The European Union's Constitutional Mosaic

University of Edinburgh
School of Law

Working Paper Series

No 2010/31

The European Union's Constitutional Mosaic: Big 'C' or Small 'c', Is That the Question?

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Abstract

This paper examines Europe's Constitutional mosaic by focusing on the constitutional mosaic which makes up European Union constitutional discourse. It identifies the current state of EU constitutional discourse as a mosaic of different trends, the contours of which are briefly traced. It then argues that trends in EU constitutional discourse have ignored or suppressed the idea of sovereignty (hence the small 'c' adjective) and that this has resulted in difficulties both with relation to the conceptual coherence of constitutionalism and affects its usefulness as a way of understanding the polity. It argues that the constitutional idea is incorrigibly linked to the concept of sovereignty and that any constitutional discourse, even at the EU level, must entail sovereignty. It goes on to provide a sovereignty-inspired reading of EU constitutionalism through a particular reading of the European Court of Justice's constitutionalization of the Treaties and in its recent Kadi decision.

Keywords
Constitutionalism, Sovereignty, European Union, European Integration, Political Theory, Legal Theory, Philosophy,

THE EUROPEAN UNION'S CONSTITUTIONAL MOSAIC: BIG 'C' OR SMALL 'C', IS THAT THE QUESTION?

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I. INTRODUCTION

The European Union is, in many ways, the *locus classicus* of contemporary post-state constitutionalism. Its quasi-federal nature along with recent attempts to draft a self-styled 'constitutional treaty' for the supranational polity has put it at the vanguard of constitutional theorising beyond the state. As such, any metaphorical mosaic of European constitutionalism must have the European Union close to, if not right at, its centre.

A mosaic is made up of individual fragments which, taken together, make up an image or representation. As such it is more than the sum of its parts, and requires some distance and perspective in order to be truly appreciated. However, this contribution will focus on one, or a small number of 'tiles' of Europe's broader constitutional mosaic, that of European constitutional discourse. More specifically, it will interrogate the various notions of constitutionalism that have been applied in the EU context, and the related issue of what, precisely, it means for the EU to be constitutional.

As the chapter will demonstrate, EU constitutional discourse is, in itself, a 'mosaic within a mosaic', revealing a variegated picture of EU constitutionalism as a complex array of interpretations of the constitutional concept. This focus on EU constitutional discourse as opposed to the reception of the EU's constitutional claims in its Member States[1] or the broader European mosaic of interlocking normative orders, reveals that there are some gaps in the EU constitutional picture, due in the main to EU constitutional discourse's alienated relationship to the concept of sovereignty. The chapter argues, that sovereignty provides (to push the mosaic metaphor to stretching point) the 'grout' for EU constitutionalism's own mosaic; perhaps not the brightest or most beautiful aspect of the picture but absolutely essential to the existence of the constitutional mosaic itself.

II. CONSTITUTIONALISM AND THE EUROPEAN UNION

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[1] See Baquero Cruz's contribution to the current volume.

Constitutionalism has been the *leitmotif* of European Union legal studies for almost a generation.[2] It has become an article of faith amongst European lawyers[3] that the EU is a constitutional entity, notwithstanding its genesis in a set of international treaties set up by sovereign states. As is well known, in a series of seminal judgements on the nature of the treaty system which established the then European Economic Community ('EEC'),[4] the EU's judicial arm, the European Court of Justice ('ECJ'), set the foundations for the EU as a constitutional polity in a similar manner to the US Supreme Court's elevation of the US constitution in its famous *Marbury v. Madison* decision.[5] To summarise what is considerably well-trodden ground,[6] in a series of cases, the ECJ found that the EU legal order, unusually for an international treaty system, contained the following characteristics: that individuals could rely directly on EU primary and secondary law in national courts without the requirement of prior implementing measures by national authorities;[7] that EU law overrides any provision of national law in cases of conflict;[8] that the ECJ enjoys exclusive competence to decide questions on the validity and application of EU law;[9] and that the EU entails a principle of implied powers whereby it may assume certain powers in order for it to achieve the objectives stipulated in the Treaties.[10]

In this way, the system of European integration established by the Rome Treaty had, by judicial fiat, metamorphosed into something new, *sui generis*, which resembled more closely the constitutional structure of a federal system than that of a classic treaty system under international law such as the United Nations or North Atlantic Treaty Organisation.

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[2] Some of the pioneering work in this regard includes Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution,' (1981) 75 American *Journal of International Law* 1; Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review* 595; Joseph HH Weiler, 'The Transformation of Europe,' (1991) 100 *Yale Law Journal* 2403.

[3] Whereas lawyers have been at the vanguard of EU constitutional discourse, political theorists have been taking an increasing interest in constitutionalism as part of a more general 'normative turn' in EU integration. For an overview, see Richard Bellamy and Dario Castiglione, 'Legitimizing the Euro-'polity' and its 'Regime: The Normative Turn in EU Studies' (2003) 2(7) *European Journal of Political Theory* 7.

[4] Since the entry into force of the Lisbon Treaty in December 2009 all of the bits and pieces of the organisation (EC etc) have now all been assimilated into one EU. In the light of this significant simplification exercise, 'EU' will be used throughout this paper as a generic identifier for both today's EU and the other entities which preceded it, including the European Economic Community, European Community, Community law etc.

[5] Daniel Halberstam, 'Constitutionalism and Pluralism in *Marbury v. Madison*' in Miguel Maduro and Loic Azoulai (eds), *The Past and Future of EU Law: Revisiting the Classics on the 50th Anniversary of the Rome Treaty* (Oxford, Hart Publishing, 2010).

[6] Perhaps the most detailed statement of the development is still Weiler's *'The Transformation of Europe'*.

[7] Known as the 'direct effect' of EU Law first established by the court in Case 26/62, *Van Gend en Loos* [1963] ECR 13.

[8] Hitherto known as the supremacy, but now the primacy of EU law: Case 6/64, *Costa v ENEL* [1964] ECR 585. This has now been formally recognised in Declaration 17 attached to the Lisbon Treaty.

[9] Case 314/85, *Firma Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

[10] See, for example, Case 22/70, *Commission v Council* [1971] ECR 263.

Upon this fertile ground, EU constitutional discourse has taken root and flourished in EU legal studies.[11] The constitutional idea has also made forays into EU and national politics,[12] a development reaching its zenith with the Constitutional Treaty in 2005. As is well known, this was rejected in referendums in France and the Netherlands, but a rehashed and semi-digested form of the original dish was served up in the Lisbon Treaty which finally came into force, after a few wobbles, on 1 December 2009.

The EU's reform agenda of the past decade, both successes and failures, has been the subject of much comment and debate both in academic circles and further afield[13], and it is not my intention to contribute to that particular debate here.[14] Rather, as already noted, in this contribution, I will focus on one particular tile of Europe's constitutional mosaic; specifically the ways in which the constitutional idea itself has been theorized in this robustly constitutional but non-state entity.

In order to do so, the chapter will first provide a glance at the conceptual landscape of EU constitutional discourse, tracing the divergent threads of the constitutional concept employed therein. It then critiques these conceptions of constitutionalism as failing to explicitly recognise the essential signifier of the constitutional idea; sovereignty. It goes on to illustrate problems with the forms constitutionalism adopted, arguing that a sovereignty inspired conception of EU constitutionalism provides a better and more coherent rendering of the EU constitutional picture. It finds that the EU's early 'constitutionalising' judgements as well as its recent *Kadi* decision, are sufficient evidence of the EU's sovereignty claims, and so support this sovereigntist reading of EU constitutionalism.

III. EXCAVATING THE EU'S CONSTITUTIONAL MOSAIC

[11] EU Constitutional literature is now legion. Some recent examples include Neil Walker, 'Reframing EU Constitutionalism' in Jeffrey Dunoff & Joel Tractman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance*, (Cambridge, Cambridge University Press, 2009), Miguel Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism' (2005) 3 *International Journal of Constitutional Law* 373; Joseph HH Weiler & Marlene Wind, *European Constitutionalism Beyond the State*, (Cambridge, Cambridge University Press, 2003).

[12] See for example, the proposals for a European constitution by Alterio Spinelli as far back as the 1950s: Andrew Glencross, 'Altiero Spinelli and the Idea of the US Constitution as a Model for Europe: The Promises and Pitfalls of an Analogy' (2009) 47(2) *Journal of Common Market Studies* 287.

[13] See the Special issue of *International Journal of Constitutional Law* (2005) 2/3, 163-515; Andrew Moravcsik, 'What Can we Learn from the collapse of the European Constitutional Project?' (2006) *Politische Vierteiljahresschrift* 47:2; Neil Walker, 'A Constitutional Reckoning' (2006) 13(2) *Constellations* 140 and 'Not the European Constitution' (2008) 15(1) *Maastricht Journal of European and Comparative Law*.

[14] See Cormac Mac Amhlaigh, 'Revolt by Referendum? In search of a European Constitutional Narrative' (2009) 15(4) *European Law Journal* 552.

EU constitutional discourse is acquiring a venerable pedigree, due in no small part to the broad acceptance of the ECJ's seminal judgements on the nature of the EU's treaty system.[15] A fundamental aspect of the success of the Court's constitutionalisation was the willingness of national actors, particularly national courts, to 'play the constitutional game' with the ECJ and act as joint protagonists in the construction of the European constitutional façade.[16] Moreover, the ECJ's subsequent christening of the treaties as the polity's 'constitutional charter'[17] added a formal veneer to the already substantial and broadly accepted constitutional character of the EU legal system by national legal actors. As such, constitutionalism has remained an important 'academic artefact'[18] of European integration notwithstanding the fact that it has undergone various challenges and a 'reformation'[19] in its first half century.[20]

Notwithstanding the indisputable pedigree of EU constitutionalism as a distinct field of inquiry, its precise dimensions and nature are not easily tied down. This is in large part due to divergent approaches to theorising EU constitutionalism in the discourse. The major fault lines which shape the increasingly complex field of EU constitutional discourse relate to the concept of constitutionalism adopted, the question of how or why the EU can be constitutional, as well as the question of how constitutionalism can make a contribution to the EU's well-publicised legitimacy problems, perhaps most clearly demonstrated by the failure of the Constitutional Treaty itself. Thus, navigating the terrain of EU constitutional discourse in the era of the 'postconstitutional'[21] Lisbon Treaty is complex.

In this contribution, this complexity is managed by identifying trends in EU constitutional discourse organised according to the conception or form of constitutionalism adopted. In this regard, three distinct trends in EU constitutional discourse are identified; legalist, neo-republican and processual.

The first of these trends of EU constitutional discourse, the legalist trend, remains the most faithful—some might argue parochial—to the legal origins of EU constitutionalism

[15] For a sceptical position on this question, see Baquero Cruz's contribution to the current volume
[16] See generally, Miguel Maduro, *We the Court* (Oxford, Hart Publishing, 1998).
[17] Case 294/83, *Parti Ecologiste 'Les Verts'* v *European Parliament* [1986] ECR 1339. See also the recent *Kadi* decision (discussed below).
[18] HH Weiler, *The Constitution of Europe* (Cambridge, Cambridge University Press, 1999) 223.
[19] Weiler, *The Constitution of Europe*, Chapter 6.
[20] Perhaps the biggest challenge to EU constitutionalism in recent years has been the assertion of national constitutional supremacy in the face of EU law by national constitutional courts, notably the German constitutional court in its decision regarding the constitutionality of German ratification of the Maastricht and Lisbon Treaties. See *Brunner v European Union Treaty*, *Common Market Law Reports* [1994] 57; *Lisbon Case*, BVerfG, 2BvE 2/08 from 30th June 2009, available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html.
[21] Alexander Somek, 'Postconstitutional Treaty' (2007) 8:12 *German Law Journal* 1121.

based on a characterisation of the law of the treaties as having effects similar to domestic constitutional law.[22] As such, it emphasises the importance of a hierarchical system of positive law as the essence of constitutionalism, where the constitution itself is the 'fundamental law'[23] of the system. Thus, the significance of the ECJ's constitutionalisation of the treaties was the elevation of what was essentially a species of international law to the status of the 'law of the land'[24], with the treaties playing a role analogous to national constitutions in domestic legal systems.

Conceptually, this purely legalistic form of EU constitutional discourse entails a legal positivist theory of law and constitutionalism, where legal ontology is predicated on a single source of legal *validity*, the constitution, which sits at the apex of a hierarchically ordered system of norms.[25] As the fundamental law of a system, the constitution cannot, itself, depend on a higher norm for its own validity if it is to meaningfully constitute the fundamental law. This presents a puzzle for legal theory given that the normative system is incapable of accounting for its own validity. Legal theory has attempted to solve this puzzle by postulating the authority of the constitution on a basic norm *presupposed* in relation to it[26] as a kind of ideal of reason, or by basing the validity of the constitution on a 'social fact' of obedience pursuant to a 'rule of recognition'.[27]

Applying legalist approaches of constitutionalism to the EU then, it can be argued that the ECJ, in developing the constitutional doctrines of EU law, presupposed a basic norm in relation to the Treaty system thereby equating it with a domestic constitutional order in legal terms.[28] Alternatively, the ECJ's seminal judgements can be said to have prompted a change

[22] See generally, Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 *European Law Journal* 259, and *Questioning Sovereignty*, (Oxford, Oxford University Press, 1999) (hereinafter '*QS*'), Catherine Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law' (1997) 16(4) *Law and Philosophy* 337, Frank Dowrick, 'A Model of the European Communities' Legal System' (1983) 3 *Yearbook of European Law* 169, ML Jones, 'The Legal Nature of the European Community: A Jurisprudential Model Using Hart's Model of Law and Legal System' (1984) 17 *Cornell International Law Journal* 1, Ines Weyland, 'The Application of Kelsen's Theory of the Legal System to European Community Law—The Supremacy Puzzle Resolved' (2002) 21 *Law and Philosophy* 1.

[23] Neil Walker 'Fundamental Law' in *Stair Memorial Encyclopedia of the Laws of Scotland (Re-issue 4)* (Butterworths Law, 2001) Volume on Constitutional Law, 29-82.

[24] Weiler, *The Transformation of Europe*.

[25] Paradigmatically expressed in Hans Kelsen's account of a legal system. See Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1946).

[26] Kelsen, *General Theory of Law and State,* Chapter 10.

[27] HLA Hart, *The Concept of Law*, 2nd ed (Oxford, Clarendon Press, 1994).

[28] Richmond, *Preserving the Identity Crisis* and Weyland, *The Application of Kelsen's Theory*.

in the national 'rule of recognition'[29] as to the validity of laws prevailing on the territories of Member States.[30]

This legalist constitutionalism has been given its clearest expression in the EU context in the work of the late Neil MacCormick.[31] As part of his more general theory of post-sovereignty, MacCormick argues that the concept of sovereignty entails both a legal and political dimension. The legal dimension relates to the constitutive rules of the legal system where '[s]overeign power is that which is enjoyed … by the holder of a constitutional power to make law, so long as the constitution places no restrictions on the exercise of that power'.[32] In this regard, legal sovereignty is a proxy for legalist constitutionalism. Political sovereignty on the other hand, is political power unrestrained by higher political power, which relates to the 'interpersonal power over the conditions of life in a human community or society'.[33] In arguing in favour of the primacy of legal sovereignty, MacCormick rejects a hegemonic political sovereignty finding it is not relevant to entities with standing constitutional traditions.[34] In such a situation, described as a *Rechtstaat* or 'law state', MacCormick argues that law and legal sovereignty can exist independently of an overarching political sovereignty.[35] As such, conceptually speaking, a hierarchical (constitutional) legal system can be decoupled from the concept of sovereignty and can be replicated at non-state, and importantly non-sovereign, sites such as the EU.[36] On this account, then, there is no incoherence in claiming that the EU enjoys a hierarchical constitutional legal order but is not, at the same time, a sovereign entity.

The second significant trend in EU constitutionalism adopts a concept of constitutionalism as a 'set of legal and political instruments limiting power'.[37] This reflects a republican conception of the nature and function of constitutions as 'checks and balances' on the exercise of public power through the rule of law, the separation of powers, federalism and fundamental rights protection.[38] This in turn is predicated on ideals of republican liberty

[29] Hart, *The Concept of Law* 94.
[30] In the UK context, see Paul Craig, 'Sovereignty of the United Kingdom Parliament after Factortame' (1991) 11 *Yearbook of European Law* 221; William Wade, 'Sovereignty—Revolution or Evolution?' (1996) 112 *Law Quarterly Review* 568.
[31] MacCormick, *Beyond the Sovereign State* and *The Maastricht Urteil*.
[32] QS, 127.
[33] QS, 127.
[34] QS, 128.
[35] QS, 128-129.
[36] QS, 129, 131.
[37] Maduro, *The Importance of Being Called a Constitution* 333.
[38] This conception of constitutionalism is a particular feature of much German scholarship on EU Constitutionalism. See, for example, Dieter Grimm, 'Does Europe Need a Constitution?' (1995) 1(3) *European Law Journal* 282 and 'Integration by Constitution' (2005) 3(2-3) *International Journal of Constitutional Law*

which is ensured through the fragmentation of political power.[39] The transportation of these republican-inspired ideals to the EU level provides for a form of federal neo-republican constitutionalism with a *communautaire* twist.[40] Whereas with classic republican constitutional theory, the constitution is an expression of the constituent power where 'the people as a whole adopted the Constitution'[41] which in turn provides the mechanism through which government is restrained, the primary checks on power in EU constitutionalism are overwhelmingly *functional*, where the exercise of power is limited to the achievement of the specific aims or objectives stipulated in the Treaties, such as the establishment of the internal market. In this regard, EU neo-republican constitutionalism protects the prerogative of the Member States against the unauthorised exercise of what is deemed to be delegated sovereign power by the EU's institutions. In the EU context, this neo-republican constitutionalism thus prioritises the constitutional principles of subsidiarity, the principle of the conferral of powers as well as a strong doctrine of *ultra vires*.[42] Moreover, whereas institutional design is an important element of this neo-republican EU constitutional discourse,[43] law is the primary mechanism of control which patrols the exercise of power by EU institutions as enforced by the courts, primarily the ECJ.[44] The development of a strong fundamental rights

193; Ingolf Pernice, 'Multilevel constitutionalism in the European Union' (2002) 27 *European Law Review* 511 and 'The Treaty of Lisbon: Multilevel Constitutionalism in Action' (2009) 2/09 *Walter Hallestein Institut Working Paper*; Armin von Bogdandy, 'The European Union as a Supranational Federation: A conceptual attempt in the light of the Amsterdam Treaty' (2000) 6 *Columbia Journal of European Law* 27. There is also more than a hint of republican ideals informing Maduro's writings on EU constitutionalism. See *The Importance of Being Called a Constitution* and 'Europe and the constitution: what if this is as good as it gets?' in Weiler and Wind (eds), *European Constitutionalism Beyond the State*, Maduro 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed), *Sovereignty in Transition*, (Oxford, Hart Publishing, 2003).

[39] In this regard, classic republican theory endorses a strong separation of powers doctrine. For a paradigmatic statement see Baron de Montesquieu (Charles de Secondat), *The Spirit of the Laws* [1748], Anne Cohler, Basia Miller & Harold Stone (eds), (Cambridge, Cambridge University Press, 1989), especially Book II, 'On the law that form political liberty in its relation with the constitution'. This theme has been taken up in political theory in recent years through the writings of Philip Pettit and Richard Bellamy who adopt a republican conception of political liberty in terms of independence from arbitrary power or non-domination. See Philip Pettit, *Republicanism: A Theory of Freedom and Government*, (Oxford, Oxford University Press, 1999), particularly Chapter 2; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge, Cambridge University Press, 2007).

[40] Pernice, *Multilevel Constitutionalism*.

[41] Stephen Griffin, 'Constituent Power and Constitutional Change in American Constitutionalism' in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism* (Oxford, Oxford University Press 2007) 49.

[42] See above n38.

[43] Maduro, *The Importance of Being Called a Constitution*.

[44] There is an affinity between the role of law in neo-republican EU constitutional discourses and approaches in political science to European integration such as Giandomenico Majone's conceptualisation of the EU as a 'regulatory state' or Moravcsik's recent work on the democratic deficit in the EU, in the sense that they all posit a strong role for law in keeping the EU's institutions in check and therefore see law as the primary source of legitimacy in the EU. See Giandomenico Majone, *The Dilemmas of European Integration* (Oxford, Oxford University Press, 2005); Andrew Moravcsik, 'In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union' (2002) 40(4) *Journal of Common Market Studies* 603.

jurisprudence from the ECJ,[45] which was crowned by the EU's own bill of rights,[46] is an extra safeguard against abuse of power by the EU institutions and enhances EU constitutionalism's neo-republican credentials. As such, this trend in EU constitutional discourse implies a unique form of federal republican constitutionalism; where sovereign states, rather than citizens, play a leading role and the concept of 'public' in the *res publica* is elusive.

A third, more recent trend in EU constitutional discourse, is one which conceptualises the idea of constitutionalism in terms of a *process*.[47] Thus, rather than defining constitutionalism in terms of static legal hierarchies or formal structures of restraint, this processual approach views constitutionalism as a forum for contestation regarding the values of the political community where reasonable disagreement is articulated and debated. James Tully's critical and practical constitutionalism is exemplarily of the approach to constitutionalism upon which this third trend in EU constitutional discourse relies.[48] Central to Tully's 'agonistic'[49] conception of constitutionalism is the acceptance of disagreement 'all the way down',[50] where contestation is central to the constitutional concept itself; something to be celebrated rather than pathology to be remedied.[51] Thus, reasonable disagreement is both inevitable and profound both within and over the rules of constitutional law.[52] No rule, procedure or agreement is sheltered or protected from contestation or enjoys a higher status or protection contrary to conventional 'entrenched' constitutionalism. [53] Moreover, not only is the subject matter of contestation unlimited, but also the process of contestation itself is

[45] See, for example, Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, Case 4/73, *Nold*, [1974] ECR 491, Case C-112/00, *Schmidberger v. Austria*, [2003] ECR I-5659, Case C-36/02, *Omega*, [2004] ECR I-9609.
[46] Charter of Fundamental Rights of the European Union, OJ C 303, 14 December 2007.
[47] The notion is eloquently presented by Bankowski and Christodoulidis, who use the metaphor of the journey to capture the processual conception of constitutionalism. Zenon Bankowski and Emilios Christodoulidis, 'The European Union as an Essentially Contested Project' in Zenon Bankowski and Andrew Scott (eds), *The European Union and its Order* (Oxford, Blackwell, 1999). Examples of the processual approach in EU constitutional discourse include Joshua Cohen and Charles Sabel, 'Directly-Deliberative Polyarchy' (1997) 3 *European Law Journal* 313, Jo Shaw, 'Postnational Constitutionalism in the European Union' (1999) 6:4 *Journal of European Public Policy* 579 and 'Process, Responsibility and Inclusion in EU Constitutionalism' (2003) 9(1) *European Law Journal* 45; Emilios Christodoulidis, 'Constitutional Irresolution: Law and the Framing of Civil Society' (2003) 9(4) *European Law Journal* 401; Michael Wilkinson, 'Civil Society and the Re-imagination of European Constitutionalism' (2003) 9:4 *European Law Journal* 451.
[48] James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) 65 *Modern Law Review* 204 (hereinafter 'UM') and *Public Philosophy in a New Key*, 2 Vols, (Cambridge, Cambridge University Press, 2009). Although for critique of Tully's approach from within processual constitutional thinking, see Christodoulidis, *Constitutional Irresolution*.
[49] UM, 208.
[50] UM, 218.
[51] UM, 218.
[52] UM, 218.
[53] UM, 207.

perpetual. As Tully remarks, '[n]o sooner is a constitutional principle, rule or law laid down as the basis of democratic institutions then it is itself open in principle to democratic challenge, deliberation and amendment.'[54] The cornerstone of such dialogic contestatory constitutionalism is *audi alteram partem*,[55] or 'hear the other side', and this is virtually the only certainty which processual constitutionalism offers, given that everything else, up to and including the framework within which the process takes place, is up for contestation.

Applying this approach to the EU[56] represents a break from teleological accounts of European integration towards political and economic union.[57] It also therefore represents a departure from legalistic approaches to EU constitutionalism, with their path-dependent linear logic of integration,[58] preferring a conceptualisation of the EU in terms of an 'essentially contested concept'.[59]

Moreover, the processual constitutional approach also represents a departure from the certainties which inform the neo-republican approach. For the neo-republican approach, EU constitutionalism represents a clear division of labour between the EU institutions and that of its member states which, as noted, remain the 'masters of the treaties'. This implies that there are clearly identifiable and objective criteria against which the EU's activities can be evaluated, and in particular, criticised, the *sotto voce* implication being that the sovereign nation-state remains the only truly legitimate political actor. As such, the role of the EU's constitution is to keep the EU's institutions in check by solidifying in law the limitations of the legitimate exercise of the EU's powers. For processual constitutionalism, the picture is not so simple. Constitutionalism as process does not allow for such a clear-cut distinction between competences which allow for a definitive carving up of EU and Member State powers. The legitimacy or otherwise of both EU and Member State competences and their exercise are imminently contestable. Thus, the legitimatory monism which informs neo-republican approaches, essentially legitimacy through legality, is but one aspect of a richer tapestry of EU constitutionalism. Different constituencies will perceive the legitimacy of the exercise of EU and Member State powers differently, and this pluralism must necessarily be factored into the EU constitutional design.

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[54] UM, 208.
[55] UM, 218.
[56] It should be noted that Tully has, himself, commented upon the EU; see Tully, *Public Philosophy*.
[57] See Ernst Haas, *The Uniting of Europe* (London, Stevens & Sons, 1958).
[58] Jo Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic' (1996) 16 *Oxford Journal of Legal Studies* 231.
[59] Bankowski and Christodoulidis, *The European Union as an Essentially Contested Project*.

In sum, with respect to some of the fundamental questions which are central to the concerns of EU constitutionalism such as the *finalité* of integration and the appropriate levels of government within the EU constitutional space, disagreement in the EU runs deep and is manifested in a variety ways, including (admittedly decreasing) national vetoes and treaty 'opt outs';[60] not to speak of the broader dissent among national electorates regarding the nature and role of integration more generally as was manifested in the failed attempts to draft a self-styled constitutional treaty for the polity. Thus, according to this processual trend, an epistemic approach to constitutionalism based on diversity and contestation as opposed to unity, consensus or legally-demarcated competences is both practically and normatively more desirable than modern enlightenment constitutional forms, in a context where 'the very social basis of the polity remains highly contested and very fluid'.[61]

IV. BIG 'C' OR SMALL 'C': IS THAT THE QUESTION?

What is clear from this mapping exercise of the terrain, is that EU constitutional discourse is varied and complex; a 'mosaic within a mosaic'. However what also emerges is that EU constitutional discourse is part of a more general trend which attempts to forge a new trajectory in the career in the concept from its more familiar state setting. It can be argued that the conception of constitutionalism employed in the EU constitutional discourses represents a *parsing* of the state-based constitutional concept into its constituent parts; fundamental law, checks and balances, constituent power, democratic deliberation etc. and a subsequent *fusion* of the various bits and pieces of the constitutional puzzle for the purposes of their application to a new post-state site. In this way, EU constitutional discourse is engaged in constitutional experimentalism, involving innovations in the (state-based) constitutional idea to suit the particular—and peculiar—circumstances of a post-state supranational polity. Thus, notwithstanding its strong genetic resemblance to state constitutionalism the concept of constitutionalism employed in EU constitutional discourse, be it legalist, neo-republican or processual, represents, to a certain extent, a *reinterpretation* of its post-Westphalian state variety. This new venture of the constitutional idea trades under a variety of different brand names including 'low intensity constitutionalism',[62] constitutionalism 'with a small c'[63] or 'constitutionalism lite'[64]; the EU itself a constitutional

[60] Perhaps the most salient in recent times being Poland and the UK's opting out of parts of EU's charter of fundamental rights.
[61] Jo Shaw, *Postnational Constitutionalism* 586-587.
[62] Maduro, *The Importance of Being Called a Constitution* 334.
[63] Neil Walker, 'Big 'C' or small 'c'' (2006) 12:1 *European Law Journal* 12.

body without a soul,[65] a constitutional site yes, but of a different, more anaemic form than that of its statist cousin. EU constitutionalism has been spun from the same cloth as national constitutionalism but with a new (more frugal) design more suitable to the conditions and requirements of the supranational polity.

Perhaps the most salient aspect of this reinterpretation of the constitutional idea in the EU context is its almost complete elision of the concept of sovereignty, primarily due to the fact that the EU is not considered a state and therefore does not enjoy sovereignty. Rather, in the process of parsing and fusing which has been the hallmark of EU constitutionalism, the concept of sovereignty has not made the cut. As such, EU constitutional discourse eschews any suggestions that the *fact* of (small 'c') EU constitutionalism equates with the existence of, or even trajectory towards, a sovereign Europe. Rather, the various trends of EU constitutional discourse entail a conception of constitutionalism which attempts to do without the concept of sovereignty either as a 'social fact' of power or as a normative discourse of the foundation of authority such as constituent power. [66]

As such, the legal positivist tradition which informs legalist approaches to EU constitutionalism whether couched in terms of a *Grundnorm,* rule of recognition or *Rechtstaat* has little to say about the concept of sovereignty more generally.[67] Indeed, for MacCormick, who inherits this positivist legacy, 21st century Europe is a decidedly sovereignty-free zone. In decoupling hierarchical constitutional law in terms of institutional normative order from a political concept of sovereignty through the notion of the *Rechtstaat*, MacCormick established that the EU could enjoy a constitutional legal order without necessarily being sovereign. Extrapolating from this, MacCormick continues that, not only is the EU not sovereign, but that its Member States do not enjoy sovereignty either, due to the fact that they are bound by EU law.[68] Given this state of affairs, MacCormick argues that Europe has moved 'beyond the sovereign state'.[69] In doing so, certain aspects of the state idea

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[64] Jan Klabbers, 'Constitutionalism Lite' (2004) 1:31 *International Organizations Law Review* 31.
[65] Maduro, *As Good as it Gets* 77.
[66] Which in normative constitutional discourse is equated with popular sovereignty and constituent power. See Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12:2 *Constellations* 223.
[67] Carl Schmitt famously critiqued Hans Kelsen's pure theory by claiming that he 'solved the problem of the concept of sovereignty by negating it'. Carl Schmitt, *Political Theology* (Chicago, Chicago University Press, 2005) 21.
[68] QS, 132.
[69] The one slight qualification to this is that MacCormick acknowledges that sovereignty is still relevant externally; that is both the EU and its Member States enjoy a 'compendious legal external sovereignty' to the rest of the world, QS, 133.

have evolved and enjoy continued relevance such as constitutionalism and law but others, like sovereignty, are, at least in Europe, becoming increasingly redundant.

An ambivalence with respect to the concept of sovereignty also surrounds neo-republican approaches to EU constitutionalism. Along with the idea of checks and balances, another central tenet of republican theory is the idea of popular sovereignty, where sovereignty resides with a people as opposed to stemming from royal or divine sources.[70] However, in respect of neo-republican EU constitutional discourse, in the absence of the orthodox repository of republican sovereignty, a sovereign European people, the only viable surrogate is that of the sovereign states which created the polity in the first place. Thus, the EU's Member States remain 'masters of the treaties' who have 'pooled' or 'limited' their sovereignty but ultimately retain the final say in matters European.[71] On this view, whereas European *law* can be considered constitutional, its politics remains resolutely international through intergovernmental bargaining reflecting the 'dual character of supranationalism'.[72] Not only does this 'dual character' create problems for the coherence of the idea of EU constitutional *authority* and its implicit hierarchical ordering, but it presupposes a republican discourse without a public.

Processual forms of EU constitutionalism share a common starting point in repudiating sovereignty and attempting to prize open the rigid categories and identities imposed by this modernist concept.[73] In this regard, the processual accounts of constitutional concept of sovereignty.[74] It is precisely the limitations offered by the concept of sovereignty which has prompted the turn towards more processual, deliberative models of constitutionalism and democratic experimentalism.[75] With its emphasis on 'partisanship, dissent, disagreement, contestation and adversarial reasoning'[76], processual constitutionalism

[70] This is, perhaps, most clearly illustrated in Rousseau's conception of sovereignty as the exercise of the *volunte generale.* Jean-Jacques Rousseau, *The Social Contract* [1762] (Oxford, Oxford University Press, 1994), Book II, Chapter 2. See also John McCormick, 'People and Elites in Republican Constitutions, Traditional and Modern' in Loughlin and Walker (eds), *The Paradox of Constitutionalism*.
[71] See Maduro, *The Importance of Being Called a Constitution*.
[72] Maduro, *The Importance of Being Called a Constitution*, 335. See also for the original account Joseph HH Weiler, 'The Community System: the Dual Character of Supranationality' (1981) 1 *Yearbook of European Law* 267and *The Transformation of Europe*.
[73] For a clear, if somewhat extreme, illustration of this idea, see Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA, Harvard University Press, 2000), *Preface*.
[74] Richard Bellamy and Dario Castiglione, 'Building the Union: The Nature of Sovereignty in the Political Architecture of Europe' (1997) 16(4) *Law and Philosophy* 421.
[75] Indeed, in some more radical forms of EU processual constitutionalism such as Cohen and Sabel's 'directly deliberative polyarchy', sovereignty is even accused of causing a broader failure of politics in the twentieth century. Their response to this failure is to fracture centralised political power and with it, leave behind the concept of sovereignty. See Cohen and Sabel, *Directly-Deliberative Polyarchy* 314.
[76] Tully, *UM*, 219.

leaves little room for the putative unity and homogeneity imposed through state-based conceptions of popular sovereignty. Processual constitutionalism, therefore, relies on the 'diffusion'[77] of sovereignty where the notion is either repudiated or is ubiquitous such that 'nowhere is it particularly important'.[78]

In many ways, the absence of an overt discussion of sovereignty in EU constitutional discourse is not particularly surprising. The very objective of parsing the concept of constitutionalism into small and big 'c's was to enable the use of parts of the constitutional idea without the big 'C' baggage of sovereignty. In particular, one of the apparent main stumbling blocks of EU constitutionalism is the absence of a Europe-wide *pouvoir constituant* which would 'consciously will a European political existence'[79]. This deficiency permeates much political theorising at the EU level and is genetically linked to the 'no-demos' debate.[80] Thus, parsing the idea of constitutionalism into a 'small c' forms permits the use of the constitutional idea in respect of the EU without foundering on its lack of thick political community or sovereign people. Small 'c' constitutionalism, then, is constitutionalism without a constituent power, a people, and therefore sovereignty.

This reinterpretation of the idea of constitutionalism to suit the circumstances of the EU, is redolent of the various shades and degrees of familiar state-based concepts which have populated non-state sites which make up the broader tapestry of global legal transnationalism of which the EU is but one, particularly salient, example. However, profound problems of 'translation'[81] affect this wider development, perhaps the most serious of which is ensuring that the state-based concept adopted retains its epistemological purchase as a 'way of world-making' beyond its domicile. In order to ensure this, the relevant 'signifier'[82] of the relevant state-based concept must be retained. It is submitted that, with respect to the notion of constitutionalism, this signifier is the concept of sovereignty. This claim can be supported by examining the evolution of the concept of modern constitutionalism at the state level. For this a brief excursus into the evolution of the state is warranted.

A. CONSTITUTIONALISM AND THE STATE

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[77] Hans Lindahl, 'Sovereignty and Representation in the EU' in Walker (ed), *Sovereignty in Transition*, 92.
[78] Neil Walker, 'Late Sovereignty in the European Union' in Walker (ed), *Sovereignty in Transition*, 15.
[79] Paraphrasing Schmitt, see *Constitutional Theory* (Duke, Duke University Press, 2008) 127. On the question of constituent power and EU constitutionalism see Walker, 'Post-Constituent Constitutionalism? The Case of the European Union' in Loughlin and Walker (eds), *The Paradox of Constitutionalism*.

[80] For a general overview, see Weiler, *The Constitution of Europe*, Chapter 8.
[81] Neil Walker, 'Postnational Constitutionalism and the Problem of Translation' in Weiler and Wind (eds), *European Constitutionalism Beyond the State.*
[82] Walker, 'Postnational Constitutionalism and the Problem of Translation' in Weiler and Wind (eds), *European Constitutionalism Beyond the State*.

The idea of constitutionalism has enjoyed a long and illustrious career featuring both in the politics of the ancient world as well as appearing at the vanguard of political theories of transnationalism and globalisation.[83] However, in its modern form, constitutionalism is inextricably linked to the co-evolution of the state and the concept of sovereignty as a form of political and legal organisation.[84] The state emerged out of the governing arrangements of the medieval period, incorporating feudal bonds and the overarching authority of the Roman church.[85] Central to its development was the emergence of an idea of sovereignty which entailed the centralisation of power in one locus as opposed to the prevailing fragmented power arrangements.[86] This was achieved, to a large extent, through the adoption of law, latterly positive law, as a form of rule which, given its universal application and simplifying tendencies, provided both an intelligible and efficient means of transmitting the power of the sovereign to an ever broader constituency.[87] Law's general and universal application made it a useful tool in the dissemination of political power, given that it could traverse the various extant societal divisions; regional, sectoral and patrimonial. This, in turn, enhanced efficiency by obviating the need for 'particularized modes of conflict resolution'.[88]

As Thornhill notes, this rise in the use of legal forms in sites which evolved into states were indispensible to the rise of the *political power* of the sovereign and the development of an autonomous political realm central to the concept of sovereignty, distinct from, and superior to, morality, economy and perhaps most fundamentally, ecclesiastical authority.[89] This increase in the use of legal forms of rule in turn provoked the extrapolation of legally informed theoretical principles which attempted to validate the origins and actions of political

[83] See generally, Charles McIlwain, *Constitutionalism: Ancient and Modern*, (Indianapolis, Liberty, 1975), Bardo Fassbender, *The United Nations Charter as the constitution of the international community*, (Leiden, Martinus Nijhoff, 2009), Jeffrey Dunoff, 'The politics of international constitutions: the curious case of the WTO' in Jeffrey Dunnof and Joel Tractman (eds), *Ruling the World?: Constitutionalism, International law, and Global Governance* (Cambridge, Cambridge University Press, 2009), Gunther Teubner, 'Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Oxford, Hart Publishing, 2004).
[84] Chris Thornhill, 'Towards a historical sociology of constitutional legitimacy' (2008) 37 *Theory and Society* 161.
[85] See generally Michael Oakeshott, *On Human Conduct*, (Oxford, Clarendon, 1975) Chapter 3; David Held, *Democracy and the Global Order* (Cambridge, Polity, 1995), Part II and Martin van Creveld, *The Rise and Decline of the State* (Cambridge, Cambridge University Press, 1999).
[86] See particularly Oakeshott, *Ibid.*

[87] Thornhill, *Towards a historical sociology*, 172.
[88] Thornhill, *Towards a historical sociology*, 171.
[89] Martin Loughlin, *The Idea of Public Law* (Oxford, Oxford University Press, 2003).

institutions[90] and coincided with the rise of theories of political legitimacy which predicated the legitimacy of sovereignty and the autonomy of the political on natural law or the social contract.[91]

This development reached its zenith during the Enlightenment where this twofold development of functional autonomy and philosophical justification were fused in a concept of constitutionalism made up of a *pouvoir constituant* and *pouvoir constitué*.[92]

What is clear from this evolution is that the modern constitutional idea emerged *as a facet of the concept of sovereignty*. The concept of constitutionalism under conditions of political modernity, therefore, is incorrigibly anchored in the concept of sovereignty which is, in turn, an expression of the autonomy of the political realm.[93] The modern concept of constitutionalism then, has a specific teleology, that of serving the ends of the maintenance of sovereignty and the preservation of autonomy of the political by tracing 'the boundaries between the political system and other areas of social practice, and in so doing… preserv[ing] its autonomy and legitimacy as concentrated around a set of evidently limited political issues.'[94]

If, at root, constitutionalism is an expression of sovereignty, then a constitutional discourse which ignores the concept of sovereignty is problematic. As such, constitutionalism relates to a specific form of power, *sovereign* power, which in turn implies an autonomous realm of legitimate authority which makes claims to hierarchy and obedience. Therefore constitutional discourse necessarily presupposes claims to *ultimate authority* and *hierarchy*. To dismiss this essential aspect of constitutionalism, it is submitted, is to dismiss the essence of the constitutional idea itself, making a 'sovereignty-less' constitutionalism oxymoronic. The oxymoronic nature of a constitutionalism without sovereignty creates problems for the characterisation of the EU as constitutional polity in EU constitutional discourse. These manifest themselves in each of the trends in EU constitutional discourse outlined above which, on close analysis, betray deficiencies or incoherencies in their characterisation of the EU as a constitutional polity.

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[90] For an early account of this development see Walter Ullman, 'The Development of the Medieval Idea of Sovereignty' (1949) 64 *English Historical Review* 1.
[91] Thornhill, *Towards a historical sociology,* 173.
[92] Thornhill, *Towards a historical sociology,* 173. See also Griffin, *Constituent Power and Constitutional Change* and Lucien Jaume 'Constituent Power in France: The Revolution and its Consequences' in Loughlin and Walker (eds), *The Paradox of Constitutionalism* (Oxford, Oxford University Press, 2007).
[93] Loughlin, *The Idea of Public Law*.
[94] Thornhill, *Towards a historical sociology,* 175.

Firstly, with regard to the legalistic forms of EU constitutionalism, sovereignty provides the key ingredient which distinguishes the EU from other forms of legal organisation as a genuinely constitutional polity. In removing the constitutional idea from the conceptual context of sovereignty, legalistic accounts of EU constitutionalism run the risk of definitional inflation such that defining the EU in constitutional terms proves to be of limited heuristic value. Even, if we bracket MacCormick's not uncontroversial post-sovereignty thesis which arguably, like Kelsen, dismisses the essential political element of sovereignty[95], there is a question as to the 'added value' of describing the EU as constitutional in terms of *Rechtstaat.* If the requirements of constitutionalism relate to a basic idea of an institutional normative order, what is it that differentiates the EU *qua* constitutional entity from other forms of post-state (and indeed sub-state) legal forms? Such a minimalist concept of constitutionalism runs a real risk of succumbing to the charges of 'golf club governance' levelled at the attempt to draft a constitutional-style document for the EU.[96] The constitutional epithet simply becomes yet another label for the supranational structure, yet another proxy for the empty idea of the *sui generis* polity. It is the sovereignty claims at the EU level which make the EU constitutional and distinguish this particular legal system from other forms of inter-state cooperation.

This problem of definitional inflation is also present in neo-republican accounts of EU constitutionalism where the use of law as a restraint on political and administrative power is evidenced at many diverse sites at both the post-state and substate level. This account of constitutionalism, moreover, has an affinity with the Global Administrative law movement which, somewhat paradoxically, attempts to distance itself from the post-state constitutional discourse as a much more modest way of capturing the increasing transnationalisation of constitutional values and legal forms.[97] However, to this inflationary problem can be added a basic question of logical consistency. If constitutionalism as a form of restraining power is adopted in the absence of sovereign power, as the neo-republican view seems to espouse, the question arises as to *what form of power is being restrained?* As noted above, constitutionalism emerged as a facet of sovereignty and, as such, in its legitimating function, it was aimed at restraining *sovereign* power. If EU constitutionalism does not relate to sovereign power, or if sovereign power is absent at the EU level, then the restraining function

[95] For a critique in this vein see Loughlin, *The Idea of Public Law*, 88-93.
[96] This refers to UK Foreign Minister Jack Straw's claim that even golf clubs have constitutions during the drafting of the Constitutional Treaty. See *The Economist*, 12 October 2002.
[97] See Benedict Kingsbury et al, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15 and Benedict Kingsbury, 'The Concept of 'Law' in Global Administrative Law' (2009) 20:1 *European Journal of International Law* 23–57.

of constitutionalism which is at the forefront of neo-republican accounts becomes logically incoherent. If the EU is not sovereign, then what need is there for *constitutional* law to restrain it?

Finally, with respect to the processual trend of EU constitutionalism, disagreement, which is axiomatic in processual constitutionalism, requires an *a priori agreement* regarding with whom, and over what, to disagree. Sovereignty provides the vital *frame* within which deliberation can take place. Without such agreement, the disagreement central to processual constitutionalism can never get off the ground. The concept of sovereignty, with its claims to ultimate authority and hierarchy over individuals and its *conscious designation of certain issues as political*, allows actors to identify themselves as participants in the deliberative process, as well as providing a 'particular' over which to deliberate. Without such a non-negotiable, non-contestable agreement providing a fulcrum around which disagreement can gravitate, contestation becomes chaotic unmediated 'noise'.

Therefore EU constitutionalism needs the concept of sovereignty in order both to ensure the conceptual coherence of the idea of EU constitutionalism as well as to ensure that constitutionalism retains its practical utility as a way of producing a relevant political way of knowing and understanding the EU. Thus, for the EU to be characterised as a constitutional polity, it must simultaneously be a sovereign polity.

V. LOCATING SOVEREIGNTY IN THE EU

As noted above, justifications of sovereignty in modern constitutionalism have revolved around the notion of *pouvoir constituant*, the power to constitute legitimate order.[98] From the perspective of modern accounts of constitutional origins, the search for sovereignty in the EU constitutional order is *prima facie* inauspicious. The EU's constitutional order is not the product of a revolutionary overthrow of an *ancien régime*. Indeed, it was arguably not conceived of in constitutional terms at all when the original treaties were signed by the founding six Member States in the 1950s.

However, the discourse of a constituent power in modern constitutionalism, as noted, is part of the *justificatory narrative* of sovereign power and therefore sovereignty precedes constitutionalism. This, then, begs the question of what *sovereignty* constitutes. Sovereignty, can be defined as a normative claim to a particular type of authority, *ultimate* authority over a

[98] See Kalyvas, *Popular Sovereignty*.

particular territory and people.[99] As a form of normative claim, or 'speech act', then, sovereignty does not relate to a simple 'fact' of power, nor can it be equated with an ethnic, cultural or historic community.[100] Rather, sovereignty relates to an unambiguous assertion of ultimate authority which is 'plausible'[101] in the sense that it is heeded to a significant degree by those over whom the claim is made, reflecting the 'relational' nature of the concept.[102] Moreover, as Werner and de Wilde note, as a claimed status to ultimate authority, sovereignty is always at stake—permanently contestable,[103] and so sovereignty claims are therefore necessarily *iterative*. As a result of the precarious nature of sovereign status, assertions of sovereignty are likely to be more pronounced where that status is threatened or weak;[104] empty sovereign vessels make the most noise.

Moreover, as noted above, given that the justificatory discourse of sovereignty and its derivations such as constitutionalism, are concerned with the validity or justification of political power which is exogenous to the justificatory discourse itself, sovereignty claims are always *self-validating*. The very emergence of the concept of sovereignty itself as explaining the centralisation of power in the state required a justification independent of existing justificatory forms such as feudalism or Christendom to seal its autonomy. Thus, sovereign claims always appear self-referential and self-norming when viewed from an external point of view. In this way, initial sovereign claims, paradigmatically declarations of independence, always constitute a transgression of established order.[105] Revolutions are never legal.[106]

Therefore, to dismiss the possibility of an EU sovereignty claim due to the fact that it cannot be said to entail a credible constituent power is, it is submitted, to put the cart before the horse. Sovereign claims to authority and hierarchy *necessarily precede the justification and validation of these claims* through justificatory discourses such as that of a constituent

[99] See generally Wouter Werner and Jaap de Wilde, 'The Endurance of Sovereignty' (2001) 7(3) *European Journal of International Relations* 283 and Walker, above n. 78.
[100] Werner and de Wilde, *The Endurance of Sovereignty*. Hobbes, notably in this regard, was clear in predicating his theory of sovereignty on a 'commonwealth by design [civitas institutiva]' Thomas Hobbes, *On the Citizen* [1641], Richard Tuck and Michael Silverthorne (eds) (Cambridge, Cambridge University Press, 1998), 102.
[101] Walker, above n. 78, 17.
[102] Werner & de Wilde, *The Endurance of Sovereignty*, and Loughlin, *The Idea of Public Law*.
[103] *Werner & de Wilde, Ibid.,* 287.
[104] *Ibid,* 286.
[105] For example, the US declaration of independence, a paradigmatic sovereignty claim, was, from the point of view of the *ancien régime* UK constitutional order, a breach of established order. On this point see Hans Lindahl, 'Acquiring a Community: The *Acquis* and the Institution of European Legal Order' (2003) 9(4) *European Law Journal* 433 at 434.
[106] Hannah Arendt, *On Revolution* (London, Penguin, 1990). See also Jacques de Ville, 'Sovereignty without sovereignty: Derrida's *Declarations of Independence*' (2008) 19 *Law and Critique* 87.

power.[107] To insist upon an ontological constituent power to justify sovereign claims in *any* constitutional context is to reify the concept of sovereignty and to wilfully ignore the necessarily unjustifiable origins of *any* sovereignty claim.[108] Therefore, rather than a putatively credible constituent power, the necessary *a priori* of a constitutional discourse is an unambiguous and plausible claim to ultimate authority made within an institutional context to which such justificatory discourses can attach. This, it is argued, is present in the ECJ's interpretation of the EU's legal and political system.

B. WE THE COURT

The early judgements of the ECJ, as noted, were the original catalyst for the evolution of EU constitutional discourse, however, they can also be interpreted in terms of sovereignty claims on behalf of the EU.[109] For example, in establishing the doctrine of direct effect in *Van Gend en Loos*, the ECJ found that: [110]

> 'the [then EEC] Treaty is more than an agreement which merely creates mutual obligations between the contracting states … [t]he Community constitutes a new legal order of international law for the benefit of which states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only their Member States but also their nationals'.

Thus, the Court was claiming a particular status for the EU's legal system which was not evident from a literal reading of the Treaties. In this way, the ECJ's interpretation constituted a *transgression* of established order through legal interpretation.[111] It is this transgressive interpretation which supports the contention that the decision constitutes a sovereignty claim. As noted above, sovereignty claims are always unauthorised from the point of view of the *status quo*, an act of 'seizing the initiative'.[112]

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[107] Which is the basis of the 'no demos' thesis in EU constitutional discourse. See Joseph HH Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 1(3) *European Law Journal* 219.
[108] Something which Hobbes himself, acknowledged, finding that 'there is scarce a Commonwealth in the world, whose beginnings can in conscience be justified'. Thomas Hobbes, *Leviathan* [1651], Richard Tuck (ed), 486.
[109] See Lindahl, *Sovereignty and Representation in the EU*.
[110] *Van Gend en Loos,* 12.
[111] Lindahl, *Acquiring a Community,* 434.
[112] Lindahl, *Acquiring a Community,* 440.

The decision constitutes a transgression of established order because the Court had no prior authority to interpret the Treaty system in this way. Under a conventional—one could say *ancien régime*—reading, the treaties were international agreements signed by sovereign states, and binding under international law only, and only had domestic effect in accordance with national constitutional requirements. However, the Court deliberately rejected this conventional reading by finding that the Treaty system constituted a 'a new legal order of international law'[113] basing its finding on less than convincing evidence.[114] However, it is precisely the paucity of evidence for such a reading of the treaties as a new legal order which makes this interpretation a transgression. Were the treaty structure to unambiguously assert the novelty of the treaty system vis-à-vis international law, then the ECJ's claims would have appeared very conventional.[115]

This initial transgression of established order by the ECJ was quickly followed by a strong claim to the *autonomy* of the EU legal system, validated in self-referential language in the *Costa v ENEL* decision. In this decision in particular, a clear sovereignty claim is discernable presupposing the existence of an autonomous European political realm. In answering a preliminary reference from an Italian court with respect to the role of EU law in national legal systems, the Court found that:[116]

> 'by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.'

In this passage, the Court supplemented its transgressive reading of the treaties with an unambiguous assertion of the sovereign authority of the legal order. In doing so, the Court

[113] *Van Gend en Loos,* 12.
[114] Gráinne de Búrca, 'Sovereignty and the Supremacy Doctrine of the European Court of Justice' in Neil Walker (ed), *Sovereignty in Transition*.
[115] There are those who argue that the ECJ's assertions of the constitutional doctrines of the Treaty system were highly conventional—a perfectly reasonable interpretation of the text of the Treaty and its structural implications, and so anything *but* transgressive. See, for example, J Baquero Cruz, 'The Changing Constitutional Role of the European Court of Justice' (2006) 34 *International Journal of Legal Information* 223-245. However, while one could quibble with the transgressive nature of the establishment of direct effect in isolation, it is argued that it is but one factor in a broader picture of the Court's activity which *cumulatively* constitute a sovereignty claim (see further below).
[116] *Costa v ENEL,* 593.

went on to articulate the logical corollary of autonomy as a sovereignty claim by emphasising the *hierarchical* nature of the EU's legal system where:[117]

> 'the transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereignty rights, against which a subsequent unilateral act incompatible with the concept of Community cannot prevail. Consequently, Community law is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.'

Thus, the Court held that the EU entailed a sovereign legal order through its authority and autonomy. Moreover, this sovereignty claim serves to demarcate an autonomous political realm of the EU. The autonomy of the political realm relates to the notion that the political domain has distinct 'purposes, concerns or interests that set it apart from the divisive activities of sectarian social actors and the aims that motivate them'[118]. Therefore, the assertion of an EU political domain implies that the EU has its own purposes, concerns and interests distinct from those of its Member States. As much was intimated by the Court in this decision where it found that the then EEC is not concerned with the politics of its Member States or their relations *inter se* but with its own particular concerns and interests expressed in the 'terms and spirit of the Treaty'[119] with its own clear objectives whose attainment cannot be jeopardised by the politics of its Member States.[120]

Moreover, as noted, the transgression implicit in initial sovereignty claims necessarily entails a self-validating justification of the assertion of that sovereignty. This self-validation is clearly illustrated by the ECJ's reasoning in support of the autonomy of the legal system:[121]

> ' … the law stemming from the Treaty, an *independent* source of law, could not, because of its special and original nature, be overridden by

[117] *Costa v ENEL,* 594
[118] Joshua Flaherty, 'The Autonomy of the Political' (Unpublished PhD Thesis, Massachusetts Institute of Technology, 2003) 7.
[119] Joshua Flaherty, 'The Autonomy of the Political' (Unpublished PhD Thesis, Massachusetts Institute of Technology, 2003) 593.
[120] Joshua Flaherty, 'The Autonomy of the Political' (Unpublished PhD Thesis, Massachusetts Institute of Technology, 2003) 594.
[121] *Costa v ENEL*, 594.

> domestic legal provisions, however framed, without being deprived of its character as Community law, and without the legal basis of the Community being called into question'.

The Court reasons that EU law is independent and original and as such, cannot be overridden by provisions of national law, because if it were susceptible to national law override, then it would not be independent and original;[122] the Court effectively ends up back where it started. As noted, every sovereign claim entails such circular logic (witness the 'self evident truths' of the US declaration of independence) and where the sovereign claim is made in a legal register such as in the EU context, the tautology is particularly pronounced given the strong justificatory nature of law as a normative discourse. Thus, the fact that the Court was effectively 'pulling itself up by its own bootstraps',[123] simply serves to reinforce its nature as a necessarily self-validating sovereignty claim.

Thus, these early decisions can be interpreted as sovereignty claims in respect of the EU where the ECJ claimed the ultimate authority of the EU legal system over national systems through a transgressive reading of the treaties supported by explicitly self-validating normative claims. Moreover, in this regard, the ECJ was staking a claim to the sovereignty of the EU and the autonomy of a European political realm, such that the concerns and interests of the EU were independent of those of its constituent Member States.

As noted above, as a claimed status, sovereignty is precarious and must be defended through iterations of the sovereignty claim. Moreover, such iterations tend to be more forceful when sovereign status is threatened or at risk. This applies as much to the ECJ's assertion of the sovereignty of the EU as to any other sovereignty claim. There are many ECJ decisions which constitute an iteration of the EU's sovereignty claims. However, the Court's *Kadi* decision, one of the most important in recent years, is a particularly clear example of the iterative nature of the EU's sovereignty claims.[124]

C. KADI JUSTICE OR SOVEREIGNTY CLAIM?

[122] Lindahl, *Sovereignty and Representation in the EU* and de Burca, *Sovereignty and the Supremacy Doctrine* 115.
[123] Bruno de Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order' in Paul Craig and de Burca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999) 199.

[124] Case C-402/05 and C-415/05, *Kadi and Al-Barakaat*, Judgment of 3 September 2008 (hereinafter *Kadi*).

This important decision involved a challenge to the validity of an EU Regulation adopted in the context of 'smart sanctions' adopted by the United Nations Security Council aimed at individuals who were suspected of belonging to Al-Qaida.[125] The effect of the resolution was effectively to freeze the assets of any individual or organisation which appeared on the list. The EU adopted a number of measures to implement resolutions, particularly Regulation No. 467/2001 which listed Kadi in its annex as a person suspected of supporting terrorism and whose assets in EU Member States were duly frozen. Mr Kadi brought an action against his listing pursuant to the regulation, challenging its validity on the grounds of *inter alia* fundamental rights breaches which, he claimed, were protected under the EU's legal order. In particular, he argued that his listing pursuant to a secret procedure resulting in the sequestering of personal assets violated his right to property and due process. Both the ECJ as well as its Advocate-General found that the EU Regulation which implemented the UN resolutions violated both basic due process rights as well as the right to property which were protected under the EU's legal system[126] and the Regulation duly invalidated.[127]

The decision has prompted much commentary ranging from the lawfulness of the basis of the EU Regulation[128], to the potential problems for the uniformity of international law provoked by the judgement[129] and the redefinition of the relationship between international law and EU law.[130] However, as noted, the judgement also constitutes a robust iteration of the EU's sovereignty claim.

In its reasoning, the Court at several junctures in a long and complex judgment stressed the autonomy of the legal system as it had done almost 50 years previously. However, in this decision, the ECJ extrapolated from this claim finding that: [131]

> 'the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the *expression*, in a community based on the rule of law, of a constitutional guarantee stemming

[125] For a detailed overview see Hinoja Martinez, 'The Legislative Role of the Security Council in its fight against Terrorism: Legal, Political and Practical Limits' (2008) 57 *International and Comparative Law Quarterly* 333.
[126] *Kadi,* paras 348, 352 and 370.
[127] *Kadi*, paras 372.
[128] Takis Tridimas and Jose Gutierrez-Fons, 'EU Law, International Law, and Economic Sanctions against Terrorism: The Judiciary in Distress?' (2009) 32 *Fordham International Law Journal* 660.
[129] de Burca, 'The EU, the European Court of Justice and the International Legal Order after Kadi' (2009) 1(51) *Harvard International Law Journal. 1-49.*
[130] de Búrca, 'The EU, the European Court of Justice and the International Legal Order after Kadi' (2009) 1(51) *Harvard International Law Journal* and Samantha Besson, 'European Legal Pluralism after *Kadi*' (2009) 5(2) *European Constitutional Law Review* 237.
[131] *Kadi*, paras 316-317.

> from the EC Treaty *as an autonomous legal system which is not to be prejudiced by an international agreement*. The question of the Court's jurisdiction arises in the context of the *internal and autonomous order of the community* within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights.'

Moreover the context within which this case was decided, one of 'competing claims to authority'[132] is paradigmatic of when sovereignty claims are most likely to be asserted. Legally speaking, the case presented a conflict between the obligations of the EU's Member States under the EU Treaty system and their obligations under the UN Charter (of which they are all signatories) including Security Council resolutions under Article 25 of the UN Charter. According to Art 103 of the Charter, the obligations of Member States must *prevail over any other international obligations* assumed by the states, therefore including the obligations assumed by EU membership. Art 307 (now Art 351 TFEU) of the EC Treaty, moreover, provided that obligations assumed under the EC Treaty will not be affected by international obligations undertaken *prior* to EU Membership which clearly includes the UN Charter and measures taken thereunder including Security Council resolutions. Interpreting this provision on the prior assumption of international obligations by the EU's Member States, the ECJ found that this would lead to the primacy of the Charter in matters of secondary Community law *only*.[133] It would not, the Court found, permit 'any challenge to the principles that *form part of the very foundations of the Community legal order*'[134] and therefore could not authorise any derogation from the 'principles of liberty, democracy and respect for human rights and fundamental freedoms'[135] protected by the EU. Thus, the Court was reasserting the autonomy of the community legal order and its own jurisdiction to review the impugned measures as an expression of the sovereignty of the system as a whole. Moreover, this independence was asserted not, or not only, internally as against national legal orders which was the case in *Costa*, but rather *externally*, as against the international legal order, and the UN Charter in particular when this system potentially challenged the autonomy of the EU's system by claiming primacy over the EU system as was argued in the case. In

[132] Werner and de Wilde, *The Endurance of Sovereignty,* 286. In this regard, they highlight how Hobbes, Bodin and Schmitt developed their own theories of sovereignty against a backdrop of political instability.
[133] *Kadi*, para 307.
[134] *Kadi*, para 304.
[135] *Kadi*, para 303.

this regard the Court was making a clear sovereign claim in the sense of asserting the independence from international law of the EU's legal order. Thus, no longer does the EU constitute a 'new order of international law' but is an autonomous, sovereign order which is *emphatically not* subject to the international legal order which has application in the EU only in accordance with and on the terms of, EU law. In asserting this independence from international law, the Court was asserting the robustly *dualist* nature of the EU legal order vis-à-vis the reception of international law, a classic sovereign prerogative exercised by states in the international system.[136] Thus, the EU was asserting the autonomy of the EU political realm in the teeth of the 'international law of international laws' that is the UN Charter with its clear requirement of primacy under Art 103.[137]

Finally, as well as asserting its autonomy externally, the ECJ in this decision was asserting its sovereignty internally by simultaneously justifying this autonomy through the language of fundamental rights protection. As described above, constitutionalism is a facet of sovereignty and has served to maintain and preserve the autonomy of the political realm. Constitutional rights, in particular, have in played a particularly important role in this function. As Thornhill notes:[138] '[C]onstitutional rights are … the forms in which states have produced generalized and normatively acceptable descriptions of their activities and foundations: they are also the normative prerequisites of state legitimacy. … By guaranteeing constitutional rights, a state acts to articulate and to reinforce the conditions of its necessary functional autonomy and to provide a theoretical explanation of its legitimacy in terms likely to command respect from and integrate those to whom rights are applied.'

The ECJ's development of a fundamental rights jurisprudence has been well documented.[139] However, to reiterate, it is significant that fundamental or constitutional rights were also at stake in the *Kadi* decision in the sense that as well as asserting its autonomy as against international law, the Court was simultaneously legitimating its sovereignty claim internally in the language of fundamental rights.

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[136] See Ian Brownlie, *Principles of Public International Law* (Oxford, Oxford University Press, 2008), Chapter 2. In the UK context, a classically dualist state, see *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

[137] Contrast the ECJ's approach with the approach of the UK's House of Lords in its Al Jedda judgment, *R (Al Jedda) v Secretary of State for Defense* [2007] UKHL 58, [2008] 1 AC 332. Here the House of Lords found that the UK's obligations assumed under the UN Charter took precedence over national fundamental rights protections contained in the Human Rights Act and the UK's obligations under the European Convention of Human Rights. EU law was not engaged in this case.

[138] Thornill, *Towards a historical sociology,* 176.

[139] See above n45. For an overview, see Craig and de Burca, *EU Law*, 4th ed. (Oxford, Oxford University Press, 2008) chapter 11.

In sum, in order to discover a unambiguous sovereignty claim in the EU context which can support EU constitutional discourse, one need look no further than the catalyst for the constitutional discourse itself; the ECJ's important early decisions. Moreover, these claims have permeated the ECJ's case law over the years, reflecting the iterative nature of sovereignty claims. The *Kadi* case in particular, provides a recent and robust iteration of these sovereignty claims. This, in turn, presupposes the autonomy of an EU political realm with its own concerns and interests over and above the politics of its Member States.

VI. CONCLUSION

This contribution has sought to argue that the EU constitutional discourse is a complex and variegated element within Europe's broader constitutional mosaic which has remained incomplete due to the absence of the concept of sovereignty. Sovereignty, it was argued, essentially keeps the mosaic in place. It vitiates the charge of definitional inflation which can be levelled, in , particular, at legalist forms of EU constitutional discourse, as not all rule-based entities such as golf clubs can be described as constitutional; it is only those which make sovereignty claims and to which an autonomous political realm can be attributed which warrant the epithet constitutional. Moreover, the EU's sovereignty claims provide ballast to the checks and balances of the neo-republican accounts of EU constitutionalism. Checks and balances only make sense when *sovereign* power is at stake as it, in the final analysis, constitutes the threat to *political* liberty. Finally, sovereignty provides the frame for processual constitutional discourse. It is in this regard that the self-authorising logic of sovereignty is most pronounced given that the sovereignty claim itself cannot be part of the deliberative process. However, it also highlights the role of sovereignty in facilitating disagreement, even radical disagreement, which has practical normative effects.

To include the concept of sovereignty in EU constitutionalism, it was argued, diminishes these risks and helps to firmly root the EU as a constitutional polity. Without sovereignty, EU constitutionalism can only be a partial theory of the EU which is vulnerable to charges of conceptual incoherence and definitional inflation. The EU's sovereignty claims indicate precisely what is unique about the EU as a constitutional polity.

Thus, the EU is a constitutional polity precisely because it makes claims to sovereignty both over its Member States as well as externally, against the international community as a whole as was demonstrated in the ECJ's *Kadi* decision. That the EU's sovereignty claims occur in the context of court judgements as opposed to declarations of independence—the sovereignty register of choice in modernity—does not undermine their

status as unambiguous claims to sovereignty and the autonomy of an EU political realm. Rather, the sovereignty claims of the ECJ clarify the nature of the EU as a form of legal and political activity, ensuring that the picture presented is one which is both familiar and intelligible to those over whom it claims to govern.

The EU's sovereignty has always been precarious and it has had to constantly nurture this relationship to preserve and maintain its autonomous political realm, a task which is becoming increasingly difficult. EU sovereignty is of a much more attenuated nature than the sovereignty of its Member States and the legitimacy problems in terms of lack of identification, affiliation and understanding from its citizens—attributes central to the *relational* concept of sovereignty—that were so painfully exposed during the ratification crises of the Constitutional and Lisbon treaties, are major problems which the constitutional polity faces. The solution to stabilising the EU's sovereignty claims are beyond the scope of this contribution. However, a remedy is impossible without a proper diagnosis, which requires an adequate representation of the EU. In constructing this representation, whereas constitutionalism provides the 'tiles' of this particular mosaic, sovereignty provides its overall shape.