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Between Philosophy and Law:
Sovereignty and the Design
of Democratic Institution

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NOMOS: DESIGNING DEMOCRATIC INSTITUTIONS

Robert Post

Between Philosophy and Law:
Sovereignty and the Design
of Democratic Institutions

A major thesis of Iris Marion Young's stimulating paper is that "the principle of state sovereignty lacks moral legitimacy,"¹ and that we ought therefore to aspire toward a "global governance system"² which supersedes independent nation states and devolves powers to "self-determining peoples."³ In these brief remarks I shall discuss this thesis, which I find deeply unconvincing. I shall argue, first, that Young's thesis rests upon an inadequate understanding of the nature of sovereignty, which is important to get right in order to comprehend the design of democratic institutions. I shall argue, second, that Young's thesis derives from a partial and misleading perspective on issues of institutional design, a perspective often associated with philosophical, as distinct from legal, treatments of such issues.

I.

Young's attack on "claims of state sovereignty"⁴ advances on several distinct fronts. In this section of my

¹ Young, at 24.

² Id. at 39.

³ Id. at 40.

⁴ Id. at 22.

remarks, I shall discuss Young's argument that state sovereignty necessarily implies the impossible notion that sovereign states possess a kind of "final authority," so that "no other state and no transnational body has the authority to interfere with the actions and policies of a sovereign state."⁵ In the next section of these remarks, I shall address two additional moral arguments against state sovereignty proposed by Young, which turn on the increasing entanglement of modern states in obligations of international and domestic justice.

Young most fundamental objection to the concept of the "independent sovereign state"⁶ is that it embodies a "principle of non-intervention," such that a sovereign state possesses "final authority" over its "territory and people, and no outside state or agent has legitimate claim to interfere with the decisions and actions of that authority."⁷ Young apparently believes that sovereign rights must be broadly characterized in this fashion because the concept of sovereignty flows from the principle of "freedom as non-interference."⁸ Young writes as though this principle uniquely justifies the right of sovereign states to prevent others from intruding upon their internal affairs. But it would be strange indeed if as universal and as

⁵ Id. at 24.

⁶ Id. at 22.

⁷ Id. at 32.

⁸ Id. at 32.

fundamental a concept as sovereignty should in the end turn on a particular and controversial account of freedom.

Although Young's characterization of the attributes of sovereignty certainly has respectable warrant,⁹ it is inaccurate, as even Young herself appears to concede. No contemporary state has the kind of sovereignty that Young describes. This suggests that Young's theoretical explanation of sovereignty might also be deficient. In fact any assessment of the concept of sovereignty, as it presently exists, requires us first to develop an alternative explanation of the concept that is more descriptively precise and theoretically convincing.

A more plausible account is that the concept of sovereignty derives from the fundamental question of how states assume the status of collective agents. This status is assumed whenever we speak of states as having the capacity to speak, act, promise, and so forth. The status is assumed whenever we claim that states should be accorded moral liberties characteristic of persons, like freedom. The very concept of the state, in short, presupposes that it is a special kind of agent, an agent composed of a collection of persons.

Young certainly does not disagree that groups of persons can acquire collective agency. In fact she

⁹ See, e.g., 1 Lassa Oppenheim, International Law 101 (1905). For a discussion of traditional conceptions of sovereignty, see Neil MacCormick, "Beyond the Sovereign State," 56 Modern Law Review 1 (1993).

explicitly invites us to imagine an international order in which collectivities (like "states"¹⁰ or "peoples"¹¹) enjoy relationships of "relational autonomy"¹² that are characterized by the kind of freedom that signifies "non-domination."¹³ This vision of the international order presupposes that groups of persons have established some form of collective agency, for Young understands relational autonomy as promoting "the capacity of agents to pursue their own ends in the context of relationships in which others may do the same,"¹⁴ and she understands "freedom as non-domination" as safeguarding "an agent's choice situation" from improper constriction.¹⁵

The legal concept of sovereignty underwrites the capacity of groups of persons to forge this kind of collective agency. The concept is used to safeguard the processes by which collective agency is constructed. In the words of one commentator, "[s]overeignty's value lies in the fact that it creates a legal space in which a community can negotiate, construct, and protect a collective identity.

¹⁰ Young, at 37, 35.

¹¹ Id. at 35.

¹² Id. at 34.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

Sovereignty, simply speaking, permits the expression of collective difference."¹⁶

Framed in this way, sovereignty protects whatever processes a group uses to construct their collective agency. I have no theoretical explanation of how this happens in states generally, but I have written elsewhere at some length about how democratic states establish collective agency.¹⁷ In brief, democratic states are organized to achieve collective self-governance, which means that the people in such states aspire to rule themselves. How this happens is quite complex, but suffice it to say that it entails a continuous negotiation between individual and collective self-determination within the medium of a shared public culture. A state's democratic legitimacy depends upon its fidelity to the process of collective will formation inherent in this negotiation, and this legitimacy in turn underwrites a democratic state's capacity to assume collective agency on behalf of its citizens.

Of course within democratic states the "will" of the people is always putative, never determinative or final. Domestic politics consist of a continuous competition for the mantle of speaking "in the name of" the people. From the external perspective of international affairs, however, where foreign peoples and states are excluded from this

¹⁶ Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples," 45 Stan. L. Rev. 1311, 1348 (1993).

ongoing process of democratic will-formation, the agency of a democratic state presents itself as fixed by whatever mechanisms of distributing power have been democratically and antecedently authorized.

This theoretical and moral account of the agency of democratic states explains why it is said that in democracies "the people are sovereign."¹⁸ The collective agency of a democratic state is supposed to express the popular will of the people. We might thus say that sovereignty within a democratic state is located in the ultimate source of the state's collective agency, in, as Hobbes presciently put it in his definition of sovereignty, the locus of the "Artificiall *Soul*" of the state.¹⁹ The democratic sovereignty of the people represents a "final authority" in the sense that no appeal can lie to any other authority in determining the identity of the state.

On this account, sovereignty does not derive from any particular principle of freedom, but instead from the necessity of attributing collective agency to states. We recognize sovereignty to the extent that we wish to

¹⁷ For a full statement of the argument sketched in this paragraph, see Robert Post, Constitutional Domains: Democracy, Community, Management 6-10, 179-96, 268-89 (Harvard University Press 1995).

¹⁸ McIntyre v. Ohio Elections Commission, 514 U.S. 334, 346 (1995); see U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995). Neil MacCormick, while recognizing the principle of "the sovereignty of the people," oddly concludes that "the principle belongs to the theory of democracy as ideal moral theory, rather than to a descriptive or analytical legal or political theory." Neil MacCormick, "Sovereignty, Democracy, Subsidiarity," 25 Rechtstheorie 281, 285 (1994). At least from the American perspective, this conclusion seems demonstrably incorrect.

¹⁹ Thomas Hobbes, Leviathan 81 (C.B. MacPherson ed. 1968).

safeguard the creation of a collective agent capable of managing the monopoly of force characteristic of government institutions. We recognize democratic sovereignty to the extent that we wish to safeguard the creation of a collective agent designed to manage the monopoly of force in a way that expresses the popular will of a particular collection of persons. For this reason, the sovereignty of democratic states reflects the value of self-determination. We can override democratic sovereignty only at the price of compromising that value.

It does not follow from this analysis, however, that democratic states cannot be "interfered with," for sovereignty is "final" only in respect to the constitution of collective agency. Thus sovereign democratic states can and are subject to a range of international obligations. These obligations, however, must be of a kind that can justifiably be applied to collective agents. Obligations that can justifiably be imposed on individual agents can often also properly be applied to collective agents. Just as a person can be obligated to keep her promises, so can a democratic state be obligated to keep its contracts and treaty engagements. Just as a person can be required to obey the constraints of domestic law, so can a democratic state be required to obey the constraints of international law. (But because the authority and sources of international law are so obscure, the vast majority of

international constraints imposed upon democratic states are conceptualized in terms of a voluntary assumption of obligations.)

In an important passage, Young seeks to describe how she would envision a world without independent sovereign states:

First, self-determination means a presumption of non-interference. A people has a prima facie right to set its own governance procedures and make its own decisions about its activities, without interference from others. Second, insofar as the activities of a group may adversely affect others, or generate conflict, self-determination entails the right of those others to make claims on the group, negotiate the terms of their relationships, and mutually adjust their effects. Third, a world of self-determining peoples thus requires recognized and settled institutions and procedures through which peoples negotiate, adjudicate conflicts, and enforce agreements. Self-determination does not imply independence, but rather that peoples dwell together within political institutions which minimize domination among peoples.²⁰

It is evident from this passage both that Young confounds sovereignty as non-interference with sovereignty as the construction of collective agency, and that she also fails to grasp the full implications of the latter. Contrary to Young's assertion in this passage, "self-determination" most certainly does "imply independence," at least with respect to the construction of the collective agency of a democratic state. That agency is designed to express the popular will of a particular group of persons, and not the popular will of others. Yet this independence is not necessarily inconsistent either with a democratic state's recognition of

²⁰ Young, at 36-37.

the rights of third-parties or with its participation in international dispute settlement mechanisms. Just as a person can submit to legal procedures and recognize the just claims of others without necessarily losing her own status as an agent, so also can a democratic state.

In fact, to the extent that Young invites us to imagine a world order that is characterized by relational autonomy and freedom as non-domination, she must presuppose the kind of sovereignty that preserves the integrity of the processes by which the collective agency of groups is established. Sovereignty is therefore actually a condition precedent to the kind of international order Young envisions. Her emphasis on international interdependence is best understood as a way of specifying the moral and practical obligations that ought to bind collective agents, like states.

II.

Once sovereignty is understood in the way I have proposed, it is clear that Young's two additional arguments against the independent sovereign state must also fail. The first of these arguments is that "globalization makes peoples interdependent and thereby brings them together under the scope of justice."²¹ The second is that sovereign states "do not sufficiently recognize and accommodate" the

²¹ Id. at 22-23.

"prima facie rights of self-governance" of "national and cultural minorities."²²

That the sovereignty of democratically legitimate states reflects the value of collective self-determination has important implications for Young's first argument. We do not generally regard obligations of justice as inconsistent with the agency of persons; in fact we commonly interpret the requirements of justice so as to make them compatible with that agency. For analogous reasons, we ought to interpret the demands of international justice so as to render them compatible with the collective agency of democratic states, and hence with the independent sovereignty of such states. Even if the demands of international justice were to prove incompatible with democratic sovereignty, however, we would at most confront a conflict between the fundamental good of self-governance and the value of justice, and nothing Young says authorizes us unambiguously to choose the latter.

A proper understanding of democratic sovereignty also has important implications for Young's second argument, which rests on the claim that rights of "national and cultural minorities" to self-determination tend to be inadequately recognized within sovereign states. Young's argument may be taken to mean that particular groups or peoples within specific democratic states are so dominated that they feel excluded from processes of collective will

²² Id. at 29.

formation and hence do not regard the state within which they happen to reside as democratically legitimate. On its face, however, this is not an argument against the sovereignty of democratic states as such, but an argument against the democratic legitimacy of particular states. The implication of the argument is either that democratic legitimacy in such states should be reconstructed or that sovereignty ought to be relocated to the "distinct peoples" who, on Young's account, "have prima facie claims to self-determination."²³ For the "self-determination" of such distinct peoples to have integrity, however, it must itself also be protected by the legal shield of sovereignty.

I should note in passing that Young's notion that distinct peoples have prima facie claims to self-determination seems facially inconsistent with Young's own account of what she calls a "relational rather than substantial social ontology."²⁴ Young convincingly argues that peoples and groups are matters of degree, that they become distinct "as a function of" their relations to others rather than because of the "essential nature" of their own members, and that therefore there are no "clear conceptual and practical borders that distinguish one group decisively from others and distinguish its members decisively."²⁵ This argument would seem radically to undermine the notion of

²³ Id. at 22.

²⁴ Id. at 20.

"distinct" peoples, and hence to efface any reliable guide as to where "prima facie" rights of self-determination might actually lodge.

In fact, it is precisely because "peoples" and "groups" have such fuzzy boundaries, because individuals so often belong to various overlapping groups and peoples, that most democratic states choose to use essentially political criteria to distinguish those included in the process of constructing collective agency from those who are excluded. These criteria are defined not by reference to standards of group identity, but instead by reference to the shared *political* commitment to self-governance conveyed in the status of citizenship, a status often defined by criteria quite distinct from those of group identity.

Young sometimes seems critical of the very idea of such criteria. She complains that "[s]overeignty entails a clear distinction between inside and outside,"²⁵ and that any such distinction falsely flattens the complex interdependence of the world. Yet if ultimate decisionmaking authority in a democratic state lies in its people, some differentiation must be made between those who are included in the democratic polity and those who are excluded. Either a person does or does not have the right to participate in processes of democratic self-definition. Because the sovereign people in a democratic state is authorized to act

²⁵ Id. at 20-21.

²⁶ Id. at 23-24.

in the name of the state, we must have criteria for ascertaining exactly who is included within the contours of that "people." To put the matter crudely, we must be able to distinguish those who may vote from those who may not.

The creation of such boundaries can theoretically be avoided in only one way. If self-determination were to be relocated to the global level, so that every person in the world were to participate in the construction of a universal democratic state, the sovereignty of individual democratic states would indeed be rendered theoretically superfluous. Young seems in her essay to advocate some such "a global governance system"²⁷ that would express "democratic values and institutions."²⁸

The concept of world democracy, however, is not inconsistent with the concept of democratic sovereignty. It instead relocates such sovereignty to the people of a world-community. The collective agency of that community would assume a final sovereign authority to define its own nature and identity. A world democracy might well choose, as Young seems to advocate, to devolve and decentralize power to more local units.²⁹ This is what presently happens in federal countries like the United States, where the people of the nation have chosen to allocate their sovereignty between a centralized federal government and decentralized states.

²⁷ Id. at 39.

²⁸ Id. at 41.

But this choice expresses, rather than compromises, democratic sovereignty. It designates how a sovereign democratic people have decided to distribute their power.

Although the ideal of world democracy is theoretically unobjectionable, I should note that it suffers from disabling practical objections. Self-governance requires the creation of a public culture within which the negotiation between individual and collective self-determination can occur.³⁰ It is through the medium of such a culture that citizens come to identify with their states in ways that are necessary to achieve democratic legitimacy.³¹ It seems wildly implausible to postulate the existence of any such global public culture within the foreseeable future.

Young's claim that global regulatory bodies need not "be any *more* removed from ordinary citizens than many national regulatory bodies currently are"³² is simply unresponsive to this point. In successful democratic states national regulatory bodies are responsive to a national democratic public culture that facilitates the formation of a national popular will. Although democratic legitimacy is

²⁹ See *id.* at 38.

³⁰ For a discussion of that nature of that culture, and for an argument that it will be more likely to be successful if it transcends the limitations of any single community or "people," see Constitutional Domains at 134-150.

³¹ See *id.* at 191-96, 286-88; Robert Post, "Community and the First Amendment," 29 Arizona St. L.J. 473 (1997).

³² Young, at 42.

impossible without such a culture, it cannot simply be summoned out of thin air. Democratic public cultures emerge from a shared history, from good luck, from common norms and commitments. Even relatively homogeneous Europe is facing formidable difficulties in forging such a common public culture at the level of the European Union. There is presently no such global public democratic culture, nor is there any hope of establishing one for a very, very long time. We can expect, therefore, that for the foreseeable future institutions that possess democratic legitimacy will continue to assume the attributes of sovereignty at something like the geographical level of contemporary states.

III.

If the analysis I have so far offered is correct, Young's assault on the concept of sovereignty is unconvincing. The question I shall address in this section of my remarks is why Young might have been tempted to take the position that "self-determination does not mean sovereign independence."³³ To a lawyer it is merely a solecism to apply this position to a state. My hypothesis, however, is that Young's position flows from a particular perspective on questions of institutional design, a perspective that tends to characterize philosophical, as distinct from legal, analysis of these questions.

³³ Id. at 42.

I should begin by noting that there is a way of understanding self-determination that renders manifestly true Young's claim that "self-determination does not mean sovereign independence." If self-determination is understood to be a good that exists in the world, that good is in fact often distributed in ways that do not correspond to sovereignty. Modern institutions do not establish mechanisms of self-determination in an all-or-nothing way. The good of self-determination comes in degrees and kinds, and it is often disconnected from legal sovereignty. In the United States, for example, residents of cities exercise considerable self-determination, and yet cities are not sovereign. Shareholders of corporations exercise the kind of non-sovereign, non-territorial self-determination that Young seems sometimes to envision.³⁴ Young properly celebrates these manifold forms of self-determination that appear to flourish without the seemingly artificial shield of sovereignty. Her project is to propose the fairest and most reasonable way of distributing the good of self-determination among the people of the world.

We must, however, distinguish between two different ways in which the good of self-determination can be exercised. That good can either reflect an originary power, or it can exist at the sufferance of higher power. Cities and corporations, for example, have charters that circumscribe the limits of their self-determination; the

³⁴ Id. at 40.

charters specify who can vote, in what ways, and to what ends. Cities and corporations lack the originary power of self-determination with respect to these charters, because they are imposed upon cities and corporations by states. When it comes to the content of their own charters, cities and corporations do not have the originary power ultimately to determine the structure of their own self-determination.

Whether we choose to characterize a particular exercise of self-determination as originary depends upon the context and purpose of the characterization. Within the confines of its charter, a city or a corporation can have the originary power to exercise its self-determination as it chooses. But it lacks this originary power with respect to the terms of the charter itself. We can think of originary power, therefore, as a kind of chain, with each democratic institution exercising originary self-determination with respect to some aspects of its power, but deferring to the originary power of some more authoritative institution with respect to other aspects. Cities defer to states, which in turn defer to the federal government, which in turn defers to the people of the United States.

When we speak of sovereignty in a democratic state, we refer to the ultimate originary power of self-determination with respect to institutions of government and of law. Sovereignty is located where deference to a higher originary power ceases. Democratic sovereignty designates the

ultimate authority of a group of persons to become the author of their own forms of self-government; their authority is ultimate because the collective agency of their government will reflect their popular will, and not the will of others.³⁵ Within a democratic state, all other forms of political self-determination exist at the sufferance of sovereignty. In this sense, therefore, ultimate originary self-determination with regard to matters of government and law does indeed imply "sovereign independence."

At the root of Young's rejection of sovereignty lies her failure to theorize the aspects of self-determination that are originary. This failure stems from Young's general approach to the task of institutional design. Young writes as though the purpose of institutional design is to articulate the fairest way of distributing human institutional goods, like the good of self-determination. Institutional designs are better or worse depending upon how cogently their proposed distribution of goods can be justified. But this perspective renders originary self-determination both irrelevant and suspect.

³⁵ There is of course room for ambiguity, since we do ordinarily view it as incompatible with democratic sovereignty that it must be exercised in a way that is subject to certain constraints. It is not usually regarded as self-contradictory, for example, to say that the originary power of self-determination cannot be exercised in such a way as to violate human rights. To observe this, however, is to mark the difference between the originary power of self-determination, exercised pursuant to particular constraints, and the deferral of the power of self-determination itself. The line between these two conditions can sometimes grow blurry, and this creates a kind of dynamic ambiguity. One can see this ambiguity at work in the gradual and imperceptible evolution from, for example, separate European sovereign states to a single sovereign European Union.

It is irrelevant because there is no need for sovereignty if Young has actually offered the best possible allocation of the good of self-determination. The distribution of that good is fixed by the reasons that justify her design; if these reasons are persuasive, they are presumed to be convincing to rational persons. Sovereign independence thus becomes superfluous because rational persons, even if vested with ordinary self-determination, would only recapitulate the features of Young's design. It is also rendered suspect because sovereignty would seem to serve no purpose except to function as a cloak to hide the desire to authorize the (presumably unjustifiable) distribution of goods in ways that contradict the convincing reasons that underwrite Young's design.

Young's rejection of sovereignty thus comports with her more general approach to questions of institutional design. That approach focuses primarily on the reasons offered to justify the fair distribution of goods, like the good of self-determination. The force of these reasons tends to eclipse the independent agency of those to whom goods are to be distributed, because rational agents are assumed to accept persuasive reasons. It should be entirely unsurprising that this perspective on institutional design, which stresses reasons and fair shares, is frequently associated with the work of philosophers.

Lawyers, by contrast, tend to view issues of institutional design primarily from the perspective of

implementation. They assume that disputes will arise about reasons and fair shares, and they therefore tend to focus on the question of who will be authorized to interpret and enforce the application of an institutional design. This is because lawyers are by profession acutely aware of what John Rawls has termed the "burdens of judgment," burdens that lead reasonable persons to disagree about important matters.³⁶ Lawyers tend to believe that no area of human affairs is exempt from the burdens of judgment, including even the interpretation and application of principles of justice.

For this reason, lawyers conceptualize decisionmaking as reflecting not only the impersonal force of abstract reason, but also the authorship of particular decision-makers. Lawyers therefore deem the allocation of decision-making authority to be central to questions of institutional design. Because it matters very much whose interpretation of an institutional design carries final authority, the question of ordinary self-determination assumes fundamental importance within legal thought.

Viewed from this perspective, Young's proposals do not transcend the necessity for sovereignty. They merely evade facing the question. We need to parse Young's vision of international relationships by asking who would have the ultimate power to define and enforce the complicated details of the dispersed and decentralized forms of self-

³⁶ John Rawls, Political Liberalism 55 (Columbia University Press 1993).

determination she proposes. If Young were to respond to this query, she would have to identify the collective agent with final authority to determine the shape of its own nature in matters of government and law. She would in this way locate sovereignty.

IV.

It would of course be merely tendentious to argue that there is a necessary distinction between philosophical and legal perspectives on issues of institutional design. It is John Rawls, after all, who has offered the most compelling account of the burdens of judgment. Yet when all is said and done, there do seem to be important differences between approaches to institutional design that stress reasons and fair shares, and those that stress implementation. These differences do seem to track the distinct professional foci of the two professions.

My objective in these short remarks has not been to defend one approach or the other. It is clear to me that any reasonable account of institutional design must be responsive to the professional concerns of both philosophers and lawyers. An acceptable institutional design must justify its allocation of goods, and it must also pay attention to the distribution of ultimate decision-making authority in the implementation of that allocation.

That having been said, it is also necessary to acknowledge that there is some tension between these two

distinct approaches. Although institutional designs sometimes involve only matters of process and implementation, they often also turn on the substantive values expressed by their justifications and by the fair outcomes they are created to achieve. Final decisionmaking authority to interpret and apply these justifications and outcomes must lodge somewhere. Final decisionmaking authority will necessarily encompass the capacity to act in ways that the author of an institutional design might well regard as inconsistent with her understanding of its justifications and of its expected fair outcomes.

This tension is at its zenith when dealing with designs for the distribution of the good of self-determination, a subject that is surely at the heart of the organization of democratic institutions. The reasons justifying any institutional design for the allocation of this good will necessarily strain against the need of those exercising the originary capacity of self-government to both interpret and implement those reasons.

We are thus moved into the territory of paradox and compromise. Young's article illustrates the impossibility of any clean solution. Even if the reasons offered by Young to justify her preferred distribution of the good of self-determination were completely convincing, a subject I have not explored in these remarks, her proposed institutional design would fail because of its refusal to acknowledge the need for self-determination as an originary act. The sign

of this refusal is Young's full-scale attack on the concept of legal sovereignty.

In the design of democratic institutions, however, it is perilous to ignore the necessity of sovereignty. We can be sure that in any actual democratic social structure the originary power of self-determination will lie somewhere, and its location ought to be accounted for within our institutional designs. If sovereignty does not lie in a single, all-encompassing, world democratic government, sovereignty will continue to lodge in the potentially divisive hands of independent states. But, if I am correct in my suggestion that a world government is unlikely within the foreseeable future to carry democratic legitimacy, this may not be such a bad state of affairs.

Young is certainly correct to anticipate that as international interdependence expands, we can expect sovereign states to become bound in increasingly close terms of cooperation with other sovereign states. Eventually this may lead to the development of a public culture of global proportions, which may indeed propel us toward the visionary terminus imagined by Young. The appearance of a legitimate world democracy would certainly be a happy day, in no small part for the reasons so eloquently advanced by Young.