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FINDING THE “SOVEREIGN” IN “SOVEREIGN IMMUNITY”: LESSONS FROM BODIN, HOBBES, AND ROUSSEAU

ABSTRACT: The doctrine of “sovereign immunity” holds that the U.S. government cannot be sued without its consent. This is not found in the Constitution’s text; it is justified on philosophical grounds as inherent to being a sovereign state: a sovereign must be able to issue commands free from constraint. The sources of this understanding of sovereignty—Hobbes, Bodin, and others—are, in turn, condemned by opponents of sovereign immunity as absolutists whose doctrines are incompatible with limited, constitutional government. This debate, and thus the usual conception of sovereign immunity, rests on a fundamental mistake. Hobbes and his peers were careful to avoid the conflation of government with sovereignty. “Sovereign” immunity, then, is an imposter doctrine that protects government officials by falsely draping them in the sovereign’s cloak. The only sovereign actor, in the American polity, is the people in the act of making or amending the Constitution. Our true, Hobbesian sovereign immunity is nothing more than our unbounded freedom to enact constitutional law.

Keywords: Bodin; constitutional law; Hobbes; Rousseau; sovereign immunity; sovereignty; James Wilson.

Sovereign immunity—the state’s immunity from suit without its consent—is famously not to be found in the American Constitution.¹ It is a
judicially created doctrine nonetheless favored by many judges who generally proclaim skepticism towards judicially created doctrines. On its face it seems to be a monarchical anachronism, in deep tension with the concept of a limited government bound by the rule of law. A king or queen could claim to be immune from the enacted laws, for as the famous maxim went, “the king can do no wrong” (or earlier, and perhaps more precisely, *Princeps legibus solutus est*). But ours is a constitutional democracy. By what right, then, can the government claim exemption from obeying its own legal regime? Sovereign immunity often obstructs or even eliminates the ability of wronged citizens to gain judicial redress against governmental actors behaving in a confessedly unlawful way.

This twin puzzle—an extra-textual legal doctrine seemingly at odds with basic principles of lawful government—has made sovereign immunity a subject of concern to both political and legal theorists (e.g., Brettschneider and McNamee 2015; Chemerinsky 2001; and Levy 2008).

What sovereign immunity claims in its favor is its status as inherent to the concept of sovereignty itself. “The sovereign is exempt from suit,” Justice Holmes wrote, “not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends” (*Kawanakaoa* 1907, 353). To warrant this claim, Holmes cites a bevy of early-modern political theorists, including Hobbes and Bodin, who—Holmes tells us—settled the question of “the immunity of a sovereign power from suit without its own permission” (ibid.). The “logic” of sovereign immunity is the logic of sovereignty itself, as articulated by Hobbes, Bodin, and other likeminded theorists.

Left unstated, however, is the very important question of who holds the “sovereign power”—and therefore, who possesses this immunity—in the American polity. The answer has generally been unstated because it seems abundantly clear: it is the government, vested with sovereign powers by and through the democratic electorate. It is, after all, the government that exercises most of what we take to be the markers of sovereign authority: declaring war and making peace, levying taxes and establishing fines, protecting the public safety and issuing criminal penalties. As the government exercises sovereign power, so, too, must it enjoy the traditional immunity inherent in the notion of sovereignty.

Recently, however, several historians of political thought—especially Kinch Hoekstra (2013), Daniel Lee (2013 and 2016), and Richard Tuck
—have challenged this obvious answer. These theorists have developed an interpretation of the early modern understanding of sovereignty—drawn from Hobbes, Bodin, and Rousseau, among others—as vested in a specific actor who could command but not be commanded. At first blush, such a definition of sovereignty seems to naturally yield an idea of a sovereign “immunity” akin to the one articulated by Justice Holmes. But what Holmes did not understand, and what has largely been forgotten in contemporary understandings of the concept of sovereignty, is a more basic and provocative observation: Sovereignty is not government. The governing authority that makes the day-to-day regulatory decisions affecting the lives of the citizenry need not be, probably should not be, and often will not be, the sovereign—precisely because of the obvious dangers of imbuing the executors of the law with sovereignty’s unaccountable authority.

This observation goes beyond the banal point that the people are the ultimate sovereign. A great many democratic theorists would agree to that, but would suggest that government is the instrument or mechanism through which the people’s sovereignty is expressed—democracy occurring through the people imbuing their government with the people’s sovereign power (e.g., Brettschneider and McNamee 2015; Kramer 2004).³ In contrast, the view developed by Hoekstra, Lee, and Tuck separates sovereignty and government (or “administration”) much more firmly, so much so that one has almost nothing to do with the other. In this view, the prerogatives of sovereignty do not transfer from the people to a government even if the latter is democratically elected. And if the government is not the sovereign, by extension it cannot enjoy the immunity that is built into the idea of sovereignty itself.

In this respect, the contemporary doctrine of sovereign immunity is based on a fundamental definitional mistake. Ironically, it is Hobbes and his cohort—long condemned for their absolutist bent—whose understandings of sovereignty demonstrate why the doctrine has no place in a constitutional democracy.

Under normal circumstances, a gap between the philosophical understanding of an idea and the way that idea is used in legal doctrine may be of little concern. Political theorists typically are not lawyers, and lawyers are certainly not philosopher-kings, so the failure of a doctrinal legal concept to conform to the understanding of a parallel philosophical term would not necessarily undermine the legitimacy of the legal concept. Law can and often does diverge from the best philosophical
accounts. But the peculiarly extra-constitutional origins of sovereign immunity render it different. Because sovereign immunity is unique in being explicitly based on an expressly philosophical conception of what “sovereignty” is, it is uniquely dependent on getting the underlying philosophy right as well.

The idea of the sovereign in early modern political thought resolved a very particular problem regarding where the ultimate political authority would rest. In a functioning state, it was presumed that some body must have the final, ultimate authority to make a decisive determination that could not be overturned by other actors. In this sense, the sovereign did have a sort of “immunity,” but this was a descriptive rather than normative term: if another actor could exert juridical authority over the putative sovereign, then the would-be sovereign was not an actual sovereign, because he did not in fact possess final authority to command and not be commanded.

None of this, however, implied that the sovereign was obliged to directly enact all of the ordinary, day-to-day decisions that kept the state in order. This was the task of officers who together constituted the government. Frequently, most of the direct forms of political control we as citizens experience come from the hands of the government, not the sovereign. This is crucial because, unlike the sovereign, governmental officers do not possess the untrammeled authority to act without constraint (most obviously, because they remain under the ultimate authority of the sovereign). For this reason, the “absolutist” theorists most associated with the development of sovereignty as a concept were in fact strongly in favor of allocating significant authority to these accountable officers, with the unaccountable sovereign retreating to the background.

In the American context, this conception of sovereignty poses the following question: what body in the United States gives commands but cannot be commanded? Phrasing the question this way makes “government” (whether federal or state; executive, legislative, or judicial; or even all in combination) seem a very odd answer. It is perfectly coherent to say that any of these bodies must be constrained by rule, law, or amendment (even if we might have pragmatic reasons for insulating them from such constraints).

The better answer, then, is that American sovereignty rests in the authority retained by the people to craft and amend the Constitution.
unlawfully, or legislative enactments failing constitutional muster, or even judicial opinions being overturned by constitutional amendment, there is no juridical authority to which one can appeal so as to argue that the content of a duly ratified constitutional clause is unlawful. This is because, in deciding what to put in our Constitution, we as a polity are entirely free from legal restraint. It is in that capacity that sovereignty is exercised; and it is therefore there and there alone where we enjoy a complete, Hobbesian “sovereign immunity.”

What, then, is the future of “sovereign immunity”? Although “sovereign immunity” is a misnomer, in its ordinary usage, this does not entail that everything that we now place under the rubric of sovereign immunity needs to be abolished. There still remain legitimate pragmatic reasons for, in certain situations, establishing what might better be called “governmental” or “administrative” immunity. But because such decisions do not come from any inherent attribute of the government as a sovereign, they cannot simply be read into the Constitution as an implicit feature of our governmental structure. Hence, a proper understanding of sovereignty would entail at least renaming (if not abolishing) the imposter doctrine of “sovereign immunity.” But there remains a true Hobbesian sovereign immunity—the untrammeled authority that exists in the people’s authority to make and amend the Constitution. And that immunity has implications of its own that are potentially more radical still.

We often talk casually of “the people’s” right to amend the Constitution. But this power is typically vested in governmental institutions (Congress and state legislatures). Taking seriously the sovereignty/government distinction could imply an even more radical analysis of whether America has, in fact, retained a democratic sovereign at all.

**A Brief Overview of Sovereign Immunity**

The standard upshot of the doctrine of sovereign immunity is that the government cannot be sued without its consent. Despite its sometimes drastic effects on people seeking redress for governmental wrongdoing, this idea is nowhere to be found in the Constitution. Rather, it is taken to be “axiomatic” given the sovereign nature of the United States as well as the several states (Mitchell 1983, 212).

The core instances of sovereign immunity in American law are the default prohibition against directly suing the United States (or a state government) for monetary damages, and the parallel default prohibition
against suing foreign states in American courts, codified in the Foreign Sovereign Immunities Act. In justifying these instances, Holmes’s Hobbesian argument has been markedly influential, although it is not the only rationale to which appeal has been made. The argument that sovereign immunity is an inherent extension of a sovereign state has been repeatedly relied upon in the federal judiciary throughout the twentieth century, when “sovereign immunity” doctrine entrenched itself (The Western Maid 1922; Williams 1933; Nevada 1979).

As an historical matter, however, sovereignty was a blurry concept at the time of founding, and its intellectual basis has remained unsettled in American legal thought ever since (see Read and Allen 2012). James Wilson, an ardent Federalist and one of the original justices on the Supreme Court, took up the view closest to the Hobbesian/Rousseauian position that will be laid out in more detail below. In support of constitutional ratification before the Pennsylvania convention, Wilson was emphatic as to where sovereignty rested: “In this Constitution, all authority is derived from the People” (Elliott 1891, 434). “Those who ordain and establish,” Wilson argued, “have the power, if they think proper, to repeal and annul” (ibid., 435). Founding-era debates over “sovereignty” largely focused on the matter of continued state sovereignty following constitutional ratification, and in Chisholm v. Georgia, then-Justice Wilson continued in a Rousseauian vein to argue that the “sovereign, when traced to his source, must be found in the man” (Chisholm 1793, 458). From this, he concluded that the people, through the Constitution, were entirely free to modify, diminish, or even “extinguish” entirely any powers hitherto enjoyed by the states—including their immunity from federal suits (ibid., 464).

As David Ciepley (2017) compellingly argues, the immediate reference for this model of sovereignty and government was the corporate form. The corporation (at least as understood during the founding era) was a body created, structured, and limited by the sovereign, yet it possessed administrative authority over delegated domains. Just as a corporation receives a charter from the sovereign, so too does government receive written authorization and limitations (in the form of the Constitution) from the people—the chartering body of the liberal democratic republic. However, not every framer shared Wilson’s view, and for many, the concept of sovereignty was far more opaque than it was for him.

Hamilton, in Federalist 81, provides an explicit defense of sovereign immunity predicated precisely on the notion of sovereignty that I will
argue is confused: “It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent” (Pole 2005, 433). But Hamilton lacked a cohesive understanding of “sovereignty,” and so elsewhere in the Federalist Papers his views on the concept are jumbled. While his first substantive reference to “sovereignty” in Federalist 9 asserts that the Constitution preserved for the states “certain exclusive and very important portions of sovereign power” (46), in Federalist 15 he lambastes the Anti-Federalists for cleaving, in their support of states’ rights, to “the political monster of an imperium in imperio”—a sovereign within a sovereign (77). While Hamilton speaks at length about the effects of sovereignty, his commentary lacks any clear statement regarding its definition. It seems more likely that Hamilton—who, after all, was acting as a polemicist in The Federalist—was not independently reassessing the nature of sovereignty so much as he was seeking to avoid, as far as possible, disturbing the default assumption of continued state sovereignty.

Uncertainty over the scope of “sovereignty” and sovereign immunity continued through the Constitution’s first century. Chisholm held that states were not sovereign bodies under the Constitution; the 11th Amendment overturned Chisholm but its text restricts itself to the narrow case of immunity from suits by citizens of a foreign state. It does not (as a textual matter at least) address suits against a state by citizens of that state, nor does it discuss suits against the federal government from any source. On the federal level, the first successful pleas of immunity in response to suit did not occur until more than a half-century after the Constitution’s ratification (Fallon Jr., et al. 2009, 842). And in United States v. Lee (1882), a sharply divided Court allowed a suit to proceed against officers of the United States who had appropriated property on behalf of the United States—significantly diminishing the protective power of “sovereign immunity.”

After that, Justice Holmes’s Hobbesian foundation for sovereign immunity helped stabilize the doctrine’s place in American constitutional law. As statutory law and judicial doctrine defining the scope and parameters of sovereign immunity continued to develop, it relied on a set of basic philosophical assumptions regarding the meaning of “sovereignty.” Thus, government was held to possess a default entitlement to sovereign immunity. Exceptions are at the government’s discretion and are interpreted narrowly to respect the government’s sovereign prerogatives (Sisk 2003). Persons seeking to hold government legally accountable for unlawful conduct must prove why they are entitled to their day in
court, rather than government taking on the burden of establishing why the case should be non-justiciable.

Lacking direct textual support, these assumptions are supposedly derived from the core understandings of what “sovereignty” means. As Will Baude (2017) puts it, sovereign immunity was part of the “constitutional backdrop” that existed at the framing, which encompassed certain prerogatives assumed to attach to the state as its birthright upon constitutional ratification. Our doctrine of sovereign immunity—as developed and entrenched as it is today—still relies upon these core understandings. If they are unsettled—or worse, turn out to be misapprehensions—not just the philosophical but also much of the legal case for sovereign immunity is imperiled.

The Orthodox View: Sovereign Immunity and Absolutism

“Sovereignty,” in Bodin’s words, “is that absolute and perpetual power vested in a commonwealth” (Bodin [1576] 1955, 65). Hobbes gave a similar account, finding sovereignty where subject persons have ceded their right of resistance to decisions made by a specific actor or institution—to wit, the sovereign (Hobbes [1650] 2008, 107). In either case, the defining feature of sovereignty is in the unaccountable nature of the sovereign with respect to its subjects. Hence, Hobbes wrote that “no man that hath sovereign power can justly be … in any manner by his subjects punished” (Hobbes [1668] 1994, 113), and Bodin identified as “the distinguishing mark of the sovereign that he cannot in any way be subject to the commands of another” (Bodin [1576] 1955, 68). The sovereign is not simply the highest law-giver. For the sovereign to be sovereign, it must be able to enact (and repeal) binding law “without the consent of any superior, equal, or inferior being necessary,” while simultaneously being “above the law” itself (ibid., 82, 72).

In this view, while the sovereign can delegate power to various officers and lieutenants, such delegation does not confer sovereignty. No matter how much authority the sovereign elects to delegate, he will always retain “a reserve of right in his own person, whereby he may command, or intervene … in all matters delegated to a subject, whether in virtue of an office or a commission” (ibid., 66; see Hobbes [1668] 1994, 116, and Lee 2016, 209). For the same reason, Bodin and Hobbes each insisted that sovereignty could not be divided. If multiple bodies within the same republic purported to be sovereign, then none possessed

Such language is sweeping, and it is therefore unsurprising that Bodin, like Hobbes, has been frequently read (in a view promoted by Julian Franklin) as an absolutist opposed to any checks on royal authority (Franklin 2009 and 2001). An absolute monarchy seems to most cleanly instantiate the notion of a complete and undivided sovereign authority. An American system, where power is divided over several institutions (federal versus state, and also within the various branches of government), appears incompatible with this vision. Indeed, modern history seems to provide few instances of “idealized organic internal sovereignty”; rather, “domestic sovereignty and authority have always been in one way or another divided” (Krasner 2001, 137). Therefore, Tuck argues, Franklin “in effect simply pointed to the U.S. Constitution as an adequate rebuttal of what he took to be Bodin’s central claim” (Tuck 2016, 31).

The American model, under this view, is premised precisely on the notion that sovereignty is divisible and, indeed, that political freedom demands that it be divided. Ours is a rebellion against the notion that a ruler—any ruler—can act with complete and untrammeled impunity across the entire domain of governance. “The United States,” Erwin Chemerinsky writes, “was founded on a rejection of a monarchy and of royal prerogatives. American government is based on the fundamental recognition that the government and government officials can do wrong and must be held accountable” (Chemerinsky 2001, 1202).

One can therefore grasp the genesis of both the orthodox understanding of sovereign immunity and the strong democratic discomfort with the concept. If sovereign immunity is the modern manifestation of the ancient doctrine of “the king can do no wrong” (ibid., 1201-2), then it can be viewed as the sole “salvage[]” of Hobbes’s otherwise “repulsive” contention that the sovereign is entirely unaccountable to its subjects (Taylor 2001, 130-31). By the same token, many attack sovereign immunity precisely because of the Hobbesian connection—the argument being that the American model is premised on a rejection of Hobbes’s absolutism (Chemerinsky 2001, 1202; Verkuil 1983, 1583n3).

To be sure, the maxim that “the king can do no wrong” can be divorced from any notions of divine right, converting it into a purely
positive claim. In this view the king, as the supreme source of law, cannot be said to violate such law. An act by the king that appears to violate the law should instead be viewed as an amendment to it. This is the crux of Holmes’s argument when he contends that “there can be no legal right as against the authority that makes the law on which the right depends” (Kawananakoa 1907, 353). But this, too, doesn’t seem to map onto the American model of governance. If an executive-branch official appears to violate a law passed by Congress, we cannot simply infer that the executive meant to unilaterally amend the law, as the president lacks that power. This infirmity is all the more clear in the case of an alleged constitutional breach. Referring to a unitary “source” of the law or of right does not seem to account for the decidedly non-unitary nature of the American governmental system.

In short, the debate over sovereign immunity, fierce as it is, does generally agree on its genealogy. The sovereign immunity of governmental actors is drawn from a philosophical tradition pioneered by Hobbes and Bodin; the question is whether that tradition is sensibly applied beyond early-modern monarchies to encompass a modern constitutional democracy. It is this linkage that I wish to uncouple—not because a Hobbesian notion of sovereignty is outmoded as applied to the current democratic era, but because this notion was systematically misunderstood when it made the jump. Modern sovereign immunity doctrine is, simply put, based on a mistake—not about the nature of democracy, but about the nature of sovereignty.

The Alternative View: Sovereignty versus Government

To begin, it is important to emphasize what is not mistaken in the orthodox view: that the sovereign is, by definition, immune from legal recourse by its subjects.

Bodin and Hobbes conceptualized the sovereign as an actor who could command or legislate but was itself free from the command of any other authority. In that respect, the sovereign by definition had (in Hobbes’s terms) “impunity” in “whatsoever it doth” (Hobbes [1650] 2008, 114). It is easy to see how Justice Holmes and others derived from that our current understanding of sovereign immunity: giving the government impunity from suit without its consent.

Yet there were always cracks in the orthodox facade. If the question of sovereignty is “which actor can issue commands but is free from
commands itself,” government does not quite seem to provide the
answer. This is where the constitutional and democratic objections to
sovereign immunity seems strongest. Our entire system of checks and bal-
ances is designed precisely to ensure that each element of government is
subject to the oversight and potential veto of the others. As noted
above, much of the debate regarding sovereign immunity plays upon
this very tension: sovereignty as the ability to act immune from being con-
travened by others versus a limited American government where no auth-
ority is deemed above the law.

One can sidestep these problems if one takes the view that Bodin and
Hobbes are outdated proponents of monarchical absolutism. Yet a closer
reading of their philosophy suggests that this reply is too quick. At the
time that he wrote, Bodin’s crucial contribution was not formulating
the allegedly limitless nature of the sovereign; rather, it was his introd-
uction of a sharp distinction between sovereignty and government (Lee
2016, 195). This distinction was meant as a counter to Aristotelian con-
ceptions of administration, which “explicitly treated all political authority
as ‘government’” (Tuck 2016, 49).

In Bodin’s view, the key element of sovereignty was the ultimate auth-
ority to issue commands free from any external supervisory authority. “It
is the distinguishing mark of the sovereign,” Bodin writes, “that he cannot
in any way be subject to the commands of another, for it is he who makes
law for the subject, abrogates law already made, and amends obsolete law.
No one who is subject either to the law or to some other person can do
this” (Bodin [1576] 1955, 68). Government, by contrast, comprises the
agents or officials who are actually charged with implementing the sover-
eign’s commands in practice. So long as the sovereign reserves the ulti-
mate right to issue commands over government officials, they could be
left to operate independently for long periods without “sovereignty”
being imperiled. To use Tuck’s famous term, the sovereign could
“sleep” (Tuck 2016).

Hobbes illustrates the point by noting the case of a sovereign monarch
who is literally asleep. The kingdom does not fall into anarchy at night so
long as the government remains intact and operational (Hobbes 2003, 99;
see Tuck 2016, 89–90 for discussion). The same is true if the monarch is an
infant or incapacitated for long periods. From the opposite vantage,
Hobbes’s formulation raises the case of a sovereign democracy that
elects a single leader for a sustained period to govern its affairs—allocating
to it total authority—and then promptly “falls asleep again” (awakening,
perhaps, only to elect the next leader) (Tuck 2016, 91). In such cases, “all actual legislation to do with the ordinary lives of the citizens, and all actual power exercised over them, would be in the hands of the monarch, yet the monarch would not be sovereign” (ibid.). So long as the democratic polity retains in reserve the right to rule, its sovereignty remains intact, regardless of how long or to what extent it lies dormant.

Functionally, what emerges from this framework is a state structure highly reminiscent of modern constitutionalism. While sovereignty is complete, indivisible, and absolute, “the sovereign need not produce all relevant law itself. Only fundamental law had to be issued by the sovereign who could authorize others (the ‘government’ or ‘administration’) to make lesser rules on its behalf” (Herz-Roiphe and Grewal 2016, 1996). The sovereign could ordain and establish a structure of government and then “function more like a deus ex machina, appearing only rarely to adjudicate the most urgent matters of state” (Lee 2013, 419).

Following Hobbes, Rousseau picked up the sovereignty/government distinction in articulating his conception of popular sovereignty. One of the more interesting implications of focusing on the development of sovereignty as a concept is that it splits the historic alliance of Locke and Rousseau, the democrats, against Hobbes and Bodin, the absolutists. Instead, Rousseau joins Hobbes and Bodin in holding to the sovereignty/government distinction, while Locke falls in with such thinkers as Grotius and Pufendorf, who blurred sovereignty and government together (see Tuck 2016, 120). Rousseau agreed with Hobbes and Bodin that sovereignty inherently implied an absolute freedom from external command; hence, “it is contrary to the nature of the body politic that the sovereign impose upon itself a law it could not break” (Rousseau [1762] 1987, 25). But he also agreed that sovereignty and government were separate. The conflation of the two is an “error com[ing] from not having formed precise notions of sovereign authority, and from having taken for parts of that authority what were merely emanations from it” (30–31). We have government in order to execute sovereign commands, but, Rousseau warns, government is “often badly confused with the sovereign, of which it is merely the minister” (49).

Unlike Hobbes, Rousseau contended that only popular sovereignty was legitimate, because sovereignty (a) rested originally in the democratic people and (b) could not be alienated or represented through “an omni-competent institution such as a king or Parliament” (Tuck 2016, 138–39). But he did not extend this attack on representation to representative...
bodies acting as agents or officers of the sovereign people—that is, to representative government. In those cases where the general democratic will actively exercises itself and issues commands, there we see sovereignty. But most of the time, the sovereign remains dormant and permits governance through the mechanisms of the state. And unlike the sovereign authority, whose power is stipulated to be boundless, Rousseau is far more amenable to placing checks on governmental power: “For the state to be in good equilibrium, there must, all things considered, be an equality between the output or the power of the government, taken by itself, and the output or power of the citizens, who are sovereigns on the one hand and subjects on the other” (Rousseau [1762] 1987, 50). The idea that the agents of the sovereign do not enjoy the immunity possessed by the sovereign itself had emerged among English parliamentarians by the seventeenth century, who added to the maxim that “the king can do no wrong” the addendum that “his ministers may” (Torbuck 1740, 27).

Keeping the sovereignty/government distinction in mind helps clarify the longstanding oddity that Rousseau famously disclaimed a belief in direct democratic government: “Were there a people of gods, it would govern itself democratically. So perfect a government is not suited to men” (Rousseau [1762] 1987, 56). In the modern era, it is simply unfeasible to allocate to the people at large all of the day-to-day tasks of governance. But even where the people have elected to delegate governing authority to an elect few (or even a single leader), it does not mean they have alienated their popular sovereignty, so long as they reserve the right to reassert ultimate control. Rousseau draws the distinction between a people with a “master” that is capable of compelling obedience from them (in which case popular sovereignty has been destroyed), and circumstances where the commands of an individual leader “pass for manifestations of the general will.” The latter is legitimate “so long as the sovereign, who is free to oppose them, does not do so” (Rousseau [1762] 1987, 30). More recently, Robert Dahl made a similar point: “A political system would employ a fully democratic process even if the demos decided that it would not make every decision on every matter but instead chose to have some decisions on some matters made, say, in a hierarchical fashion by judges or administrators. As long as the demos could effectively retrieve any matter for decision by itself, the criterion [of final democratic control] would be met” (Dahl 1989, 113, emphasis added).
Sovereignty, in this view, continues to be utterly beyond the law or any form of accountability. Yet once the sovereign is distinct from its government, there is also no need for the sovereign to regularly exercise its terrible power. War and peace, crime and punishment, tariffs and taxes—all of these can be put in the hands of ordinary, accountable, limited government. This is why Tuck considers the concept of the sleeping sovereign to represent the birth of modern constitutional democracy. The division between the boundless but frequently dormant sovereign and the active yet bounded government “allowed for the appearance of a new kind of democracy, appropriate to the modern world, in which citizens could all be true legislators in fundamental matters but leave less fundamental ones to their agents” (Tuck 2016, 141).

“Sovereign Immunity” and the American Constitution

The preceding section demonstrated why, if one takes the approach of Bodin, Hobbes, and Rousseau (and James Wilson), our current conception of sovereign immunity is confused: it attributes sovereignty to organs of government. Whence did this confusion emerge?

It is notable that in Leviathan, Hobbes explicitly addressed the viability of suits against the sovereign and did not give the answer that the conventional reading of either Hobbesian absolutism or sovereign immunity doctrine would predict. “If a Subject have a controversy with his sovereign … grounded on a precedent Law; he hath the same Liberty to sue for his right, as if it were against a Subject; and before such Judges, as are appointed by the Sovereign” (Hobbes [1668] 1994, 143-44; see Taylor 2001, 131). And while he did go on to note that certain types of suits against the sovereign are inherently invalid, the distinction he drew between permissible and impermissible suits was notably not one of consent. Rather, the operative question was in what capacity the sovereign is acting in the course of the challenged conduct. If the Sovereign purports to be acting on the basis of “law,” then it is merely exercising its executive authority to take “no more, than shall appear to be due by that Law.” By contrast, if the controversy stems from the exercise of the sovereign “power,” then there can be no action for the reasons articulated by Holmes: the sovereign is, in effect, amending the law and so cannot be trumped by an appeal to it (Hobbes [1668] 1994, 144).

The role of “consent” in the assertion of sovereign immunity is more apparent when one considers the example provided by the English
monarchy—the primary point of comparison for early American legal commentators. In a monarchical state, the king or queen typically acts in both a sovereign and governmental role. That is, the monarch both provides the ultimate source of law and, with varying levels of frequency, directly intercedes in the day-to-day administration of the state (issuing edicts, hearing appeals, declaring war, and so on). Only where the monarch is acting in its sovereign capacity can it claim immunity. But since there is no immediately obvious way to determine which role the monarch occupies with regard to a particular pronouncement, the sovereign “consenting” to be sued is best understood simply as a disclaimer that the monarch had not been acting in a sovereign capacity.

Importantly, then, “consent” is not a matter of the government immunizing itself from suit by declaring certain acts “sovereign.” “Consent” only matters in circumstances where it is otherwise impossible to tell where sovereign power ends and governmental power begins. In a system where the sovereign and government are merged, what we take to be consent is the sovereign exercising its final juridical authority to declare into which category (sovereign or administrative) a challenged pronouncement falls. The belief that “consent” is germane in the modern American system, by contrast, stems from a failure to comprehend the implications of our clearer division between sovereign and governmental power.

Understanding the monarch to be occupying two very distinct roles in the English state—a sovereign role and a governmental role—helps make sense of a striking 1610 speech by King James I before parliament. James begins by quite literally analogizing himself to a god:

Kings are justly called gods for that they exercise a manner or resemblance of divine power upon earth, for if you will consider the attributes to God you shall see how they agree in the person of a king. God hath power to create or destroy, make or unmake, at his pleasure; to give life or send death, to judge all and to be judged not [sic] accountable to none; to raise low things and make high things low at his pleasure; and to God are both soul and body due. And the like power have kings: they make and unmake their subjects; they have power of raising, and casting down; of life, and of death, judges over all their subjects, and in all causes, and yet accountable to none but God only.

Yet then James abruptly shifts gears and states that he has every intention of following the laws of the kingdom. Far from governing simply through unbridled will, a just, modern king
set[s] down [his] mind[ ] by laws. And so the king became to be *lex loquens*, after a sort, binding himself by a double oath to the observation of the fundamental laws of the kingdom. … So, as every just king in a settled kingdom is bound to observe that pactio made to his people by his laws, in framing his government agreeable thereto … As for my part, I thank God I have ever given good proof that I never had intention to the contrary, and I am sure to go to my grave with that reputation and comfort, that never king was in all his time more careful to have his laws duly observed, and himself to govern thereafter, than I. (Kenyon 1986, 12)

At first blush, the first passage negates the second. Appeals to absolutism are not cured by the sovereign’s protests that he will voluntarily decline to exercise his limitless power. But the sovereign/government distinction gives the two passages conceptual coherency. The first relates to the king’s status as a sovereign, where he truly is godlike in his unlimited authority. The second concerns the king’s actions as an administrator and executor of the laws, wherein he is bounded and constrained. The tension emerges because this structure does not obey Rousseau’s admonition that the role of legislator and executive—sovereign and government—be placed in separate hands. The “consent” of the sovereign serves to partly—but only partly—mitigate the problem by articulating where one authority ends and the other begins.

The same problem occurs in contemporary Britain as well (albeit with parliament replacing the monarch in occupying dual sovereign/governmental roles). As Tuck observes, the United Kingdom is in some respects decidedly “pre-modern in its political structures,” as it lacks “an institutional division between constitutional and other kinds of legislation”; both are in the hands of parliament (Tuck 2016, 250). Just as in the monarchical case, there is no immediately evident distinction regarding which parliamentary enactments are exercises of sovereign versus governmental authority. In the United States, by contrast, there is a clear separation between ordinary, governmental legislation and sovereign, constitutional enactments.

But while Americans have (in effect) been the more dutiful followers of Rousseau in maintaining this divide, we cannot claim to have diverged from King James by virtue of not having a limitless, unbounded sovereign—a body that is absolute in its juridical authority to command. As Hoekstra (2013, 1095) observes:
When Americans first encounter the absolutist outlook, they often surmise that on such a view, sovereignty in this country is supposed to reside in the president, in the legislature, in the judiciary, or in all three together. A defender of absolutism would suggest that this is a sign of how lost we are, and that we the people should not be afraid of absolutism per se, but recognize that in a democracy the absolute sovereign is the people.

This observation allows us to return to the question posed at the outset: what entity, in the American republic, can issue commands free from any sort of external juridical constraint? For now the answer emerges: it is the people—not through their everyday acts of governance or even their periodic presence in the voting booth, but solely through their power to make and amend the Constitution—who possess this authority. Like King James, we, the people are free to do anything we desire, so here among us is where sovereignty rests.

In deciding what to put into our Constitution, we have “impunity” in “whatsoever we doth.” On the one hand, our Constitution may proclaim that “Congress shall make no law” abridging our freedom of speech, but nothing stops us from revising or reversing that prohibition through a new amendment. And on the other hand, if an American citizen does not like the content of an enacted Constitutional provision, there is no “law” she can appeal to against it save the sovereign amendment power itself. There is no such thing, after all, as an “unconstitutional constitutional clause.”

America did not, in Justice Kennedy’s florid prose, “split the atom of sovereignty” (U.S. Term Limits 1995, 838). We are in fact every bit as absolutist as King James’s England. The people, in the course of enacting and amending the Constitution, are sovereign and wholly immune from legal reproach; “the branches of government are nothing more or less than our currently preferred form of administration” (Hoekstra 2013, 1095). There is a “sovereign immunity,” and it is democratic in character, but it does not attach itself to the ordinary democratic actions of enacting legislation or electing representatives. Transported into a democratic context, “sovereign immunity” can indeed be detached from the monarchical maxim Princeps legibus solutus est. Instead, it expresses the democratic Rousseauian contention about the infallible general will: a will expressed constitutionally, not through ordinary politics (Rousseau [1762] 1987, 32).

While in the British context the sovereign/government distinction is obfuscated because a single actor (the monarch or parliament) occupies multiple roles, in the United States the underlying sovereign authority
is obscured because that authority is vested in an institutional structure that has historically lain dormant. The main innovation brought about by the American revolution was not that of “writing fundamental laws—for legislators had always done that—but of handing the authority to write the [fundamental] laws to an institution that might put in only fleeting appearances and be largely forgotten during the actual political activity of a community” (Tuck 2016, 251–52).\textsuperscript{17} This is an apt description of American political and constitutional history. Following the initial constitutional ratification, the “sleeping sovereign” awakened just 27 times over the next 240 years (including the ten amendments passed immediately after ratification). Because our sovereignty is so infrequently exercised, it is tempting to instead locate it in a more active body like the federal government. But it is this conflation that yields the basic confusion over “sovereign immunity.” It takes an entity that we in fact do expect to be bounded and accountable to law, and mistakenly dresses it up in the distinctive garb of a sovereign power.

Beyond the fact that it typically lies dormant, when tracing back the fundamental source of American sovereignty, it is easy get lost in our rather complex and multilayered system of government and try to locate sovereignty somewhere in the morass. We have federal and state governments, and then multiple branches of government within each layer. These layers themselves have unique modes of selection that are more or less democratic and often intertwined.\textsuperscript{18} This complexity can distract from James Wilson’s fundamental observation: each of these “streams of power … all originally flow from one abundant fountain,” namely, “the People” (Elliott 1891, 434). It is in this capacity that sovereignty—the ultimate reservation of authority—rests.

Properly understood, the American model actually provides a sterling example of the virtues of “the sleeping sovereign.” Juridically speaking, there is nothing stopping us from doing all of our governance through the constitutional process. We could make tax policy, establish tariff rates, and enact criminal sanctions all via constitutional amendment (cf. Holmes 1995, 115). We do not do so for reasons practical but also political. We exercise our untrammeled sovereign authority only very rarely, to establish the basic structure of government and the most general ends its officers are to pursue. Following this, for the most part, our sovereign authority remains dormant and our day-to-day governance is managed by legally accountable officers who are not accorded “impunity” in “whatsoever [they] doth.” It is the separation between (unchecked,
unbounded) sovereignty and (ordinary, accountable) government that provides the space for modern democracy administered under the rule of law.

**Whither “Sovereign” Immunity?**

What are the implications of returning to the Hobbesian understanding of “sovereignty”?

One is apparent already. Akhil Reed Amar ([1987](#), [1466](#)) rightly notes that there can be no “sovereign immunity” as we currently understand it, and that this applies with as much force to the federal government as it does to the states. Our “sovereign immunity” would exist rather in the complete and absolute discretion the people have in the constitutional making and amending authority. Within that space, there can be no such thing as an illegal or illicit constitutional provision. Within that space, the people are “immune” from any juridical contravention.

One could take from this that any and all unlawful governmental conduct should be subject to the full range of judicial review and remedies. But while “sovereign” immunity is clearly a misnomer, there might still be a pragmatic argument for what might be called “governmental” or “administrative” immunity. For instance, certain types of controversies might be better off removed from the judiciary and shunted into more democratic forms of dispute resolution ([Sisk](#), [2010](#), 904). This could be because the courts lack the institutional capacity to adjudicate the question effectively ([Komesar](#) 1984) or because the matter implicates core democratic concerns best left to governmental bodies more directly accountable to the people ([Smith](#), 2016, 458). The Constitution explicitly provides Congress with the authority to create exemptions to federal court jurisdiction under Article III; it is perfectly free (at least as a juridical matter) to elect to use that power to take certain cases or causes of action out of the courts.

This “pragmatic” case for governmental immunity is not directly undermined by my philosophical reassessment of sovereign immunity. What the latter does suggest, however, is that the decision to withdraw the shield of legal protection is a heavy one that should be made clearly and consciously. Currently, sovereign immunity is the default rule. But “governmental immunity” would be opt-in rather than opt-out: rather than a default assumption that the state cannot be sued unless it provides affirmative consent, the assumption would be that the state is as bound by
law as any other actor, unless the express decision is made to provide an exception. As applied to these pragmatic justifications for immunity, the problem with sovereign immunity doctrine as it stands today is that it wrongfully grants immunity as the baseline option, instead of demanding that it be justified with specific arguments germane to the specific immunity under consideration. Since government officials start with no sovereign immunity, they should receive it only through political processes sanctioned by the sovereign’s Constitution, not by having a confused idea of sovereignty read into the Constitution as government officials’ juridical birthright.

The conclusion that “sovereign immunity” should be solely an opt-in proposition seems radical enough, overturning a massive swath of American constitutional law. But it is positively moderate compared to some other political implications. Throughout this discussion, we have located a genuinely popular sovereignty in the people through their power to create and amend the Constitution. In an important sense, the Constitution can legitimately bind us as a democratic polity because “we accept our own authority to remake it” (Whittington 1999, 133). But as Tuck observes, there is an important and oft-overlooked difference between the Article VII process for initially ratifying the Constitution and the Article V process for amending it that bears on this point. While the Constitution must be ratified by state conventions, amendments can (and typically have been) ratified by state legislatures. It is not strictly consistent with popular sovereignty that a sovereign act be undertaken through arms of the government (as would happen in the standard case, when an amendment is proposed by Congress and ratified by state legislatures). One could argue, then, that “in the new American nation the people would have spoken as sovereign only to deny themselves sovereignty in the future” (Tuck 2016, 212).

Rousseau recognized the problem. He was careful not to present the exercise of the democratic will as a one-time-only instantiation of the constitutional order. The people must retain the authority to legislate continually (Rousseau [1762] 1987, 72). Rousseau believed that a sovereign democracy must have regular meeting times that are not subject to the approval of governing authorities, because if the government can block the “sovereign” assembly, then that body is actually under the dominion of the government and its sovereignty has been abolished altogether. In this view, our democratic sovereign is even deeper in slumber than the preceding account suggests: the sovereign has not
been roused since it ratified the Constitution. It is possible that it has actually been extinguished altogether.

If one is to preserve a notion of popular sovereignty—and Tuck notes that most of the framers themselves did not appear to conceive of the Article V process as a threat to it (Tuck 2016, 217)—then some of the more radical views on the mechanisms of constitutional change become more appealing. Amar, for example, posits that the people must always retain the power to alter the Constitution via national plebiscite, circumventing governmental channels in favor of direct democratic rule (Amar 1988). And while Tuck is ambivalent about this specific proposal, noting that “no one in the eighteenth century (I believe) said anything precisely like this” (Tuck 2016, 215), he does favor a moderated version of it that tracks either Bruce Ackerman’s conception of popular constitutional moments, or else the exclusivity of an Article VII-like process that more directly includes the people in the case of a wholesale revision (as opposed to amendment) of the Constitution (Tuck 2016, 216–17; see Ackerman 1998).

These more foundational criticisms of America’s sovereign democratic character extend well beyond what is necessary to support my critique of sovereign immunity as a constitutional doctrine. But they are worth considering in terms of what “sovereign immunity”—properly understood—actually implies for modern democratic governance. Whether or not we ought to enact a kind of “governmental immunity” for practical or prudential reasons, the reality of a genuine constitutional sovereign immunity will continue to have important implications in terms of the most basic understandings of our constitutional structure.

* * *

Who is the “sovereign” that is “immune”? From the time of its development by Jean Bodin and Thomas Hobbes, sovereignty referred to a juridically unaccountable actor—one who could command but not be commanded, and who always possessed the fundamental “reserve of right” to assert control over any of its officers or delegates. This sweeping assertion of authority seemed compelling as a justification for “sovereign immunity,” yet anachronistic as a relic of a bygone era of monarchical absolutism.

However, the intellectual tradition of sovereign immunity actually went astray through one subtle but important conflation: between
sovereignty and government. At the constitutional level we do assert an untrammeled authority to act with impunity and free from juridical restraint. However, our day-to-day acts of administration—everything from congressional lawmaking to executive enforcement to even the very act of electing our representatives—fall outside of this sovereign purview. To cloak such conduct in the garb of sovereignty is to repeat a significant mistake.

None of this necessarily implies that government should be subject to suit on precisely the same basis as are ordinary citizens. Government is a special institution, after all; it may very well require special rules immunizing it from certain types of juridical sanctions. But these rules are not products of sovereignty and cannot be inferred from it. They should be opted into explicitly, through the express powers that were delegated to the administrative branches by the sovereign charter. Regardless of whether we end up crafting a system of “governmental immunity” that looks similar to our current doctrine or radically different, the results would at least be purposeful and consistent with the true locus of sovereignty in the American system.

NOTES

1. “Sovereign immunity” also can refer to the autonomy of states as against interference from foreign sovereigns. While the discussion below may be germane to that conception of sovereign immunity as well, here I focus solely on the domestic legal doctrine.
2. For more on Hobbes’s influence on Holmes, see Balmer 2005.
3. Earlier defenders of this view include Grotius, Pufendorf, and arguably Locke (Tuck 2016, ch. 2).
4. There are, of course, procedural rules that dictate whether an amendment actually was ratified, but these go to whether sovereignty was exercised. They do not implicate the sovereign’s underlying substantive authority to pass the amendment in question. There is one potential exception to this statement in today’s Constitution: Article V prohibits any amendment that would deprive a state of equal suffrage in the Senate without its consent. But this is a trivial matter and, in any event, it is far from clear that it could not be circumvented via a constitutional amendment that repealed the restriction in its first clause and then abolished or reconstituted the Senate in the second (see Tuck 2016, 211; Amar 1988, 1066–71).
5. Akhil Reed Amar notes Wilson’s “careful and precise vocabulary in which government only had ‘power’ but never ‘sovereignty’” (Amar 1987, 1437).
6. The full line is “to sovereign power (whatsoever it doth) there belongeth impunity.”
7. Yet even here, any form of election will presumably be governed by certain electoral rules and regulations promulgated by the state, complicating any pure division of popular sovereign authority from governmental mandates.
8. It is thus no accident—particularly given Hobbes’s own views on sovereign immunity, discussed below—that Gregory Sisk’s more modern defense of federal sovereign immunity starts not with Hobbes but with Locke (Sisk 2010, 902).

9. Bodin concurred, distinguishing between circumstances where the people “unconditionally” grant another body sovereign power—in which case they have “renounced and alienated” their sovereignty—and a case where the sovereign power is not renounced even if the sovereign “abandons all his rights of jurisdiction and leaves their exercise entirely” to a single lieutenant (Bodin [1576] 1955, 67).

10. One way of parsing this idea is to view representative government as a democratic sovereign governing itself aristocratically. The popular majority selects a rarefied few and grants them the power to select the governing rules ordering the polity. That these actors are “senators” and “representatives” as opposed to “dukes” and “duchesses” only alters the kind of aristocracy they represent (the former entailing a stronger democratic reserve of right over the agents). This is, to be sure, a slight oversimplification because the act of electing the “aristocrats” is itself properly viewed as a form of democratic governance. More technically, the sovereign constitutional act provides a limited delegation to democratic governance (the voters) who are given the power to select an aristocratic subdelegation empowered to write and execute legislation.

11. Following the Glorious Revolution, this too was blurred somewhat: the monarch retained the executive and judicial functions of government, but laws were passed by the King- or Queen-in-Parliament. Nonetheless, the point of that somewhat opaque term was precisely to knit the sovereign monarch to a law-making process that, by all appearances, was carried out by a non-sovereign (democratic) body.

12. “It is not good for the one who makes the laws”—that is, the sovereign—“to execute them” (Rousseau [1762] 1987, 53). Bodin held a similar position in distinguishing between “lawful” and “seigneurial” government (Lee 2013, 411).

13. Israel’s “Basic Law,” a de facto constitution enacted through the same process as any other Knesset legislation, would provide another example. Even though it is procedurally identical to ordinary legislation, the Israeli Supreme Court has determined that “the Basic Laws are enacted by the Knesset as the Constitutional Authority of Israel, and that the Basic Laws enjoy a superior normative status as compared with ordinary legislation, which is enacted by the Knesset in its role as the Legislative Body of Israel” (Dorner 1999, 1330, emphasis added).

14. Interestingly, this is not true in every constitutional system—in many nations courts have taken it upon themselves to annul certain “unconstitutional” constitutional amendments (Roznai 2013). Corey Brettschneider properly concedes that his theory of democratic sovereignty, which does seek to attach a sovereign character to certain “ordinary” political decisions that meet particular criteria, in fact requires that courts be willing to annul constitutional amendments that run afool of basic democratic commitments (Brettschneider 2010, 156; see Brettschneider and McNamee 2015).

15. Hobbes and Bodin would no doubt appreciate the metaphor nonetheless, for while they did think sovereignty is indivisible, they also would have expected that the effect of such a division would in fact be very much akin to that which occurs upon splitting an atom.

16. Notably, it would appear that the first-order officers “appointed” by the American constitutional sovereign are not, as one might suspect, the president, senators,
representatives, judges, and so on. Rather, the initial task of implementing our constitutional structure is given over to the people, who then, in turn, are instructed to “appoint” subordinate officers (the aforementioned governmental officials) through constitutionally prescribed mechanisms. Consider Rousseau’s statement that the initial “decree[] that there will be a governing body established under some or other form”—functionally, creating a constitutional structure—is a sovereign act, but that the subsequent decision to populate the government with officers is an act of government, not sovereignty (Rousseau [1762] 1987, 77).

17. This might be even more apparent at the state level, where most of the early state constitutions (beginning with Massachusetts in 1778) were ratified by plebiscite (Tuck 2016, 254).

18. Compare the legislative bodies, which are directly elected, to the executive, whose chief is elected through the intermediary institution of the Electoral College, and whose primary subordinate officers are subject to legislative confirmation; and the judiciary, which is appointed through a joint process that includes both the executive and part of the elected legislature.

19. The availability of state conventions to ratify constitutional amendments may undermine this critique. But it is worth noting that this process has only been used once: to ratify the 21st Amendment. Moreover, while the Constitution does allow for amendments to be proposed at a national constitutional convention, such a convention—which has never occurred—can be called only at the request of the legislatures of two thirds of the states—that is, by governmental units.

20. This may raise more questions than it answers. How, but through governmental institutions, is the plebiscite called? Who puts items on its agenda? Who determines the precise wording? Consider Ciepley (2017) on the difference between the people acting in its sovereign, “chartering” capacity, versus the people as a multitude or mob.

21. In U.S. Term Limits (1995), Justice Thomas argued that “it would make no sense to speak of powers as being reserved to the undifferentiated people of the Nation as a whole, because the Constitution does not contemplate that those people will either exercise power or delegate it. The Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation” (848).

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