

Sovereignty, the Corporate Religious, and Jurisdictional/Political Pluralism

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We typically associate sovereignty with the modern state and presuppose the coincidence of political rule, public power, government, legitimacy and jurisdiction with territorially delimited states. We are also used to referencing liberal principles of justice, egalitarian ideals of fairness, republican conceptions of non-domination and separation of powers, and democratic ideas of popular sovereignty (democratic constitutionalism), for the standards that should constitute, guide, limit and legitimate the exercise of sovereign power. This Article addresses an important challenge to these principles: the reemergence of theories and claims to jurisdictional/political pluralism on behalf of non-state “nomos groups” within well-established liberal-democratic polities. Theories of jurisdictional political pluralism purport to account for the independent sovereign authority of the corporate religious, while providing a “postmodern,” “permeable,” “pluralist” conception of sovereignty allegedly more appropriate descriptively to twenty-first century reality and more attractive normatively, than the modern statist version. This Article analyzes and assesses these claims. It criticizes the disassociation of the sovereignty concept from publicly accountable power; challenges the displacement of rights-holders from individuals to corporate groups, and offers a different, federal alternative to anachronistic or normatively flawed modern monistic statist conceptions. My purpose is to preserve the key achievements of democratic constitutionalism and to apply them to every level on which government, power, rule, and/or domination is exercised.

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INTRODUCTION

The concept of sovereignty standardly designates the highest level of independently exercised final decision-making authority and jurisdiction (the right to “say” the law) in a domain.¹ Regarding the right to rule, sovereignty links public power to legitimacy and legality. Typically, it entails autonomy: independence from dominating interference by external authorities, within the respective domain of rule and decision-making. It is also doubly relational, pertaining to interactions between those subject to and holders of sovereign power, and among sovereigns. It is, moreover, a deeply contested and polemical concept tied to claims and counter-claims of authority and legitimacy.² Conceptions of sovereignty vary accordingly, as do the historical contexts in which they are asserted.³

We are used to associating sovereignty with the modern state, and the coincidence of worldly powers of political rule, public authority, legitimacy and jurisdiction with territorially delimited states. In the aftermath of the great eighteenth century democratic revolutions, popular sovereignty and democratic legitimacy replaced state organ sovereignty and monarchy as the source and final authority on government, law, and public policy. We have since then become used to referencing liberal principles of justice, republican conceptions of the separation of powers and non-domination, and democratic ideas of popular sovereignty (democratic constitutionalism) for the standards that constitute and limit the legitimate exercise of public power.

These links are now apparently breaking down. Much attention is being paid to the proliferation of juris-generative public and private powers on the trans- or supra-national level (international organizations, regional unions, supranational courts, multinational corporations and global financial institutions), and their implications for the international system of sovereign states and principles of democratic constitutionalism.⁴ This Article addresses a different

1 See DIETER GRIMM, SOVEREIGNTY 14 (2015); F.H. HINSLEY, SOVEREIGNTY 1 (1986).

2 Whether the concept of sovereignty is legal or political, fact or norm, mystical or positivist, is much debated. See Hent Kalmo & Quentin Skinner, *Introduction: A Concept in Fragments*, in SOVEREIGNTY IN FRAGMENTS 1 (Hent Kalmo & Quentin Skinner eds., 2010) (discussing the multiple debates on the concept). I approach sovereignty as a polemical claim to authority, a discourse, and a concept with multilayered semantic meanings.

3 On the concept/conception distinction, see JOHN RAWLS, A THEORY OF JUSTICE 9 (rev. ed. 1999).

4 For a discussion of the relevant debates, see JEAN L. COHEN, GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY AND CONSTITUTIONALISM 1-80 (2012). See also JOSHUA BARKAN, CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT

challenge: the reemergence of theories and claims to jurisdictional/political pluralism on behalf of non-state “nomos groups” within well-established liberal-democratic polities. The relevant actors and theories contest the supremacy of the civil law and deny the relevance of liberal-democratic principles to all lawmaking.⁵ While contemporary advocates purport to include other corporate associations besides the religious (universities, guilds, cities), it is obvious that the main referent and driver of today’s jurisdictional political pluralism on the domestic level is the assertion of the sovereign autonomy of the corporate religious.⁶ Coupled with a critique of “monist,” “plenary” state sovereignty, sophisticated jurisdictional pluralist political theories are proliferating.⁷ The discourse of religious freedom and accommodation is being tied to conceptions of religious institutionalism, church autonomy, and integralist versions of liberty of conscience that have little to do with liberal, republican or democratic principles. Those conceptions are justified by pluralist theories of sovereignty, in ways that ultimately deny the jurisdiction of civil law regarding “internal” associational matters.⁸ Theories of jurisdictional political pluralism purport to account for the independent authority and rights of religious nomos communities, while providing a new postmodern “neo-medieval” and/or “permeable” conception of sovereignty allegedly more appropriate descriptively to twenty-first century pluralist “reality” and more attractive normatively, than the modern statist version.⁹

This is not a repetition of the distinction between “sovereign” competences delegated to various governmental offices and the ultimate source of public power

UNDER CAPITALISM (2013); Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT’L L.J. 229 (2015); Katharina Pistor, *From Territorial to Monetary Sovereignty*, 18 THEORETICAL INQUIRIES L. 491 (2017).

5 E.g., Robert M. Cover, *The Supreme Court, 1982 Term — Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

6 I use the terms “corporate religious” and “church” to refer to religious nomos communities whether or not they are incorporated under state law.

7 See, e.g., VEIT BADER, *SECULARISM OR DEMOCRACY: ASSOCIATIONAL GOVERNANCE OF RELIGIOUS DIVERSITY* (2008); ABNER GREENE, *AGAINST OBLIGATION* (2012); STEPHEN MONSMA & J. CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM* (2008); VICTOR M. MUNIZ-FRATICELLI, *THE STRUCTURE OF PLURALISM* (2014); Jacob Levy, *From Liberal Constitutionalism to Pluralism*, in *MODERN PLURALISM* 21 (Mark Bevir ed., 2012).

8 See Jean L. Cohen, *Freedom of Religion, Inc.: Whose Sovereignty?*, 44 NETH. J.L. & PHIL. 160 (2015).

9 See MUNIZ-FRATICELLI, *supra* note 7; GREENE, *supra* note 7. See *infra* for a discussion of their arguments.

and law — the people.¹⁰ The purpose of religious status group jurisdictional pluralism is not to invoke the *demos* or *demoi* to render public or private power accountable. Nor are the demands framed in terms of liberal rights of individuals to privacy, associational or expressive freedom. Instead, they pertain to assertions of jurisdictional sovereignty by religious *nomos* communities, whose sources of law and authority are deemed *exogenous* to the civil law, and distinct from the liberal principles of justice and democratic legitimacy that undergird constitutional democracies.¹¹ The key idea is “the preservation of a certain ambit of authority for corporate communities which . . . refuse to ground their own legitimacy on the state’s acquiescence or permission, and insist on their standing as arbiters of their own normative sphere.”¹²

Elsewhere I have argued that a jurisdictional logic was implicit in several recent U.S. Supreme Court decisions in which religious freedom claims for exemption from general valid laws for corporate groups were upheld.¹³ The jurisdictional approach is clearly evident in the proliferating demands for exemption from antidiscrimination laws for religious individuals running businesses who do not want to cater to same-sex couples.¹⁴ It also undergirds refusals by public officials to issue marriage licenses to gay couples in compliance with constitutional law.¹⁵

10 See COHEN, *supra* note 4, at 1-80; Kalmo & Skinner, *supra* note 2.

11 Critiques of monistic state sovereignty and demands for religious status group jurisdictional pluralism are not new. See JOHN FIGGIS, *CHURCHES IN THE MODERN STATE* (HardPress Publishing 2013) (1913). For an analysis of Christian personalism and related assertions of religious sovereignty over personal conscience and its supremacy *vis-à-vis* the state, see SAMUEL MOYN, *CHRISTIAN HUMAN RIGHTS* 73-100 (2015).

12 MUNIZ-FRATICELLI, *supra* note 7, at 32 (explaining Archbishop Rowan Williams on Christian perspectives on sovereignty).

13 See Cohen, *supra* note 8 (discussing *Burwell v. Hobby Lobby Inc.*, 134 S. Ct. 2751 (2014), and *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012)).

14 See Ira Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 *HARV. J.L. & GENDER* 35 (2015) (discrediting the “right to discriminate” invoked by religious employers); Joseph William Singer, *Property and Sovereignty Imbricated: Why Religion Is Not an Excuse to Discriminate in Public Accommodations*, 18 *THEORETICAL INQUIRIES L.* 519 (2017).

15 A notorious case in point is that of a Kentucky county clerk who invoked God’s authority and her religious duty to resist complicity with sin that enforcing the constitutional right of homosexual couples to marry would allegedly entail. She did not resign or leave the matter to her deputies, stating, revealingly: “If I resign, it solves nothing. It helps nobody.” Adam Beam, *Clerk Prayed Over Decision to Stop Issuing Marriage Licenses*, ASSOCIATED PRESS (July 20, 2015,

In this Article, I focus on the concepts of pluralism and sovereignty that are doing the theoretical work. I begin in Part I with a discussion of the structure of pluralist theory, as understood by the contemporary jurisdictional political pluralists.¹⁶ I draw on the most systematic recent theoretical statements of the core features of jurisdictional political pluralism: Victor Muniz-Fraticelli's *The Structure of Pluralism*, and Abner S. Greene's *Against Obligation*.¹⁷ I then turn in Part II to the concept of sovereignty advocated by the jurisdictional political pluralists, all of whom reject the modern conception. Drawing on the recent work of Dieter Grimm, among others, I show, in Part III, that the jurisdictional political pluralists rely on a misleading analysis of medieval and a one-sided conception of modern sovereignty. I also show that their critique underestimates the distinctive normative authority of public power and civil law based on liberal-democratic norms and on the idea of popular sovereignty, properly understood. Nevertheless, the late modern conception of sovereignty, even without the pluralists' caricature, is anachronistic and in need of reconceptualization. In Part IV, I argue that the undeniable facts of pluralism and deep division should inform efforts to devise a postmodern conception freed from a homogeneous vision of the nation or a centralized, monist version of the state. Indeed, pressures from within and without on the modern sovereign nation-state call for creative thinking that avoids throwing out the liberal-democratic constitutionalist baby with the statist nationalist bathwater. I conclude by arguing that whatever conception we deploy, the concept of postmodern democratic sovereignty cannot be severed from *public power and authority* under general law, oriented to the (to be sure contestable) public good, constrained by liberal principles of justice and rooted in democratic principles of legitimacy. *The limits we put on the scope of democratic sovereignty or public power (on any level: federal, national, supranational, regional or global) must be seen as endogenous self-limits required by the best, most inclusive egalitarian understanding of liberal principles of justice, the rule of law, republican principles of accountable and separated public powers, and democratic principles of legitimacy and voice.* This is the sine qua non for taming the arbitrariness of autocratic rule in any corporate body. Just how the democratic polity should relate to religious

3:33 PM), <http://bigstory.ap.org/article/7052404793bf4e19aed429e308027215/clerk-prayed-over-decision-stop-issuing-marriage-licenses>. See generally Marty Lederman, *Merry Christmas, Kim Davis! [Updated]*, BALKINIZATION (Dec. 23, 2015), <https://balkin.blogspot.co.il/2015/12/merry-christmas-kim-davis.html>.

16 See Jean L. Cohen, *The Politics and Risks of the New Legal Pluralism in the Domain of Intimacy*, 10 INT'L. J. CONST. L. 380 (2012).

17 GREENE, *supra* note 7; MUNIZ-FRATICELLI, *supra* note 7.

voluntary associations is a complex issue requiring nuanced answers. But we should avoid the worst-case scenario of ascribing sovereignty to private corporate entities, freed from the oversight of accountably exercised liberal democratic public power.

I. JURISDICTIONAL POLITICAL PLURALISM

Theories of jurisdictional political pluralism typically emerge in polemical opposition to a particular way in which state sovereignty is construed and exercised. While I cannot demonstrate this here, I concur with Reva Siegel and Douglas Njaime's diagnosis that in the United States, the recent reemergence of such theories with respect to religious status groups has much to do with the culture wars over changing sexual morality, and the gains in gender equality and LGBT rights.¹⁸ I focus on the revival of jurisdictional political pluralism as it pertains to sovereignty claims of certain kinds of societal associations, in particular the corporate religious.

According to Muniz-Fraticelli, the structure of pluralist arguments entails three theses tantamount to a normative pluralist ideal, rendering pluralism distinct be it in the domain of meta-ethics, politics, or law: the claim of a plurality of sources for whatever is central to a domain; the claim that these are incommensurable and incapable of being categorically ranked; and the permanent possibility of conflict and tragic loss.¹⁹ Accordingly, pluralist arguments have the same ideal-typical normative/descriptive structure whether they refer to plurality of value, legitimate political authority, or the sources of legality. This isn't a restatement of the Weberian war of gods entailed by the differentiation of institutional value spheres in modern society. For Weber's theory presupposed the comprehensive and monist sovereignty of the modern state and the supremacy of civil law when it conflicts with various other value spheres: precisely what jurisdictional political pluralists reject.²⁰

Nor can one assimilate the logic or politics of today's religious autonomy advocates to multiculturalism, despite the efforts of some jurisdictional

18 Reva Siegel & Douglas Njaime, *Conscience Wars: Complicity Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015). On the economic stakes, see Nomi Stoltenberg, *It's About Money: The Fundamental Contradiction of Hobby Lobby*, 88 S. CAL. L. REV. 727 (2015).

19 MUNIZ-FRATICELLI, *supra* note 7, at 11.

20 MAX WEBER, *POLITICS AS A VOCATION* 77-128 (1919); Max Weber, *Religious Rejections of the World and Their Directions*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 323 (H.H. Gerth & C. Wright Mills trans., H.H. Gerth & C. Wright Mills eds., 1958).

pluralists to ride on the coattails of that movement.²¹ Multiculturalism generally approaches ethnic, religious, and linguistic diversity through the paradigm of cultural difference.²² Whether multicultural policies are deemed remedial (of past injustice to minority cultures) or constructive (of enriched conceptions of the public culture), multicultural accommodation is cast as a politics of inclusion of “cultural” minorities into society on fair terms.²³ Groups are taken as morally relevant entities, but if fairness requires group-differentiated citizenship rights, liberal multiculturalists like Will Kymlicka insist that the groups be constrained by liberal principles.²⁴

Jurisdictional political pluralism makes no such stipulation. Nor is it focused on cultural difference. As Muniz-Fraticelli succinctly put it, “[T]he problem that pluralism attempts to understand and solve is, first, not a cultural problem and, second, not directly a problem of justice but authority.”²⁵ Jurisdictional political pluralism pertains to the *authority claims* of “first-level associations” — self-regulated organizations that assert an inherent right to exist and to take corporate action not derived from the license of the state.²⁶ These associations have their own distinctive norms, authoritative agents, explicit rules of membership and lines of hierarchy that enable the group to act in its own name as a corporate person. Greene concurs, noting that particular associations entail sources of normative authority and obligation distinct from and autonomous of the state. He is “concerned only with competing norms and sources of obligation, and not with liberty per se.”²⁷ Organized “nomos-communities” determine the authoritative rules of their own structure and processes and police compliance with the group’s ethos. For both authors, religious nomos communities are the paradigmatic “first-level” associations.²⁸

21 See Cohen, *supra* note 8.

22 See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* (1995).

23 On the “inadequacy” of multiculturalism compared with jurisdictional/political pluralism, see MUNIZ-FRATICELLI, *supra* note 7, at 31-46.

24 For a discussion of communitarian and liberal-individualist multiculturalism, see *id.* at 31-45. See also Will Kymlicka, *Disentangling the Debate*, in *UNEASY PARTNERS: MULTICULTURALISM AND RIGHTS IN CANADA* 147 (2007); Will Kymlicka, *Two Models of Pluralism and Tolerance*, 14 *ANALYSE & KRITIK* 33 (1992).

25 MUNIZ-FRATICELLI, *supra* note 7, at 39, 42 (invoking the medieval church’s declaration of *libertas ecclesia* as an example of jurisdictional autonomy claims *vis-à-vis* the civil law in the absence of cultural difference (nearly everyone was Christian)).

26 *Id.* at 32-33 (citing Archbishop Rowan Williams).

27 GREENE, *supra* note 7, at 5.

28 Despite mentioning other groups, all of their examples are of religious associations’ demands for accommodation.

To what, then, does the incommensurability claim pertain? And why is jurisdictional political pluralism tantamount to a sovereignty bid? The claims to juris-generative authority of “first level associations” are incommensurable *vis-à-vis* one another and the state. At issue are not substantive norms or ethical-political differences, but rather that the authoritative sources of group norms and their obligatory force are on a par with those of the state.²⁹ Since the authority of such groups is neither delegated nor justified by the same reasons that justify state authority, there may be no common reasons the state could invoke when acting towards them, i.e., none that would resonate within the groups. Authority assertions are couched in principles internal to each association: they are not derived from a universal standard of justice.³⁰ Thus, “nothing in pluralism per se argues that autonomous associations are bound by . . . minimal standards of decency even if they are not liberal standards . . . an injustice in one association does not by itself justify interference by the state or any other group.”³¹

Indeed! The point is to deny the supremacy of the civil law, to reject the idea that we are obligated by it regardless of whether it is the law of a democratically organized, liberal political community, and to reject multiculturalism’s concessions to liberalism’s individualistic principle of justice to persons.³² Jurisdictional political pluralism is not focused on liberty per se or on the individual’s prerogative to question the interpretative monopolies or nomothetic power of group authorities by appealing to liberal-democratic principles of equality and justice. For this would position the democratic state as policeman of non-state corporate groups’ internal practices. Instead of motivating associational freedom and relative autonomy by appealing to the same *endogenous* principles conferring legitimacy on and limiting modern liberal-democratic constitutional democracies (e.g., equal individual liberty, popular sovereignty), jurisdictional political pluralism purports to instantiate and defend *exogenous* limits to state authority.³³ Since “first-level” associations are not creatures of the state, their claims to authority derive from distinct sources, justified by reasons incommensurable with those justifying public political power. (For example, they may invoke a religious tradition or god’s commands.) Thus, incommensurability entails a “tragic” conflict of authorities. Despite the invocation of freedom of individual conscience to justify demands for accommodation, the concern of the jurisdictional pluralist

29 GREENE, *supra* note 7, at 3.

30 MUNIZ-FRATICELLI, *supra* note 7, at 42.

31 *Id.* at 45.

32 GREENE, *supra* note 7, at 19-20.

33 MUNIZ-FRATICELLI, *supra* note 7, at 41.

is not freedom or equality of individuals, but the authority of organized nomos groups to which they belong to make rules congruent with their ethos and to discipline their members.

II. PLURALIST SOVEREIGNTY

The challenge to state sovereignty flows logically from this approach. But one more step is required to construe jurisdictional political pluralism as a sovereignty bid. Enter the thesis of competition among “first-level” associations (including the state) insofar as they assert internal authority over members and *meta-jurisdictional* authority *vis-à-vis* the outside. Conflicts are meta-jurisdictional when they concern the capacity of associations to act autonomously within a certain given sphere, and to define the boundaries of that sphere.³⁴ The potential of “tragic conflict” ultimately pertains to this level of authority and, obviously, to sovereignty qua supremacy.

There is allegedly no way to legitimately ascribe the prerogative of boundary drawing to a supreme authority, because the meaning of boundaries and the right to draw them will always be contested by different nomos communities. Since there is no evident superiority of any normative order, jurisdictional political pluralists deem the priority accorded to the state in the modern sovereignty regime to be only factual, not moral. The claim of constitutional democracies to have the legitimate power to demand general legal compliance, their liberal willingness to recognize exceptions for various reasons notwithstanding, still locates the discretion to do so, and to draw boundaries, in the state. It is this supremacy and meta-jurisdictional authority (the competence to determine competences) that the jurisdictional political pluralists challenge.³⁵ For them, the religious sources of normative authority are hardly inferior to those undergirding the civil law, thus the latter may not claim the normative high ground.

An important aspect of the pluralist critique of the modern concept of sovereignty pertains to its voluntarism and the absolutist, plenary and monistic features that go with it. Why then frame the authority of corporate groups in terms of sovereignty? Apparently, no other concept will suffice to account for the authority the relevant non-state groups claim over their members, or to dislodge state monism.³⁶ But clearly a conception of sovereignty different from the monist modernist model is required. The dilemma is apparently resolved

34 *Id.* at 25, 53.

35 GREENE, *supra* note 7, at 20.

36 *Id.* at 102.

by counter-posing two conceptions of sovereignty: the voluntarist, absolutist, monist modern one that construes sovereignty as an attribute of the will, prior to and the sole source of law; and an alternative “constitutionalist” (originally medieval), pluralist, permeable conception that construes sovereignty, and all authority, as dependent on a prior moral, religious and/or legal order that constitutes the sovereign.³⁷

The aspect of sovereignty that the two competing conceptions share, according to the pluralists, is that of an ultimate arbitral agent — a person or office — entitled to make final, binding decisions in a domain. But, they argue, it is only on the misleading modern conception that entitlement and finality must logically entail absolute independence from higher norms along with dominance over other groups. The modern conception is voluntarist, meaning that sovereignty pertains to a will whose commands and decisions are law. This conception is associated with the rise of monarchical absolutism, state-making, and the theories of Bodin and Hobbes, both of whom insisted on the attributes of independence, indivisibility, comprehensiveness, unity, and absoluteness. Accordingly, if sovereignty is a matter of the will, it is perforce unitary, indivisible, and supreme over all others within the sovereign’s territorial jurisdiction. On the monist-voluntarist conception, the sovereign’s will is the source of all legally valid norms and has the power to change them at any time: this precludes constitutional constraints on the lawgiver. Since the will is incapable of division, it also excludes plural or shared sovereignty, as well as the possibility of autonomous corporations as independent lawmakers within society. Associations have no legal status unless authorized by the sovereign and are perforce subordinate to sovereign will. It is this voluntarist, originally monarchical conception that morphed into statist monism once absolute monarchy was defeated.

All this is anathema to the jurisdictional political pluralist because it means that the state has meta-jurisdictional authority to ascribe competences, regulate and allocate revocable jurisdictions to corporate groups. Accordingly, the voluntarist, monist modern conception of sovereignty renders associational autonomy impossible. To be autonomous, corporate groups must be able to make final and un-appealable decisions with regard to their interests and members. The pluralists thus turn to the late medieval European order for it was, on their reading, undergirded by a constitutionalist conception of “sovereignty” predicated on jurisdictional pluralism. Medieval sovereignty was constitutionalist in the sense that the prerogatives and powers of the sovereign were deemed to derive from a legal order that preceded him. The sovereign was not absolute but bound by natural and divine law and custom.

37 MUNIZ-FRATICELLI, *supra* note 7, at 115.

Moreover, medieval constitutionalism was a normative order composed of multiple autonomous sovereigns and corporate domains, each exercising final authority within their jurisdiction. That this was tied to rigid social hierarchies is apparently beside the point. True most obviously of the church after the papal revolution, autonomous jurisdiction also pertained to the estates, cities, guilds, and universities comprising what Poggi has called the late medieval or early modern *standestaat*.³⁸

There are two lessons to learn from this. The first — a conceptual takeaway from the medieval model — is that sovereignty as constitutionalist can be limited, plural, and divided.³⁹ So long as the sovereign “office” is entitled to rule with finality on some matters, then one can speak of plural or divided sovereignty.⁴⁰ Limits come from the coexistence of multiple sovereigns with authority over the same population. The rules and norms constituting sovereignty must come from somewhere, but the jurisdictional pluralists maintain that the norm and the sovereign emerge simultaneously because the norm that entitles one to sovereign authority in any corporate body also constitutes it. As H.L.A. Hart pointed out, the sovereign is not identifiable independently of the rules; rather, the rules are constitutive of sovereignty.⁴¹

But Hart was challenging Austinian organ sovereignty, arguing that the rules may but need not mandate a unitary sovereign located in a single body. Pace the pluralists who invoke him, Hart was not a legal pluralist regarding the internal order of the territorial state. Moreover, his point was that *modern* sovereignty is juridical and constitutional rather than voluntarist. He could thus hardly endorse their dichotomy between constitutionalist-medieval and voluntarist-modern sovereignty, for he insisted on the constitutive character of legal norms for all forms of sovereign authority. The pluralists’ (mis) use Hart to institute a reversal in the way we think about contemporary state sovereignty in relation to constitutionalism and to associations. On the “voluntarist” account, liberal sovereign authority may well abstain from intervening in internal group affairs, but deems its abstention as grounded in its own self-limitation. The sovereign state has the meta-jurisdictional authority to intervene. On the “constitutionalist” medieval model, according to the pluralists, the political sovereign is authorized to act within its sphere of competence as final arbiter, but has no authority over other autonomous

38 GIANFRANCO POGGI, *THE DEVELOPMENT OF THE MODERN STATE* (1978).

39 MUNIZ-FRATICELLI, *supra* note 7, at 115.

40 *Id.* at 15; GREENE, *supra* note 7, *passim*.

41 H.L.A. HART, *THE CONCEPT OF LAW* 76-77 (2d ed. 1997) (cited by MUNIZ-FRATICELLI, *supra* note 7, at 115).

sovereign authorities within society.⁴² Accordingly, associations organized under their own constitutive norms do not derive their authority from the political sovereign and their internal authorities are entitled to be final decision makers, within their own domain. If conflicts arise, as they inevitably must (and did in the late medieval epoch), then the state can be justified in adjudicating amongst the various groups only if it is permeable to the corporate associations' own claims to authority.

The second lesson we are meant to draw from the late medieval model is that the authority of the state then and now is, at most, "second order." It has first-order authority over citizens with respect to the functions of providing order, peace, and welfare, but *vis-à-vis* societal associations it has only a secondary authority thanks to its capacity to provide the institutional conditions they need to function. The well-designed "pluralist state" allegedly facilitates the coexistence of sovereign corporate groups, prevents injustice among them by regulating their interrelations, but it must defer to the group members' reasons for accepting group authority when it comes into contact with them. Societal corporate groups are first-order associations and their internal authorities are the final arbiter of the ways in which their members would best comply with the ethos, purpose, and rules of each. The state may not substitute its judgment for theirs as this would defeat the second-order reasons for the states' authority over them.⁴³ As a first-order association, it has no normative priority over other associations. There is thus no moral duty to prioritize first-order state norms, even constitutional ones, *vis-à-vis* norms of other *nomos* communities when these conflict.⁴⁴

Indeed, on Greene's conception, state sovereignty should be construed as "permeable" — full of holes — given that the sources of normative authority are plural, and thus state demands for obedience must be weighed in the balance with citizens' other sources of moral obligation.⁴⁵ This is contrasted to the modernist notion that the state has "plenary" sovereignty — i.e., the legitimate authority to demand general compliance with its laws. But there's the rub: no state has plenary sovereignty because, according to Greene, there is no general, content-independent, defeasible, *prima facie* duty to obey the civil law. Nor is there *prima facie* political legitimacy, even of the liberal-democratic republican state, as political legitimacy and political obligation are allegedly "correlative."⁴⁶ Accordingly, no state has a legitimate claim to

42 MUNIZ-FRATICELLI, *supra* note 7, at 117.

43 *Id.* at 179.

44 GREENE, *supra* note 7, at 1-94.

45 *Id.* at 20.

46 *Id.* at 22-28, 50.

general coercive authority, or a moral right to impose its laws on those under its control, or to insist on the supremacy of its legal norms as the default position. Nor does it have the right to place the burden of proof on those seeking religious exemptions from generally valid law. Indeed, the point of Greene's critique of political obligation is to ground a presumptive right for religious nomos communities to exemptions (exit) from general valid laws that conflict with their normative commitments, thus shifting the burden of proof onto the state to justify its coercion.⁴⁷ Enforcement of civil law by the liberal-democratic state is apparently as arbitrary as that of absolute monarchies or other authoritarian regimes.

Instead of invoking medieval models like Muniz-Fraticelli, Greene relies on a combination of philosophical anarchist and political pluralist arguments to challenge monist, "plenary" sovereignty.⁴⁸ The philosophical anarchist arguments pertain to the denial of the prima facie content-independent, morally obligatory nature of civil law and of general political legitimacy; jurisdictional political pluralism pertains to the multiple sources of authority generated by various religious nomos communities, the denial of the supremacy of civil law over their law, and the argument that these groups impose exogenous limits to civil law. Accommodation (exit from civil law) is presented as the remedy to the harm caused by the state's unjustifiable general demand for compliance with the civil law. Greene endorses state delegation of jurisdictional power to nomos groups, stating that there should be no constitutional barrier to the state's ceding public as well as private attributes of sovereignty to religious groups that want to live under their own law.⁴⁹ Indeed, his concept of permeable sovereignty entails that the state should treat them as sovereigns. Citizens are obligated only by state laws whose content is compatible with their religious group's norms, and by those involving a "compelling state interest." Thus, the state should allow religious sources of normative authority to govern the lives of citizens to the fullest extent compatible with the stable operation of government and the liberty of other persons.⁵⁰ Yet this does not authorize the

47 *Id.* at 50.

48 Micah Schwartzman argues that, despite disclaimers, Green's approach is a variant of philosophical anarchism. Micah Schwartzman, *Obligation, Anarchy and Exemption*, 28 CONST. COMMENT. 93 (2013). Andrew Sutter characterizes Greene's work as a form of political pluralism. Andrew Sutter, *Review of Abner Greene's Against Obligation*, CONCURRING OPINIONS (Feb. 10, 2013), <http://concurringopinions.com/archives/2013/02/review-of-abner-s-greene-against-obligation-the-multiple-sources-of-authority-in-a-liberal-democracy.html>. Both are right.

49 GREENE, *supra* note 7, at 148.

50 *Id.* at 114-15.

state to regulate illiberal (or any) groups with regard to vulnerable members, provided that membership is voluntary, based on consent, and exit from them is low-cost.

This account raises but doesn't resolve many questions. Curiously, Greene does not apply his philosophical anarchist skepticism to the political authority he cedes to religious organizations, regardless of how illiberal, non-egalitarian or authoritarian these may be. But why wouldn't the argument against a general prima facie obligation to "sovereign" authority also apply to the monopolistic interpretation of religious norms (and the requirement of justification to those affected) by religious authorities? The coercion vs. consent dichotomy cannot do the work because spiritual authorities can excommunicate or ban or sanction believers, and exit can be very costly.⁵¹ Moreover, if, on the pluralist thesis, state law is on a par with the law of religious nomos communities, on what basis does the state have the legitimacy to enforce "compelling public interests," or particular laws, if it lacks the prima facie authority to coercively enforce valid law generally? Who decides which state interests are compelling? These logical problems cannot be conjured away with the invocation of permeable sovereignty, but rather are compounded by it. Indeed, neither the jurisdictional pluralist arguments for the autonomy of the corporate religious nor the "accommodation as exit" remedy follow from the general argument against political obligation.

If, as Greene insists, he is not embracing a philosophical anarchist position, why push the, in my view mistaken, correlation thesis between political legitimacy and political obligation? Political legitimacy may be a "hazy" concept, but whether or not a polity has the authoritative right to make binding public law and policy is not the same question as whether or not citizens or subjects have a moral obligation to comply with civil law. Nor is political legitimacy the same as the justice or justification of laws. It is a highly contested proposition that ties the political legitimacy of authorities, or of their legal decisions, to a moral duty to obey and vice versa. A politically legitimate legislator may make unjust laws, and illegitimate authorities may issue just decisions. Moreover, liberal-democratic governments are prima facie, not absolutely, legitimate: their laws are open to contestation, question, dissent, challenge and resistance if they are deemed unjust or unfair. As already indicated, it may be prudent or wise for citizens to obey legitimate law, but it is not clear that they have a moral duty to do so.

51 Leslie Greene, *Internal Minorities and Their Rights*, in *THE RIGHTS OF MINORITIES CULTURES* 256 (Will Kymlicka ed., 1995) (questioning the extent to which entry into religion for children is voluntary); Oonagh Reitman, *On Exit*, in *MINORITIES WITHIN MINORITIES* 189 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005).

Greene is quite adept at demonstrating the weakness, each in turn, of the standard arguments from consent, fair play, political participation (voice), natural duty, associative obligation and stability, regarding the obligation to obey civil law.⁵² But he does not succeed in dispatching a synthetic normative conception of democratic-republican political legitimacy, linked to liberal principles of justice. The good endogenous reasons these supply for the presumptive legitimacy and supremacy of liberal-democratic public power and law, notwithstanding his critique, are even presupposed by Greene. The metaphor of permeable sovereignty and the willingness to defer to compelling state interests imply that the democratic state serves as the matrix for other types of “sovereignty” that occupy the gaps. Thus, despite the claim that religious associations’ norms and authority are on a par with the state’s, Greene, like other pluralists, still seems to accord it a logically privileged place, although neither he nor other pluralists ever adequately account for this.⁵³

Pluralist theorists also typically beg the question of the normative purchase of pluralism. The jurisdictional pluralist thesis that in every society there is a foundational plurality of incommensurable sources of authority and no way to rank them purports to be both a normative and a descriptive claim. Even if it were descriptively accurate, it is not clear why jurisdictional political pluralism follows and is deemed intrinsically valuable.⁵⁴ Individuals belong to many groups including the polity, and the individuals’ own judgment, the judgment of authorities in religious nomos communities, and the judgment of political authorities may all conflict. Pluralism gives us no way to assess which are “first-order reasons” and which ones to follow. In the case of the liberal-democracies, we know why the authority of the state’s law is normatively compelling: it construes its addressees as equals, applies generally to all in the polity, and it can be changed by those subject to it. Its normative purchase pertains to liberty, equality, fairness, voice and reflective judgment of the individual citizens. Liberal-democracy respects dissent and counsels considered use, not abdication, of one’s reflective judgment regarding legal authorities or the authority of any particular law. But jurisdictional pluralists ascribe a hermeneutic monopoly to authorities in charge of a religious nomos group, support the renunciation of autonomous reflective judgment, and prescribe submission on the part of members. There does not seem to be much respect

52 For an argument tying political legitimacy to the moral duty to comply with the law, see A.J. Simmons, *Justification and Legitimacy*, 109 *ETHICS* 739 (1999).

53 See Sutter, *supra* note 48 (arguing that state sovereignty is the matrix for permeable sovereignty).

54 See Turkuler Isiksel, *Global Legal Pluralism as Fact and Norm*, 2 *GLOBAL CONSTITUTIONALISM* 160 (2013).

for plurality or dissent within the nomos communities. Given internal power asymmetries, and the refusal to apply liberal-democratic norms of equality and voice regarding interpretation of sacred texts or the internal structure of these groups, the sheer fact of their plurality is not enough to vindicate the normative claim that they merit sovereignty.

We are also left in the dark as to who has the competence to decide jurisdictional and political disputes over competence and boundaries.⁵⁵ Insisting on plural sources of law, the non-derived genesis of corporate group life, their “real personality,” and the existence of non-state normative “legal” orders and noting that tension among them is a permanent feature of the human condition do not answer that question. The medieval political-theological ontology undergirding corporate status and jurisdictional claims is not available to us today. Invoking federalism with respect to private corporate power only confuses the issue. We are given no normative guidance as to how to decide what rights individual citizens, with their crosscutting memberships and loyalties, have against their own, various nomos group authorities and who enforces them. Nor are we told what the scope of their “internal governance” is, or which institutions are “internal” to and under the authority of a religious nomos group.⁵⁶ Well-designed liberal-democratic federal systems require congruence of political regimes on all levels of government, constitutionalize basic individual rights, and do not leave their enforcement to local powers, hardly what the jurisdictional pluralist has in mind. As others have shown, the critique of monism is not enough to give pluralism itself a normative or coherent quality.⁵⁷ Revealingly, the pluralists resort to an analogy with contemporary conflicts of law approaches regarding noncitizens within a state’s domestic legal order. The implication is that we treat jurisdictional conflicts between private associations and the state no differently from a dispute over applicable law between a domestic and a foreign state. But this would have the precise opposite effect of the principle of federation: it would render internal societal relations external, instead of the reverse (federation turns international relations into domestic ones).⁵⁸

The analogies with medieval sovereignty and international law obfuscate the basis on which jurisdictional political pluralism in the medieval (or

55 Carl Schmitt, *Ethic of State and Pluralistic State*, in *WEIMAR: A JURISPRUDENCE OF CRISIS* 63 (Arthur Jacobson & Bernhard Schlink eds., 2001).

56 Ira C. Lupu & Robert W. Tuttle, *Religious Exemptions and the Limited Relevance of Corporate Identity*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 373 (Micah Schwartzman, Chad Flanders & Zoe Robinson eds., 2016).

57 Isiksel, *supra* note 54.

58 See COHEN, *supra* note 4, at 8-149.

international state) system was conceivable at all *as an order*. What was it about either context that allowed actors and analysts to speak of a normative *order or system* of plural jurisdictions rather than sheer chaos and power struggles? What overarching normative order made conflicts over jurisdictions and their resolution through political techniques of negotiation or compromise in the medieval context at all possible? Indeed, how were people able to see that the disputes were internal matters to one society or civilization? “Pluralism” cannot provide the answer. We must take another look at medieval and modern sovereignty to answer these questions.

III. MODERN AND MEDIEVAL SOVEREIGNTY REVISITED

To speak of sovereignty before, during and after the modern epoch one needs a working definition that fits different contexts. Thus, it is not wrong to start with the idea that sovereignty describes the highest final decision-making authority.⁵⁹ The word “sovereign” was used in the Middle Ages in this way and the pluralists are right to note that it did not designate an absolute single holder of all sovereign powers.⁶⁰ Nor was sovereignty an abstract concept: it was a term describing concrete positions of authority and powers allocated among the many jurisdictions regulating the same population. With respect to one another, one could only be relatively, not absolutely sovereign: a possessor of final decision-making authority in one domain could be subordinate to a different holder of final sovereign power in another.

Conflicts over jurisdiction notwithstanding, medieval constitutionalism was tantamount to an order, thanks to two features curiously downplayed in the pluralist accounts. First, there *was* an absolute voluntarist sovereign source of law and lawmaker, from whose *wills* all law (found and interpreted) and all jurisdictions supposedly derived, namely God. Second, the medieval “constitutional” order, although entailing plural jurisdictions autonomous from one another, nevertheless was based in the ultimate overarching *unity* provided by Western Christianity. Thus, the powers of the various sovereigns, including emperor and pope, kings and barons, were not ultimate, and their jurisdictional disputes were interpretive-legal ones thanks to an overarching order, which was attributable to a single authoritative, unitary, meta-jurisdictional religious source whose allocation of legal competences was unchallengeable, albeit open to competing interpretations. The underlying authoritative status order,

59 GRIMM, *supra* note 1, at 14.

60 *Id.*

instituted and justified theologically, could not be questioned and it acquired ontological, quasi-sacramental status.

The other key feature of medieval usage of the word “sovereignty,” ignored by the jurisdictional pluralists, is that it pertained only to temporal powers. As Grimm points out, even if divinely ordained, only a holder of worldly powers was deemed sovereign regarding temporal affairs. The church was responsible for spiritual matters, but church officials including the pope *were not viewed as sovereigns*.⁶¹ That term was used only for secular civil authorities. Thus, each baron was sovereign in his barony, but the pope was never called sovereign.⁶² Battles over supremacy between emperor and pope and conflicts over limits were constant, but no one contested that limits existed and were divinely ordained. It is correct that law regulated and constituted sovereignty, but temporal sovereignty did not entail autonomous lawmaking. Because medieval constitutionalism existed within the overarching frame of a God-given social order regulated by God-made natural law, political rule was understood to implement or reestablish law when violated, not to create it. Jurisdiction did not entail legislation in our modern sense, and supremacy in a domain did not ipso facto entail sovereignty, at least insofar as the officials of the medieval church were concerned.⁶³

Indeed, it is telling that all the jurisdictional pluralists ignore the link of the concept of sovereignty to *public* power that existed even in the medieval epoch! *Sovereignty pertained not only to the highest and ultimate authority to decide and give binding orders, but in particular to public power and the temporal right to rule.* The pluralists acknowledge that property and the private domination (*dominium*) is not tantamount to sovereignty, but fail to explicate why. From the earliest usage of the term, “imperium” in ancient Rome, to use of the word “sovereignty” in the Middle Ages, to the modern concept of sovereignty, the reference was to the legal and legitimate acquisition and use of public, not private power. It is precisely this distinction that the jurisdictional pluralists wish to elide.

Why does this matter? It does, because the pluralist characterization of premodern “sovereignty” is meant to serve as a model, to be updated and used polemically against the modern “monist,” “statist” conception. But as Grimm helpfully reminds us, there is an important distinction to be made between a word and a concept. In its medieval usage, sovereignty was only a word used to describe specific temporal or secular positions of status and power. But *it did not disclose the character of a system of rule* and the

61 *Id.* at 16.

62 *Id.* at 14-16.

63 HAROLD J. BERMAN, *LAW AND REVOLUTION* 111-19 (1983).

medieval world order could not have been subsumed under this expression.⁶⁴ Sovereignty became a concept in the latter sense only with the emergence of the modern state system carried by would-be absolute monarchs, and bound up with territorialized rule.

However, the concept of modern sovereignty, pace the jurisdictional pluralists, was never simply voluntarist. True, in conjunction with the emergence of absolute monarchy, sovereignty became a unified concept associated with indivisible, comprehensive, exclusive jurisdiction and rule. Still, the monarch was not above all law, be it the Salic Law in France or natural and divine law. Moreover, in conjunction with the emergence of the modern state, *the concept* disclosed the object domain of the plural new international order: an international society of European sovereign states, each exercising the monopoly of the legitimate use of force and lawmaking within a territory.⁶⁵ The concept continued to be adequate to its object long after monarchical absolutism and voluntarism were replaced domestically by modern liberal-republican constitutionalism and democratic legitimacy, and the international society of states expanded beyond Christian Europe, globalizing the state form and shedding the theological grounding of an exclusionary international society. Its relation to international law was always complex, but assertions of territorial control and power always required international political and legal recognition for the state to be acknowledged as a sovereign international lawmaker. My point is that even the early modern concept of sovereignty pertained to law as well as will, legitimate authority as well as power, and referred to the basic political form of *public power* — the state — as a legal and political entity.⁶⁶ Otherwise one could not make sense of the continued use of the term after the eighteenth century democratic revolutions that constitutionalized, separated and legally limited internal “sovereign powers,” or after the mid-twentieth century emergence of a new post-Westphalian, non-absolutist conception of external state sovereignty.⁶⁷

Sovereignty, for the early modern theorists writing in the aftermath of religious civil wars, became a concept quite distinct from the medieval usages of the word. Accordingly, the modern ruler was absolutely, not relatively sovereign and the concept described an abstract unity rather than a bundle of

64 *Id.* at 104.

65 This did not preclude imperial ambitions or colonial empires. See ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

66 See Martti Koskenniemi, *Conclusion: Vocabularies of Sovereignty — Powers of a Paradox*, in *SOVEREIGNTY IN FRAGMENTS*, *supra* note 2, at 222, 239-40.

67 COHEN, *supra* note 4, at 1-80.

discrete powers.⁶⁸ A key feature was the claimed monopoly of authoritative lawmaking, and of the legitimate means of violence needed to coercively enforce the law and ensure domestic peace. No area of lawmaking or coercive enforcement could be reserved to autonomous private orders with their own power bases.⁶⁹ This pertained to the secular and religious estates of the realm (the aristocracy and the ecclesia) such that the old pluralistic, late medieval standestaat ultimately became transformed into the modern state.

True, under the theory of monarchical absolutism, lawmaking became the sole prerogative of the sovereign, turning his will into the ultimate source of all law. Absolute sovereignty claimed by the prince was indeed monist. Yet it was challenged at the outset by conceptions of popular sovereignty and of the constituent power of the people, and by arguments for federal political forms against the idea of a centralized sovereign state.⁷⁰

Once the modern state system took shape, public authority became identified with state authority. In the aftermath of the eighteenth century democratic revolutions, the old system of estates, guilds, and corporations was swept away and the barriers to the exercise of sovereign public power and law directly over individuals, removed. But modern liberal-republican constitutionalism and democratic legitimacy entailed a *new conception* of sovereignty that shifted the source of law and legitimacy from the King to the people, differentiated between its possession and exercise, and placed all government and all public power under law. The idea of popular sovereignty in the eighteenth century rendered conceivable the separation and (in federal polities) the division of what early moderns considered indivisible, i.e., sovereign governance and lawmaking powers. But it did so in a different way than the standestaat, insofar as it was predicated on the distinction between the exercise of depersonalized sovereign powers and their possession, between government and sovereignty, and it entailed comprehensiveness of a unified sovereign jurisdiction exercised directly over individuals construed both as subjects and citizens.⁷¹

Popular sovereignty became intimately related to constitutionalism, i.e., to legally regulated, established, limited and constituted public power and government, the latter now reconceived as the agent or representative of the

68 GRIMM, *supra* note 1, at 21. For the competing modern concepts, see Quentin Skinner, *The Sovereign State: A Genealogy*, in SOVEREIGNTY IN FRAGMENTS, *supra* note 2, at 26.

69 GRIMM, *supra* note 1.

70 HENDRIK SPRUYT, *THE SOVEREIGN STATE AND ITS COMPETITORS* (1994); Andreas Kalyvas, *Constituent Power*, POL. CONCEPTS (2013), www.politicalconcepts.org/constituentpower.

71 GRIMM, *supra* note 1, at 32.

governed. In other words, the democratic revolutions (re)produced the idea of self-government of the people under law (and government under the rule of law), and the principle of accountability of all established governmental powers to the governed, thus linking constitutionalism, popular and state sovereignty.⁷² My point is that as the conception of sovereignty evolved in the aftermath of the eighteenth century democratic revolutions, it no longer signified voluntarism, command, arbitrariness or absolutism regarding the exercise of public power, lawmaking or other governmental functions. In constitutional democracies, all such exercise is deemed to be under constitutional law, and the source of the constitution is ascribed to the people or the “constituent power” — deemed the sole ultimate source of valid civil law and the final “court of appeal” that legitimated but did not directly rule in representative democracies.

Modern constitutionalism coupled with democratic legitimacy transformed the modern conception of legal and political sovereignty.⁷³ In liberal constitutional democracies, the constitution comprehensively regulates public authority, such that no organ of the state, no ruler is sovereign; instead all are subject to constitutional law as higher law and to the people as the source of that law. Political rule is limited by basic (constitutional) legal norms emanating from a temporal source other than the rulers, and is not at their disposal. Moreover, modern republican and liberal constitutionalism coupled with democratic legitimacy is predicated on the separation of powers. Accordingly, no state or public power or organ can be deemed sovereign, absolute, above or outside the law. It is the constitution that allocates competences and reflexively regulates lawmaking. For Grimm, this means that sovereignty in the fully constitutional state must be grasped as popular sovereignty.⁷⁴ Indeed, according to Grimm, (modern) constitutionalism could not fulfill its function of binding public authority without the distinction between popular sovereignty and government or between constituent and constituted power (the French version), with the latter term in each case deemed the representative of and ultimately accountable to the former.⁷⁵

Thus, with the constitutionalization and democratization of the modern state, sovereignty or rather popular sovereignty became linked in a new way to law and the rule of law. On the one hand, it meant that no organ of the state, no government is *absolute* or conceivable as sovereign. *On the other*

72 *Id.*

73 *Id.* at 69; Michel Troper, *The Survival of Sovereignty*, in SOVEREIGNTY IN FRAGMENTS, *supra* note 2, at 132.

74 GRIMM, *supra* note 1, at 69.

75 *Id.* at 41.

*hand, the constitutional claim to regulate became comprehensive in that no extra-constitutional bearer of governmental powers, no extra-constitutional mode of exercising public power or of lawmaking, is permitted. Nonetheless, under the republican principle of separation of powers, competences of rule are disaggregated and allocated to different governmental instances and under liberal principles, the equal liberty and basic rights of all are protected.*⁷⁶ In federal constitutional polities, competences and powers are divided on different levels of the political union. Thus, “comprehensive” does not mean “monist” or entail “organ” sovereignty or centralized public power, but it does mean that private jurisdictions immune to constitutional regulatory oversight are ruled out. Yet this does not preclude free civil spaces or independent nomos communities. On the contrary, liberal constitutionalism institutionalizes sets of basic individual rights guaranteeing equal liberty, including personal, political, associational and expressive freedoms. Popular sovereignty linked to liberal constitutionalism resolved the dilemma of how to conceive of public power as comprehensive and “sovereign,” yet under law and limited by the separation and division of governmental competences, by basic individual rights and by the autonomy but not immunity of civil society actors and associations. It also answered the question regarding who has the capacity to determine the competences constructed and allocated via a constitution. We the people, the popular sovereign, properly understood, are the source of law and of the rights we declare and give ourselves, including the highest domestic law, namely the constitution.

The jurisdictional pluralist dichotomy of medieval plural constitutionalist vs. modern absolutist voluntarist sovereignty is thus tendentious. The charge of monist voluntarism leveled not only against monarchical absolutist but also democratic states obscures the radical break within the discourse and structure of absolutism that modern democratic constitutional revolutions instituted. With regard to monism, we must distinguish the comprehensiveness and supremacy of the civil law from the plurality of juris-generative nomos communities within a society. The assertion of comprehensiveness of the civil law does not entail the obviously false sociological claim that norms generated by societal nomos communities are not law (binding rules) for their members. Depending on one’s concept of law, even a neo-Hartian could grant that such norms have qualities of law, insofar as the relevant communities generate secondary as well as primary rules and an internal attitude on the part of officials (and members) towards them. But this “pluralist” fact does not entail the normative conclusion that the civil law generated in a liberal constitutional democracy should relinquish jurisdiction over such nomos

76 *Id.* at 68.

communities. The core sovereignty issue here is *supremacy*, not monism. While comprehensiveness of the civil law's scope in a liberal democracy need not mean exclusivity (monism) regarding legal norms, it does entail the default position of the supremacy of the civil law. In short, the regulation of civil self-regulation is an indispensable prerogative of constitutionalized liberal-democratic sovereignty.

With regard to voluntarism, a key shift was the disembodiment of the principle of power and the construal of popular sovereignty as a principle of legitimacy and constituent power as a fiction with, to be sure, important effects. Since the end of the eighteenth century, the referent of popular sovereignty, "the people," could no longer be construed as a corporate entity or as a *body*, as was the case in early modern invocations seeking to challenge monarchical absolutism at the time of its inception.⁷⁷ The proper understanding of popular sovereignty (or constituent power) is through a concept of democracy that renders any attempt at embodying "the people" by an organ of government, a leader, a majority segment of the population, or in any empirical group, a usurpation because the empirical people as such is never *one*, but many.⁷⁸ "The people" is not a corporate body, with a single will that directly rules, nor a community of corporate bodies, but a principle of legitimacy, inclusion, equality, voice, and accountability of government to the governed. Popular sovereignty like democracy is indeterminate. Yet it is effective because, since the democratic revolutions at least, it triggers efforts to approximate the idea of self — government under civil law, along with equality, voice, participation and accountability, through concrete institutional mechanisms ranging from universal suffrage to referenda, possibilities of recall or impeachment, provisions for amendment of even the highest constitutional law and supreme court decisions.

Public-ness of power, openness, alternation, accountability, fallibilism, associational freedom, voice, dissent and compromise are the correlates of democracy. Neither the command theory of law nor the locus of sovereignty in a final governmental office makes sense on the democratic conception, because no organ of government has finality or is sovereign. Accordingly, the popular sovereign does not rule, but rather serves as a principle of limitation of those that do. It entails the regulative principle that the political form of the polity is determined by the people who will be subject to its laws — the demos — and that the subjects are also (if indirectly) the authors of the law, such that all laws are revisable indirectly by them. Popular sovereignty is

77 See Skinner, *supra* note 68, at 26-46.

78 See CLAUDE LEFORT, *DEMOCRACY AND POLITICAL THEORY* (1988); PIERRE ROSANVALLON, *LE PEUPLE INTROUVABLE* (1998).

always open to populist distortions: to efforts to locate it in a segment of the people and an acclaimed ruler whose will is identified with theirs. This does reopen the door to voluntarism and absolutism. But in their critique of plenary sovereignty of constitutional democracies and not only of absolutism, jurisdictional pluralists mistake the distortion for the principle, and elide the distinction between early modern voluntarist and absolutist conceptions and modern liberal-democratic versions.

The charge of absolutism also fails because late modern sovereignty in liberal-democratic constitutional republics could no longer be connected with a person or body whose will is deemed the source of law and above the law (absolute). According to Grimm, there is no empirical sovereign in a liberal constitutional democracy; there are only limited constituted powers (competences). This is true not only of representatives elected to public office, but also of “direct” decision-making powers allocated to “the people” such as referenda, initiatives or recall, as these too are constituted powers constitutionally created and regulated. Sovereignty withdraws into the constituent power but thereby becomes latent.⁷⁹ In Troper’s formulation, popular sovereignty under liberal-democratic constitutionalism is not a fact but a norm, a principle of imputation.⁸⁰ Liberal constitutional democracies perforce refer to the people or the constituent power as the sole source of civil law, so as to ensure the higher-law status of the constitution, and that the exercise of public power is under law and accountable to the citizenry. Andrew Arato extends this democratic idea to the constituent power during the constitution-making stage as well.⁸¹ As such, it works as a *principle of inclusion* for all relevant groups of actors (those who will be subject to the law) in the constituent process, not as a descriptor of any particular agent or set of agents. Instead of speaking of latency, it is best for democrats to construe the constituent power as a set of principles required by the idea of democratic constitution-making. Indeed, the groups of actors involved in constitution-making in a transitional or “revolutionary” context must be guided by the same principles that underpin the idea of popular sovereignty and constitutional democracy: inclusiveness, consensus, publicity, plurality, voice, and legality in the sense of legal continuity with prior law where possible or via the establishment of interim rules and constitutional norms to guide the process of constitution-making.⁸²

79 GRIMM, *supra* note 1, at 72.

80 Troper, *supra* note 73, at 139.

81 ANDREW ARATO, POST-SOVEREIGN CONSTITUTION MAKING (2016).

82 *Id.*

IV. POST-MODERN SOVEREIGNTY: NEO-MEDIEVAL OR DEMOCRATIC?

Thus, one cannot grasp the modern democratic constitutional state's domestic sovereignty claim through the early modern absolutist lens or through the contemporary jurisdictional pluralists' monist, voluntarist caricature. Nevertheless, problems plague even the revised constitutionalist, democratic conception of modern sovereignty, insofar as it remains linked to dogmas of exclusiveness, indivisibility and illimitability. Democrats cannot dispense with the idea that "we the people" are the source of our laws and that we shape our political form of living together. This is the core of democratic legitimacy. Nor can democratic constitutionalists abandon the requirements of liberal justification — the appeal by public officials to reasons all of us can understand and not reasonably reject. Modern liberal-democratic constitutionalism conjures away embodiment models of the unitary "will of the people," but it also invites them, along with organ sovereignty and populism, so vigilance is required.⁸³ The solution to such distortions is a more inclusive, more socially just, better democracy, not the empowerment of private nomos groups that are under no obligation to respect the rule of law, liberal or democratic principles.

Nor is neo-medievalism the correct response to the lingering anachronistic "Westphalian" voluntarist and absolutist features of external sovereignty. Many have argued that legal and political developments contradict the thesis of consent-based international law, undermine the state's monopoly of the legitimate use of force internationally, and open up the black box of exclusive and impermeable domestic jurisdiction to international concern.⁸⁴ Jurisdictional/political pluralist critics of the supremacy of civil law piggyback on these diagnoses, hoping to undermine the comprehensiveness and regulatory reach of democratic sovereignty domestically.⁸⁵

Yet, as Martti Koskenniemi reminds us, "there is a bright side to sovereignty that describes the character of collective life as a *project* — a set of institutions or practices in which forms of collective life are constantly imagined, debated, criticized and reformed over and again."⁸⁶ Sovereignty talk persists partly because of its association with positive ideals of self-determination, non-domination and independence, but also with legitimate *public* power and

83 Andrew Arato, *Political Theology and Populism*, 80 SOC. RES. 143 (2013).

84 GRIMM, *supra* note 1, at 77-81; COHEN, *supra* note 4, at 8, 316-18.

85 See sources cited *supra* note 7.

86 Koskenniemi, *supra* note 66, at 241.

authority.⁸⁷ In the aftermath of constitutionalization and democratization domestically, liberal-democratic sovereignty became bound up with the principles of the rule of law, the separation of powers, political equality, equal liberty, justice to persons, social justice, voice for all subject to the law, and accountability of the governing to the governed. As Grimm notes,

Sovereignty's most important function today lies in protecting the democratic self-determination of a politically united society with regard to the order that best suits it As long as there is no convincing mode of a global democracy, the source of democratic legitimacy and supervision must not run dry at the state level. Today sovereignty protects democracy.⁸⁸

The polemical purpose here is clear: to preserve the achievements of liberal-democratic constitutionalism that were linked to the modern sovereign state, even while the latter and the international system of states are being transformed. Thus, with respect to external sovereignty, one could conclude that in a new postmodern conception, the state retains comprehensive jurisdiction and domestic supremacy but not exclusivity or impermeability *vis-à-vis* public authoritative "international," or regional law, provided these do not fall behind the liberal principles of justice and basic rights institutionalized by states' domestic constitutions. However one wants to comprehend this phenomenon, be it through a theory of constitutional pluralism, federal ideas, or some other conceptual approach, the principles of liberal-democratic constitutionalism would ideally regulate government at all levels, and sovereignty and the state still would remain pertinent. The best-known exemplar of permeable sovereignty and constitutional pluralism with respect to *public authority* is, of course, federalism: federal states, federations of states, federacies.⁸⁹ "Shared rule and self-rule" is the quintessential federal principle and it fits with ideas of constitutional pluralism and permeable sovereignty within an association of polities that have turned external international relations into internal ones, or replaced centralized monist models of sovereign power with a matrix model of autonomous but interrelated public jurisdictions.

The key, however, is that a normatively attractive federalism for a postmodern conception of sovereignty would have to be democratic, republican, liberal and constitutionalist, public and accountable, combining self-rule and shared rule

87 *Id.* at 239.

88 GRIMM, *supra* note 1, at 128.

89 *See* COHEN, *supra* note 4, at 80-158.

in ways that ensure liberty, heterogeneity, justice and voice for all *individuals*.⁹⁰ The advantage of a federal democratic constitutionalist approach to the postmodern constellation over status group legal pluralism is that it can structure the polity, peoples and publics in ways that acknowledge ethno-religious cleavages without reifying them. It could ensure that everyone's individual rights and voice will be protected by the rule of law on every level of the polity. Constitutional pluralism and federalist principles, so understood, "pluralize" sovereignty and render it "permeable," without permitting any level of rule or authority to fall out of the scope or undermine the achievements of democratic constitutionalism.

This is hardly what the jurisdictional religious political pluralists have in mind, despite invocations of the federalist analogy. Their neo-medieval conception seeks to empower authorities in segmented private religious nomos communities, appealing to meta-social sources of legitimacy. Ultimately, the regulatory liberal-democratic state is the target of the ideology of jurisdictional pluralism. The aim is to block public oversight of corporate religious groups' self-regulation, to establish religious authorities as autonomous rulers in and over their nomos communities, supreme regarding their jurisdictions, and to expand the latter as much as possible.⁹¹ The sovereignty claims of the corporate religious entail that they, not the liberal-democratic polity, do the line-drawing and determine when their religious principles or rules require exemptions or, to put it in Schmittean terms, declare the exception to civil law.⁹² The comprehensive regulatory scope of civil law is under attack in part because it has become the carrier of liberal-democratic egalitarian norms. It also is the carrier of socioeconomic justice and regulations for the public good. Conservative elements among the corporate religious have long shared

90 See DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 232-33 (1987). Elazar argues that this is what makes federalism superior to pluralism. *Id.* at 91.

91 They succeed in forcing unwitting consumers to comply with decisions of religious arbitration tribunals and forgo access to state courts in quite secular disputes (claims of financial fraud or wrongful death). The trick is to include obscure fine print clauses in contracts requiring exclusive arbitration by religious tribunals for customers in commercial contact with religious controlled properties or service providers. Civil courts uphold these arbitration requirements, thereby shifting jurisdiction under the guise of respecting contract. See Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES, Nov. 3, 2015, at A1.

92 CARL SCHMITT, *POLITICAL THEOLOGY* 5 (1985); see Pistor, *supra* note 4 (construing sovereignty as declaring the exception, or suspending international legal rules).

a dislike of civil regulation with corporate business.⁹³ It is the combination of these impulses that is generating the backlash against the supremacy of civil law today.

Where to draw the line between benign accommodations and those that undermine important public purposes, liberal-democratic principles of justice and/or harm others is a complex task, but the liberal-democratic polity must do the line-drawing. Questions of accommodation cannot be answered abstractly or be adequately broached without disaggregating the concept “religion” to get at the specific goods at stake (conscience, ethical integrity, membership, cultural belonging, collective expression) and the relevant respective liberal rights protecting these.⁹⁴ Note that wherever constitutional democracies have implemented religious status group jurisdictional pluralism the results have been terrible for human rights, civic ethics, and respect for democratic civil law.⁹⁵ A recent study of the impact on human rights of state-enforced religious family laws in three constitutional democracies shows it undermines four sets of human rights: equality before the law, individuals’ marital and familial rights, procedural rights and the freedom of religion, including the right to be free from religion.⁹⁶ Those who lose the most are, typically, women.⁹⁷ The pluralist accommodation-ists in the United States and elsewhere have not succeeded in attaining these sorts of jurisdictional prerogatives, but that is where their ideology leads. It is not surprising that the most intense battles

93 See Paul Horwitz & Nelson Tebbe, *Religious Institutionalism — Why Now?*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY*, *supra* note 56, at 207; Lupu & Tuttle, *supra* note 56. For a different timeline, see KEVIN M. KRUSE, *ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA* (2015); and JONATHAN P. HERZOG, *THE SPIRITUAL INDUSTRIAL COMPLEX* (2011).

94 Cecile Laborde, *Conclusion: Is Religion Special?*, in *RELIGION, SECULARISM, AND CONSTITUTIONAL DEMOCRACY* 430 (Jean L. Cohen & Cecile Laborde eds., 2016).

95 Robin West, *Freedom of the Church and Our Endangered Civil Rights: Exiting the Social Contract*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY*, *supra* note 56, at 399.

96 YUKSEL SEZGIN, *HUMAN RIGHTS UNDER STATE-ENFORCED RELIGIOUS FAMILY LAWS IN ISRAEL EGYPT AND INDIA passim* (2013).

97 See Mala Htun & S. Laura Weldon, *Religious Power, The State, Women’s Rights, and Family Law*, 451 *POL. & GENDER* 11 (2015) (arguing that the political institutionalization of religious authority reinforces patriarchal family law by tying it to church-state interrelationships); see also AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS* (2001). *But see also* Jean L. Cohen, *The Politics and Risks of the New Legal Pluralism in the Domain of Intimacy*, 10 *INT’L J. CONST. L.* 380 (2012) (criticizing Shachar’s embrace of a regulated form of jurisdictional pluralism as a strategy for Western democracies).

are and will continue to be fought over family law, sex and sexuality, and education, because it is through controlling these domains that religious authorities seek to perpetuate, form, and discipline their membership.

Those of us committed to the core principles undergirding liberal constitutional democracy and social justice — equality, voice and liberty of all individuals — must challenge the idea that the only alternative to monist modernist sovereignty is a neo-medieval version of permeable sovereignty for private cultural/religious nomos communities. We must devise a compelling postmodern federal conception able to preserve the achievements of democratic constitutionalism. The guiding idea is that liberal principles of justice and democracy should orient whatever public jurisdictions exercise sovereign powers, whether these are above, below or at the level of state. There must be no ascription of sovereignty (*de facto* or *de jure*) to the corporate religious, or to for-profit business corporations, for that would indeed put us all at the mercy of unregulated private powers, hardly an attractive prospect.

