent upon the imperial crown and Parliament of Great Britain,” and declared that “the king’s Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, of Great Britain, in Parliament assembled, had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever.” 109

The essence of this statute was Parliament’s statement that it had, and necessarily required, absolute and arbitrary power over British colonies to maintain the empire. Central to this development was resurgence of the Hobbesian view of sovereignty in 18th Century Britain, especially in the work of Sir William Blackstone. Blackstone, author of the Commentaries on the Laws of England, the definitive legal treatise of his age, was central to debates over the rights of the American colonies. 110 Blackstone was a vigorous defender of liberal, individual natural rights—indeed, one who saw the entire purpose of government as founded on their protection. 111 Blackstone also held that Parliament’s power was sovereign and uncontrollable, meaning that “[i]t can change and create afresh even the constitution of the kingdom and of parliaments themselves; . . . [i]t can, in short, do every thing that is not naturally impossible.” 112 For Blackstone, rights are contained within the conception of liberty, which is limited within society to be “restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick.” 113

According to Blackstone, the rights making up this liberty—life, liberty, and property—are guaranteed only in the secondary sense. 114 They are

108 Ironically, these arguments can be found in the opening of the Declaratory Act, by which Parliament sought to refute them with its declaration of sovereign power. See id.

109 Id. (emphasis added).


111 BLACKSTONE, supra note 7, at *120.

112 Id. at *156.

113 Id. at *121.

114 Id. at *125.
embedded in the common and statutory laws of England, which, like all laws, succeeding parliaments can change or revoke.\footnote{Id. at *90 ("Acts of parliament derogatory from the power of subsequent parliaments bind not.").} The long line of statutes and declarations from Magna Carta to the English Bill of Rights have, in Blackstone’s view, established, vindicated, and protected such statutes.\footnote{Blackstone, supra note 7, at *123–24.} Despite this, laws may violate the natural liberty of the subjects and these laws, so long as they are properly promulgated, are by nature in force and effective.\footnote{Id.}

For Blackstone, then, it was the laws of England and only the laws of England (as opposed to laws of nature or of any other jurisdiction) that protected the rights of Englishmen.\footnote{Blackstone, supra note 7, at *129–30.} What, then, of the Americans? A direct result of Blackstone’s legal positivism was the view that the Americans had no rights save those Parliament chose to grant—and only so long as Parliament chose to grant them. The basis for this view lies in the concept of conquest. Examination of Blackstone’s arguments concerning “the countries subject to the laws of England” shows again that it is war that lies at the heart of the modern, absolute conception of sovereignty, and that conflict is its progeny.\footnote{Id. at *93–115.}

According to Blackstone, America was “obtained” for Britain by “right of conquest . . . . And therefore the common law of England, as such, has no allowance or authority there.”\footnote{Id. at *105.} Conquest gave absolute sovereignty to the conqueror; for Blackstone there was a presumed contract between the sovereign and the conquered. Under this contract, the conquered agreed to be governed by the conquering sovereign as it saw fit in order to escape being treated as an enemy in war.\footnote{Id. at *104.} Settling in a country thus conquered, English colonists in America, in effect, agreed to be governed in their new land as England saw fit, without the benefit of their ancient rights and privileges.\footnote{Id. at *105.} This was in contradistinction to settlers in uninhabited territories, who “carry their laws with them.”\footnote{Id.}

There would seem to remain for Americans, on this theory, some glimmer of hope for free self-government in their charters and in the precedential authority of their own common law—those legal precedents to which Parliament itself had looked in drafting its Bill of Rights. The acts of the

\footnote{Id. at *104–105.}
British Parliament applied to the colonies only where they were explicitly named, and “all laws, by-laws, usages, and customs, which shall be in practice in any of the plantations” remained valid so long as they were not repugnant to English law.124 Thus, one might see in America a continuation of the common law tradition, espoused by Blackstone, according to which custom is, in essence, law established by “general reception and usage” and to be applied by all judges unless specifically contrary to reason.125

But Parliament had neither a tradition of respecting American custom and usage, nor American representatives within itself. Moreover, since James II’s attempts to destroy colonial charters and governments and consolidate their powers in his own hands, Britain’s policy toward America had been one of neglect, rather than any formal recognition of American rights.126 In addition, while colonists might wish to refer to rights granted in various charters, only Connecticut and Rhode Island retained corporate charters by 1776.127 There also was the Declaratory Act, supported by Blackstone in Parliament as part of a program of opposition to reconciliation with colonial protestors.128 According to the Declaratory Act, American colonies were dependent countries, and a dependent country “must necessarily conform to, and be obliged by such laws as the superior state thinks proper to prescribe.”129 Sovereignty trumped American customary rights because it arrogated to Parliament an absolute right to govern people as it saw fit.

Rather than look to the American response to these claims, it seems most relevant to examine criticism of it from within the British Parliament, in particular from a figure holding the social order view of sovereignty. The Irish-born British statesman Edmund Burke was such a figure. Burke was a proponent of common law rights and the mixed constitution.130 He opposed the Blackstonian response to America, pleading for conciliation with the colonies. He was willing to accept that the Declaratory Act was true in a purely political sense—as a recognition of the final power and necessity of Parliament to protect British interests; but Parliament in its imperial capacity was to oversee colonial legislatures, not usurp their roles or annihilate them.131 Burke also sought to stifle the claims of absolute

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124 Id.
125 Id. at *68.
126 See David S. Lovejoy, The Glorious Revolution in America (1987) (detailing the combination of hostility and indifference toward American colonial charters shown by successive British administrations).
129 Blackstone, supra note 7, at 99.
sovereignty he saw at the root of troubles with the American colonies, declaring to his fellow Members that, if:

intemperately, unwise, fatally, you sophisticate and poison
the very source of government by urging subtle deductions
and consequences odious to those you govern from the
unlimited and illimitable nature of supreme sovereignty, you
will teach them by these means to call that sovereignty itself
in question. When you drive him hard, the boar will surely
turn upon the hunters. If that sovereignty and their freedom
cannot be reconciled, which will they take? They will cast
your sovereignty in your face. No one will be argued into
slavery.\footnote{132 I Edmund Burke, Speech on American Taxation, in Select Works of Edmund Burke 215 (Francis Canavan ed., 1999).}

As Burke predicted, persistent claims of absolute sovereignty goaded the Americans into action, war, and independence. Few in the United States today regret the results, but it was the British claim to modern, absolute sovereignty, and its legal consequences in the various statutes regarding taxation, quartering of troops, denial of due process rights and other rights dear to the colonists,\footnote{133 See The Declaration of Independence, supra note 106.} that lay, at least in significant measure, at the root of the troubles and violence in that colonial relationship. The persistence of these claims to sovereignty later produced violations of human rights and lasting damage to the prospects for government by the rule of law throughout much of the world.

V. THE TRAGEDY OF “SEMI-SOVEREIGNTY” IN SUB-SAHARAN AFRICA

A social order model of imperial sovereignty, if it allowed for empire at all,\footnote{134 P.J. Marshall, Burke and India, in The Enduring Edmund Burke: Bicentennial Essays 43 (Ian Crowe ed., 1997) (rehearsing Burke’s doubts concerning the wisdom of Britain having taken on the role of colonial power in India).} would have required a federated constitutional structure. The home country’s legislature would be “sovereign” in only a limited sense: governing other civilizations from a distance, protecting their prescriptive rights and customs.\footnote{135 See Frohnen, supra note 11, at 71–72 (outlining Burke’s theory of empire, according to which Britain owed colonized peoples its protection of natural as well as chartered rights, in keeping with local customs).} The constitution of empire chosen by the European nations was, to say the least, different from this. As in America, the “right” of conquest lay at the heart of European claims to sovereignty and produced arbitrary government inimical to the rule of law.

England’s much earlier treatment of Ireland, a subject country it ruled from the Middle Ages until the 20th Century, shows the pattern followed in
Sub-Saharan Africa was long-established and not some accident of history. Blackstone used Ireland as a model “dependent” country ruled by right of conquest, in which the inhabitants were forcibly dependent on the will of the conqueror and gained only such rights as that conqueror saw fit to bestow.\textsuperscript{136} European conquest from its beginnings had been justified on the grounds that the indigenous inhabitants were “not civilized.”\textsuperscript{137}

Modern sovereignty clothed arbitrary policies—aimed at subjugation and use of the colonized populace—in the language of law. Thus, the “Penal Laws” imposed on Ireland by Great Britain during the 18th Century were properly promulgated statutes intentionally penalizing Irish Catholics—members of that country’s majority religion—for remaining Catholic. These laws outlawed priests, barred Catholics from a variety of professions, stripped long-term lease rights from Catholics, and created exceptions to the rule of primogeniture such that a Protestant son might dispossess his Catholic older brother.\textsuperscript{138} Burke considered these laws to be no laws at all because they denied the majority of the population the common advantages of society.\textsuperscript{139} Such policies were appropriate under modern notions of sovereignty, according to which the legislature of the mother country might rule those living in a dependent country as it wished. In this case, parliament ruled in a manner designed to force the inhabitants’ conversion to the government-sanctioned Church of Ireland—a subsidiary of the official Church of England.\textsuperscript{140}

During the late 19th Century, when the prestige of modern sovereignty was approaching its height, colonialism in Africa took its decisive shape.\textsuperscript{141} Africans being “uncivilized” by European standards, conquest was not considered a problem: African lands were vacant in European terms because there was no sovereign nation capable of giving (or refusing to give) consent.\textsuperscript{142} This is not to say that no legal formalities were followed;

\textsuperscript{136} BLACKSTONE, supra note 7, at 98–102 (detailing the extent of British dominion over Ireland).

\textsuperscript{137} See James Muldoon, The Indian as Irishman, 111 ESSEX INST. HIS. COLLECTIONS 267, 269 (1975).


\textsuperscript{139} EDMUND BURKE, Fragments of a Tract on the Popery Laws, in WRITINGS AND SPEECHES OF EDMUND BURKE 323–32 (1901) (“It has been shown, I hope with sufficient evidence, that a constitution against the interest of the many rather of the nature of a grievance than of a law.”).

\textsuperscript{140} RICHARD MANT, 1 HISTORY OF THE CHURCH OF IRELAND 1 (1840) (referring to the Church of Ireland as part of the unified, national Church of England and Ireland).

\textsuperscript{141} ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 69–70 (1996).

\textsuperscript{142} Id.
European powers often used threats of force to obtain the signing of form
treaties by which presumed local leaders would relinquish any sovereignty
they might have had.143

Colonizers used the term “protectorate” to indicate a sense of duty
toward, or holding of a trust for, the colonized; but they also held that “[t]he
exercise of a protectorate in an uncivilized country imported the right to
assume whatever jurisdiction over all persons may be needed for its effectual
exercise.”144 This meant wielding absolute power over the colonized, with the
result that underlying political cultures were radically disrupted, if not
destroyed.145 It produced a system of bureaucratic autocracy, treating African
institutions, beliefs, and characters as clay to be molded in the name of
“progress”—all under color of law.

Political structures in pre-colonial Africa, while not liberal
constitutionalist, had been far from absolutist—chiefs did not claim sovereign
“ownership” of their demesnes.147 This changed under colonial rule.
Customary political leaders became tools of the colonizers, with some chiefs
chosen to serve as sub-governors148 and tax farmers,149 and others completely
marginalized. Like political rights, property rights also were destroyed. For
example, all land in the Congo not having a clear owner was deemed vacant
and taken by the colonizing state.150 Colonized farmers were forced to
abandon their customary subsistence farming for cultivation of cash crops
and pursuit of wage labor through a purposive tax structure and laws
requiring, for example, a minimum of sixty days labor per year on approved
crops.151

The European model maintained slavery in all but name. Forced labor
was imposed on colonized populations and, despite some paper guarantees
against abuses, there was in practice no limit on what could be required by
colonial administrators or how these requirements would be enforced because
of administrators’ legal right to use their discretion to serve what they

143 YOUNG, supra note 4, at 84 (Belgium’s King Leopold used treaties to gain chiefs’ purported
consent to his personal rule in the Congo); see also Luitfried Mbunda, Securing Human Rights
Through the Rule of Law in Tanzania, in HUMAN RIGHTS, THE RULE OF LAW, AND DEVELOPMENT
IN AFRICA 144 (Paul Tiyambe Zeleza & Philip J. McConnaughay eds., 2004).
144 YOUNG, supra note 4, at 92.
145 Id. at 222–23.
146 See id. at 75.
147 Peter P. Ekeh, The Impact of Imperialism on Constitutional Thought in Africa, in
CONSTITUTIONALISM AND SOCIETY IN AFRICA, supra note 5, at 28.
148 YOUNG, supra note 4, at 107.
149 Id. at 128–29.
150 Id. at 77–78.
151 Id. at 127, 179.
deemed the public good. The law granted colonial administrators autocratic power; indeed, the French indigénat or colonial code empowered administrators to give out summary (including corporal) punishments, in particular for any showing of “disrespect” to colonial authority. Congo colonial authorities praised the use of colonial law as a “procedure of intimidation.”

Africans had to look to the European administrators even to define who or what they were: they needed official recognition of their ethnic groups in order to have access to customary courts, and to economic and political goods, including access to land. Customary courts were necessary for colonized people to achieve some modicum of justice in dealings with Europeans, who used their superior knowledge of colonial judicial systems to secure favorable judgments. But even customary courts were subject to administrative fiat, with their procedures and substance set aside at the will of administrators in their capacity as judges of the common good. Ethnic identities themselves were subject to massive interference and magnification from the colonizers in the interests of precise delineation and reasons of state. Even as they ceded power, Europeans intensified ethnic identity and conflict by seeking in many instances to “protect” European and Asian settlers through constitutional provisions guaranteeing parliamentary representation to these groups far beyond their numerical proportion. One result of these policies has been intense conflict between state and ethnic interests, often fought on the legal and constitutional level.

With the demise of the European empires and the departure of most European elites, rulers have changed throughout Africa, but borders retain little resemblance to any pre-colonial legal, political, or cultural realities. In a seeming violation of European nationalist principles, few African nations encompass any single, particular “people”—the unit supposedly intended to enjoy self-determination. States have adopted constitutional provisions and policies of ethnic rights and recognition in attempting to gain groups’

152 Id. at 129–31, 175–76.
153 Young, supra note 4, at 116.
154 Id. at 155.
156 Id. at 115–16.
157 Id. at 232–33.
158 Id. at 211.
159 Young, supra note 4, at 115.
160 Id. at 141, at 41.
161 Id. at 41.
loyalty to the nation state. But the nation state in Sub-Saharan Africa has been built consciously as an alternative to more traditional, local associations. Very few such states have been relatively successful in achieving peaceful integration under a one-nation model; for example, Botswana has maintained a bicameral system, empowering local tribal leaders as well as national parties, and maintaining internal peace and stability.

The inevitable side-effect of ethnic identity—the defining of those outside one’s groups as “other”—has been vastly exacerbated in Sub-Saharan Africa by the demands of modern sovereignty, which justified defining those not identified with the sovereign people as “foreign.” Thus, while African peoples have been accused of having a “weak and anemic conception of citizenship,” it is more correct to say that Africans are possessed of a very strong sense of citizenship, but one that has been shaped by colonial experiences such that it is the subject of conflict. Citizenship has been reserved for powerful ethnic groups who see it as a key to control over political, legal, and economic goods throughout the nation. Colonial hegemony eliminated indigenous, mediating structures of rule, impoverishing political culture.

A key exacerbating factor has been the perceived (though unfulfilled) sovereignty of the state. The drive for national unity justified one party dictatorship to defeat “divisive” ethnic opposition. Nonetheless, the state has come to be seen by various ethnic groups as a means for distributing scarce goods and services—made particularly acute by the fact that, unlike in developed countries where “pork-barrel spending” does not entail the necessities of life, the scarcity of goods in Africa means that the distribution of governmental aid is of great importance to people’s well-being. African constitutions were overburdened during a time immediately following oppressive and debilitating colonization through demands that African states “create national unity out of diverse ethnic and religious communities, prevent oppression and promote equitable development, inculcate habits of


164 Id. at 672.


166 YOUNG, supra note 4, at 246.

167 Id. at 242.
tolerance and democracy, and ensure capacity for administration.”

As the “sovereign,” the African state found itself with control over the vast majority of economically viable economic resources within its territory, from the oil fields of Nigeria to the ranch lands of Uganda, exponentially increasing its jurisdiction over economic resources in a region of extreme poverty. The African state had stepped into the shoes of the European colonizers, but while it inherited the theoretical rights relevant to those sovereign powers, it did not inherit their resources.

Moreover, because law had been used by the colonizers merely as a façade or justification for absolute power, it gave no inherent legitimacy to succeeding regimes, any more than it provided real constraints on their exercise of power. The state in Sub-Saharan Africa uneasily coexists with more powerful centers of authority rooted in kinship and patron–client relationships rather than abstract liberal democratic ideals of political consent. Thus, the state is an object of desire and ethnic rivalry, and is too weak to stay above the ethnic fray.

Central is the issue of who shall have the legal status of citizen and so be among those who may influence or profit from the state. For example, in Nigeria one’s citizenship rights depend in large measure on whether one is considered “native” to one’s state, or even to the nation as a whole. Especially in times of political unrest, individuals and entire groups may be stripped of their citizenship on account of not being able to trace their ancestry back far enough—generally to pre-colonial times. The consequences of such loss of full ethnic status are considerable. For example, in the Congo such status remains necessary to secure customary rights of land ownership, access to customary courts and even, for entire groups, the...


169 Yemi Osinbajo, Human Rights, Economic Development, and the Corruption Factor, in HUMAN RIGHTS, THE RULE OF LAW, AND DEVELOPMENT IN AFRICA (Paul Tiyambe Zeleza & Philip J. McConnaughay eds., 2004) (regarding Nigeria, the state’s control over “virtually all the national income has led to a situation where government is the purveyor of livelihood for all. Political power therefore simply means economic power.”). On Kenya, see Joel Ngugi, The Decolonization–Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa, 20 WIS. INT’L L.J. 297, 343 n.146 (2002) (pointing out that at independence all land not registered in the names of individual proprietors was declared to be in trust for all those ordinarily resident in the area).


171 Eghosa E. Osaghae, Ethnicity, the State, and Constitutionalism in Africa, in CONSTITUTIONALISM AND SOCIETY IN AFRICA, supra note 5, at 97.

172 John Boye Ejobowah, Constitutionalism and Political Inclusion in Nigeria, in CONSTITUTIONALISM AND SOCIETY IN AFRICA, supra note 5, at 114.

173 See Osaghae, supra note 171, at 97 (providing several examples of ethnic discrimination in regard to citizenship).
right to local rule by one's own chiefs. Additionally, a central element in the Tutsi tragedy in Rwanda and the surrounding region has been the Tutsis' lack of citizenship status in any of the nations in which their people have lived for generations.

It is ironic, under these circumstances, that observers of violence place so much blame on abiding cultural ties, for many of these cultural rivalries owe their existence to colonial rule. Moreover, traditional cultures in their weakened state have been used by cynical state leaders to foment inter-ethnic hatred and loyalty within their own ethnic groups; the goal is to use old ethnic connections to cover up repression while further weakening the groups themselves, lest they provide members with a non-state centered sense of place and substantive protections of human dignity. The result is a political culture in which the central ruler gives lip service and economic benefits to his particular ethnic group while quashing localist loyalty and power so as to concentrate the ability to dole out positions of authority and gain profit for himself.

While the cultural basis of the nation in shared identity was not respected at the close of empire, the ideology of the nation state was respected. Sovereignty in Africa continues to mean that international groups provide any state, regardless of its weaknesses and/or wrongdoing, with full and equal international standing, the right to act as the final arbiter of internal disputes, and recognition as the sole locus of national authority in facing the outside world. Sovereignty is such a sacred notion, particularly in relation to Africa, that it has been used to prop up regimes that do not functionally exist (as in Somalia) or that exist only through the repression of various minority groups. The Organization of African Unity (“OAU”) itself rests on assumptions of inviolable sovereignty. Article III of the OAU Charter provides for the equal sovereignty of Member States, nonintervention in states' internal affairs, and mutual respect for the sovereignty, territorial integrity, and independence of each Member State. The OAU Charter further emphasizes the absolute nature of national sovereignty by defining

174 Mamdani, supra note 155, at 86–87.
175 Id. at 85.
176 Id. at 84.
179 YOUNG, supra note 4, at 28–29.
180 Id.
181 J ACKSON, supra note 141, at 153.
“peoples’ rights” in terms of the rights of collectivities defined by national boundaries. The result is international institutional support for failed or quasi states that puts the ideology of sovereignty before even its efficacy on the ground. States are not allowed to disappear juridically—even if for all intents and purposes they have already fallen or been pulled down in fact. They cannot be deprived of sovereignty as a result of war, conquest, partition, or colonialism such as frequently happened in the past. The juridical cart is now before the empirical horse.

The spectacle of regional powers invading the Congo to replace its government, then falling out among themselves, resulting in a bloody civil war—fought by a variety of militias backed by a variety of states—is an example that attests to the cost of the failure of sovereignty.

The “fact” of national sovereignty is at best a quasi fact in Africa, and this has meant that law itself has become quasi law. Lawyers in the international arena have come to assume that particularly crucial human rights, such as those prohibiting genocide and slavery, have attained the stature of jus cogens, subject only to subsequent, contrary customary rules and immune to being overridden by independent sovereigns. But, while international development assistance may occasionally in theory be coupled with demands for human rights protections, the inviolability of national sovereignty, even of abusive regimes, is maintained in both theory and practice, even when it violates strictures international lawyers claim have the status of law.

Important international human rights agreements themselves undermine human rights through clawback provisions allowing sovereign states to set their limits. For example, the Banjul Charter on Human and Peoples’ Rights, which the OAU’s Assembly of heads of state adopted in 1981, is not legally binding and lacks procedural restraints on sovereigns with respect to human rights. Under the Banjul Charter, sovereigns are explicitly authorized to limit basic rights such as freedom of expression, freedom of

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182 See id. at 156 (“[T]hat ‘peoples’ are synonymous with ‘sovereigns’ is particularly evident in Article 23 which declares as ‘peoples’ rights’ the entitlements that sovereigns enjoy under the Charter of the OAU.”).

183 Id. at 23–24.


185 JACKSON, supra note 141, at 144.

186 Id. at 23.

187 Id. at 155.

188 Id.
association, the right to assembly, freedom of movement, and even liberty and security of the person by subjecting them to domestic law.\textsuperscript{189} Even nations specifically adopting international charters guaranteeing specific rights may subject such charters to local law, as happens, for example, with regard to women's property rights in Zimbabwe.\textsuperscript{190}

As the sovereign is able to define the legal limits of particular rights, so it is able to define the peoples possessing them. Because the nation itself is constituted of “the people,” groups within that nation seeking recognition of their collective status and rights are, by definition, not peoples seeking self-determination but “separatists” seeking to destroy national unity.\textsuperscript{191} Lacking any recognized constitutional argument in their disagreements with the sovereign, they are left with force as the final arbiter of rights.

\section*{VI. SOVEREIGNTY TAMED}

Human rights abuses such as those occurring in Sub-Saharan Africa have spawned supranational legal responses. For example, an enforcement mechanism for international human rights has been developed and institutionalized in the international criminal tribunals, the most prominent instance of which has been the International Criminal Tribunal for the former Yugoslavia (“ICTY”).\textsuperscript{192} There have been non-European emanations from this model, including the International Criminal Tribunal for Rwanda (“ICTR”), as well as the “so-called hybrid tribunals of Sierra Leone and East Timor.”\textsuperscript{193} Moreover, the International Criminal Court (“ICC”) has been established as a permanent institution with a specific mandate to try individuals under international criminal law.\textsuperscript{194} In addition, the United Nations (“U.N.”) and other organizations have engaged in international humanitarian interventions.\textsuperscript{195}

\begin{footnotes}
\item[189] Id.
\item[190] N. Barney Pityana, \textit{Toward a Theory of Applied Cultural Relativism in Human Rights, in HUMAN RIGHTS, THE RULE OF LAW, AND DEVELOPMENT IN AFRICA 40–41} (Paul Tiyambe Zeleza & Philip J. McConnaughay eds., 2004) (discussing the use of customary law in Zimbabwe to deny a woman her portion of her father's estate because, while Zimbabwe's constitution officially outlaws gender discrimination, it excludes from legal effect areas considered within the jurisdiction of customary law, including family law, and under the relevant customary law women have no right to inherit because they can never achieve the status of adults).
\item[191] JACKSON, supra note 141, at 41.
\item[193] Id.
\item[194] Id.
\item[195] Id. at 37.
\end{footnotes}
In a more institutionalized and fully realized fashion, states within the EU have moved farthest from an absolutist perception of national sovereignty. The EU trend is toward pooled or perforated sovereignty, in which the emphasis is on the right or capacity of a nation state to participate in supranational institutions. Sovereignty is pooled in that, where once nation states exercised all powers on their own, now a common authority presides over and controls some aspects of legal jurisdiction. It is perforated in that these nation states have ceded legal authority over specific aspects of both external and internal affairs to an authority—all or some part of the EU structure—over which they retain no direct veto.

Pooling and perforation of sovereignty have produced an expansion of individual rights and development of a new, more contingent form of national control over the laws of particular European territories. In particular, “[t]he European Convention on Human Rights, as interpreted by the European Court of Human Rights, has de facto become the fundamental civil rights law for all of Europe, supplanting the formal and informal constitutional regimes of almost all European nations.” And the movement of sovereignty has not only been “up” the geographical axis. EU Member States have experienced increased calls for greater devolution of interior power. For example, Scotland and Wales approved referenda to establish greater local control in 1998. Scotland set up its own popularly elected Parliament exercising full legislative competence in all areas not reserved to the British Parliament. The new Welsh assembly exercises authority over secondary legislation or regulations. In addition, Northern Ireland, still part of Great Britain, has constituted its own Parliament with legislative powers, though they must be exercised in a consociational manner, including substantive input from both Protestant and Catholic interests.

Devolution within the EU has changed the nature of national sovereignty in Belgium as well. The Flemish and Walloon communities are provided with separate representation on regional governing bodies which have extensive authority in cultural matters, but the regions also have authority to pass internal regulations and even enter into agreements with other nations.

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197 Id.
198 Id.
199 Id.
200 Bederman, supra note 30, at 215.
201 VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1099–1100 (2d ed. 2006).
202 Id. at 1101.
203 Id.
204 Id. at 1079–1081, 1089.
Perhaps more dramatic in this realm is the process of consultation and cooperation called for between the Parliament of Northern Ireland and the Irish Republic. Limited in its applicability and jurisdiction, this international cooperation involving a sub-national government nonetheless shows the extent to which British sovereignty has become perforated—albeit with Great Britain retaining authority to amend the devolutionary legislation. Further, members of the Northern Ireland Parliament no longer swear allegiance to the British crown; it is no longer necessary, then, for representatives within that nation, or at least within one of its sub-units, to be loyal citizens of the nation state as a whole.

Europe’s devolutionary trend is possible in part because of the development of the EU, with its supranational structure of rights and protections. Scottish nationalists, for example, have made explicit their reliance on and confidence in the EU’s protective mechanisms as a safety net empowering them to demand more legal authority from London. The constitutional situation on the ground in Europe, then, is not one of a simple taking over of national powers by a supranational institution. Rather, nations within the EU have been ceding competence in certain areas both up and down the axis of geographical authority. And this means that sovereignty itself is not being simply absorbed by the EU. After all, it is the sovereign nation state that is ceding these areas of competence. The result is “a new model of state sovereignty based not on exclusive territorial jurisdiction, but rather a locus of jurisdiction that allows transfers of competence, based on multilateralism and on overlapping allocations of authority.” With perforated sovereignty, national policies remain important in most areas, but certain individual rights receive supranational protection, and subnational units, especially those dominated by ethnic groups constituting minorities in the relevant nations, receive increased law and rulemaking authority as a means of achieving minority rights and cultural autonomy.

But there is a more aggressive, and less democratic, side to the construction of supranational institutions in the EU. A veritable constitution...
of the EU has coalesced out of a series of international treaties, pointing toward a centralized government that takes upon itself increasing powers over individual lives without maintaining significant avenues for the expression of popular opinion and needs, or even for the checking of bureaucratic power.

In particular, the so-called Lisbon Treaty among EU Member States will increase dramatically the jurisdiction of EU institutions—including, for example, a competence to regulate intra-member criminal law when concerned with prosecution of serious cross-border crime or protection of European policies. The move toward EU consolidation has been developing for decades. Already in the 1960s the European Court of Justice had established in its opinions principles of direct applicability (community enactments may be applied to a Member State even if it has not accepted them), direct effect (clearly expressed community law norms create legal rights in individuals enforceable against the Member State), and supremacy. In legislative terms, the Single Europe Act of 1986 created a system of qualified majority voting ending the need for unanimity in EU voting and extending the sphere of EU jurisdiction community action to include worker health and safety, research and technology, regional development, and environmental protection.

Before dismissing concerns with this centralization as retrograde nationalism it is well to remember the non-democratic and derivative nature of EU governance structures, even with such modifications as are made under the Lisbon Treaty. The European Commission, the executive branch, both proposes and carries out legislation. Its representatives come from Member States but are appointed by the European Council, which is a legislative arm made up of varying ministers from Member States. The sole popularly elected body within the EU structure is the EU Parliament, an ungainly chamber of well over 700 members that does not propose, but rather merely accepts, amends, or rejects legislative proposals.

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216 Id. at 344.


In an international context, such derivative and executive-centered institutional arrangements need not be troubling. The people of the various countries are represented by their own leaders and the resulting treaties are aimed at harmonizing rather than controlling policy. However, a constitutional structure that acts directly on individuals and groups within Member States raises serious issues regarding consent and participation. Thus the EU stands at a crossroads: it can further embed a system of legal pluralism and overlapping jurisdictions in which varying groups and levels of government bargain in good faith with one another to achieve consensus on common goals while enjoying the right to pursue specific goals relatively unmolested; or it can further centralize power and jurisdiction into an increasingly sovereign EU structure that is distant from and unrepresentative of the increasingly diverse peoples of Europe.

In a recent decision regarding the constitutionality of EU provisions, the German Constitutional Court made the following observation:

Inward federalisation and outward supra-nationalization can open up new possibilities of civic participation. An increased cohesion of smaller or larger units and better chances of a peaceful balancing of interests between regions and states grow from them. Federal or supranational intertwining creates possibilities of action which otherwise would encounter practical or territorial limits, and they make the peaceful balancing of interests easier. At the same time, they make it more difficult to create a will of the majority that can be asserted and that directly goes back to the people (Article 20.2 sentence 1 of the Basic Law). The transparency of the assignment of decisions to specific responsible actors decreases, with the result that the citizens can hardly take any tangible contexts of responsibility as an orientation for their vote. The principle of democracy therefore sets content-related limits to the transfer of sovereign powers, limits which do not result already from the inalienability of the constituent power and of state sovereignty.
The danger and opportunity to which the court points will be rendered more promising or more dangerous depending on the capacity of the EU to maintain a balance between the demands of the people for responsive, participative government, and more universal demands for stability and the rule of law. Central to maintaining this balance, however, is maintenance of a sense of ownership of the state among the people on which it acts. One method for maintaining this sense of ownership has been the principle of subsidiarity, recognized in the Lisbon Treaty’s Protocol on the Application of the Principles of Subsidiarity and Proportionality. This principle, according to which policy actions should be taken by a higher, more distant level of government only when the lower level, closer to the people, is not competent to carry them out, could order legislative priorities. But it is only a call to legislative self-restraint, not a constitutional principle. Subsidiarity is not cognizable in regard to individual claims, but only in claims by a community institution or Member State. Thus, to the extent elites within the EU governing structure come to believe that they are the only ones competent to make decisions for Member States and their citizens, subsidiarity will not serve as a substitute for constitutional checks and balances and the result will be construction of a new, more distant, less accountable European sovereign.

VII. CONCLUSION

The modern absolutist view of sovereignty was never fully accurate. International customary law limited state sovereignty with respect to the treatment of foreigners and their property even in the heyday of nationalist thinking. And, despite the claims of legal positivists, liberal constitutionalism often manages to produce limits on state power through constitutional norms. But these constitutional norms are impeded by the doctrine of sovereignty as currently formulated. Constitutionalism is about submitting power to the law, whereas modern sovereignty assumes that there must reside, somewhere, a power that is absolute. Even a benevolent sovereign acting above the law is a tyrant; holding unbounded power it may act arbitrarily. To the extent the sovereign believes it is rightfully, in the modern sense fully sovereign, it is more likely to act in an arbitrary fashion.

Laender in Formulating German EU-Policy, 10 German L.J. 1215, 1255 (2009).

224 See id.
225 Bermann, supra note 215, at 366.
226 Id. at 368, 390–91.
227 Bederman, supra note 30, at 202.
228 See George W. Carey, The Federalist: Design for a Constitutional Republic xii (1989) (discussing the nature and importance of a “constitutional morality” dictating adherence to constitutional forms, procedures, and limitations on the part of those in government for the maintenance of constitutionalism and the rule of law).
229 The Federalist No. 47 (James Madison).
Thus prudence, as well as a principled attachment to the rule of law dictates development of greater appreciation of the importance of a variety of competing jurisdictions and levels of state action to buttress constitutional norms and cabin power.