

Sovereignty, Property and Climate Change

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(early draft)

If, as so many now do, we accept that anthropogenic climate change poses an existential threat to human life on our planet, in what ways does the global legal and political framework within which we address this threat provide either a contributory or an alleviating factor? In particular, what role do the key framing concepts of 'sovereignty' and 'property' play? There are various arguments, or levels of argument, that focus on the connection between the two framing concepts as contributory to the initiation and acceleration of anthropogenic climate change. Pulling these various arguments together, we may pose, as a summary hypothesis, that sovereignty has supplied and continues to supply a *congenial host* for the kind of property regime that produces economic growth, but also, and progressively, harmful climate change associated with such growth. At a most basic level of argument, we can point to how the development of a kind of 'elective affinity' between sovereignty and property helped to fashion and sustain a political economy ultimately generative of harmful climate change. This argument has a contingent quality, focusing on historical circumstance and the development of powerful self-reinforcing synergies. Beyond that base line account, however, there are also structural and aesthetic arguments that reinforce the place of sovereign as a receptive host to the strengths and dangers of a growth-centred property regime. Here we can discern deeper connections and stronger causalities, associated with certain fundamental features of the concepts themselves. These connections may hold notwithstanding the increasing clarity of the dangers associated with excessive growth. There is much to support these various levels of argument – historical-symbiotic, structural, aesthetic - but they all finally have a tendential rather than a necessary quality. They allow space for counter-tendencies. As it is difficult if not impossible to imagine sovereignty and property *not* both continuing to provide key elements of the global legal framework, we need to work with these counter-tendencies if we are to find a way of averting climate disaster.

1. Climate Change and Collective Action

Global warming is undoubtedly 'a defining issue of our time.'¹ Arguably, it poses the most significant current threat to the survival of the human race, perhaps more so than nuclear war,

¹ According to nobel laureate William Nordhaus, *The climate casino: risk, uncertainty, and economics for a warming world* (2013): 'global warming is one of the defining issues of our time.'

global contagion, the onset of general artificial intelligence, uncontrolled biotechnology or the impact of a rogue asteroid. Unarguably, of these existential threats, global warming the one most likely to require profound social and political change to overcome. Indeed, there is a case for saying that the challenge of climate change is humankind's only 'one shot utopia'.² For unlike these other existential threats, it may be that in the case of the mitigation of climate change only the kind of transformative ambition that we associate with the *utopian* pursuit of a 'better way of being or living'³ is adequate to the task ahead; and also that, unlike other globally extensive utopian aspirations or projects (socialist, feminist etc.) there is no prospect of a second shot if we don't get it right the first time.

Global warming is attributable to the so-called 'greenhouse effect.' When solar energy reaches the Earth's atmosphere, some is reflected back into space and some is retained by greenhouse gases. By trapping part of the Earth's radiated heat, these gases, which include carbon dioxide, methane, nitrous oxide and ozone, are essential to maintain liveable temperatures. However, human activities, notably the burning of fossil fuels such as coal, oil, and natural gas, but also agriculture, animal husbandry, deforestation, etc., have intensified the concentration of greenhouse gases in the atmosphere. In so doing, they have increased the retention of heat to a point where the rise in global temperatures threatens the basic sustainability of our ecosystem and many of the forms of social and economic life that depend on that ecosystem.⁴

Since 1972, a year that saw the publication of the Club of Rome's report on 'The Limits of Growth' and a first United Nations Conference on the Human Environment, there

² N. Walker, 'The one-shot utopia' (unpublished paper available from author)

³ Ruth Levitas *Utopia as Method* (Palgrave: London, 2013)

⁴ See e.g. *Global Climate Change*, NASA (Mar. 17, 2019), available at <https://climate.nasa.gov/evidence/>; *Greenhouse Effect*, NaT'l GeoGraPhic (Mar. 17, 2019), available at <https://www.nationalgeographic.org/encyclopedia/greenhouse-effect-our-planet/>;

has been a series of international efforts, involving governments, scientists and international organisations, to address global warming. These include the United Nations Conference on the Environment and Development in Rio de Janeiro in 1992; the Kyoto Protocol and Conference in 1997; the United Nations Conference on Sustainable Development of 2012, known as Rio + 20; and the 21st Climate Conference, in 2015, which resulted in the Paris Agreement. In addition, the United Nations Intergovernmental Panel on Climate Change (IPCC) was established in 1988 to provide all countries with scientific information on climate change and to consider effective interventions. All these initiatives were concerned to face the problem of global warming and to find a path of sustainable development by one or both of two general approaches. Either through mitigation, by limiting the emission of gases and increasing (or preventing the erosion of) carbon sinks; or through adaptation, involving measures to increase resilience in the face of increased carbon emissions, both through heat-deflective solar geo-engineering and through policies to reduce local vulnerability to impacts of climate change.

Why, despite widespread scientific agreement that the ongoing global warming process is a result of human activities and increasing awareness of the calamitous consequences of inadequate intervention – most recently re-iterated in the conclusions of the 2021 Glasgow COP 26 Conference on the decreasing prospects of maintaining temperature rises to 1.5 degrees above pre-industrial levels⁵ - is climate change so difficult to alleviate? There are a number of inter-related reasons, five of which stand out. We can call these the basic drivers of climate change.

The first basic driver is the elementary problem of *self-interest*. Various factors contributing to global warming, in particular the extraction and use of fossil fuels and

⁵ <https://ukcop26.org/wp-content/uploads/2021/11/COP26-Presidency-Outcomes-The-Climate-Pact.pdf>

deforestation, are closely tied to forms of economic production and development that both favour certain powerful interests, and enable the lifestyles of broader populations. It follows that many influential actors and constituencies, including political leaders like Donald Trump and Jair Bolsonaro, retain an incentive to deny or minimize climate risks. Secondly, there is the problem of *latency*. Because of ‘climate lag’ it is estimated that the impact of emissions will only be fully felt between 25 and 50 years after their occurrence – these effects disproportionately borne by future generations. This is a circumstance that serves as an incentive to postpone decisions that are, in fact, urgent. Yet the reasons behind this lag – the storing and only gradual release of the forces of climate change – also point to the dangers of irreversibility or irretrievability. Climate change operates through various chain reactions and feedback loops. Ocean warming leads to ice sheet melting in Greenland and Antarctica, to glacial retreat, to sea level rise, to loss in the extent of the Arctic sea ice, to species extinction, and to increasing numbers of extreme weather conditions (such as hurricanes, floods, and heat waves) that render parts of the world uninhabitable.⁶ In addition, in the Amazon, the largest biodiversity repository and carbon sink in the world, the original forest area has been seriously affected and exponentially reduced by activities such as agriculture, livestock, timber exploitation, and mining.⁷

In turn, latency is associated with two further problems that undercut the prospect of solutions. One has to do with the *complexity* of possible solutions. The anthropogenic causes of climate change may be clear-cut, if still far from universally acknowledged, but the solutions are multifactorial, and, like the problem itself, they unfold through long-term causal patterns.

⁶ See James Hansen et al., ‘Ice Melt, Sea Level Rise and Superstorms: Evidence from Paleoclimate Data, Climate Modeling, and Modern Observations that 2° C Global Warming Could be Dangerous,’ (2016) 16 *Atmospheric Chemistry and Physics* 3761 .

⁷ There is a real risk of the death of the forest in a not too distant future See also *Deathwatch for the Amazon: The Threat of Runaway Deforestation, The Economist* , August 3, 2019.

One general complexity and source of contention is the appropriate balance between mitigation and adaptation, with a tendency for those invested in the continuation of a carbon based economy to favour adaptation. The modelling of long-term solutions also has to factor in the vagaries of mass continuing compliance of human agents in solving a problem that is itself a consequence of the mass exercise of mass agency. In addition, such solutions, being holistic in scope, are bound to be policy-transversal, related to domains as diverse but interlocked as industry, transportation, agriculture, farming, deforestation, and waste management, to name but the most prominent. And, as in the case, say, of deep sea mining, where the danger of ecological mayhem has to be balanced against the sourcing of metals such as cobalt that supply the needed battery resources for the transfer to a low carbon economy, even the pursuit of more specific goals tends to be affected by the balancing of competing goods and the precariousness and unpredictability of all speculative technological innovation.⁸ In a nutshell, these various forms of complexity breed a level of uncertainty that can blur the picture of urgent necessity.

Latency and unpredictability, feeding on an underlying resistance born of self-interest, can also contribute to *political disengagement*. We have already noted how, faced with the alternative of treating the here and now as the setting for a one-shot utopia, denial of risk, or its minimization or compartmentalization into a safe zone of technological innovation and adaptation, offers one line of response. Another line of response, consistent with a more candid awareness of the dangers married to (and somewhat mitigated by) a sense that the worst aspects of climate change are still only emergent, is one of anticipatory resignation.⁹ Neither

⁸ See e.g. J. Watts, 'Race to the Bottom; the disastrous blindfolded rush to mine the deep sea.', *The Guardian*, September 27, 2021 available at: <https://www.theguardian.com/environment/2021/sep/27/race-to-the-bottom-the-disastrous-blindfolded-rush-to-mine-the-deep-sea>

⁹ See e.g. M. Thaler, *No Other Planet: Utopian Visions for a Climate Changed World* (Palgrave, 2013)

approach, wishful thinking at one extreme and fatalism at the other, is conducive to the kind of engagement that is adequate to the challenge.

In turn, the problem of political disengagement is exacerbated by a final and arguably least tractable problem of *collective commitment*. Addressing climate change, and indeed many other environmental issues, requires international cooperation as our capacity to affect the earth's natural resources in a damaging way is not contained or limited by borders. The emission of greenhouse gases is global, affecting the entire atmosphere regardless of the geographical area in which it occurs. For this reason, solutions to global warming, as well as deriving from voluntary social behaviour based on environmental awareness, need to be sought through measures of regulatory co-ordination at global, regional, national, and local levels.

That this is such a difficult problem to overcome in the case of climate change can be demonstrated by comparing it to the problem posed by some of the other existential threats we noted earlier. The avoidance of these typically involves the successful production and management of a 'public good' (or, if you like, the prevention or mitigation of a 'public bad') at a global level.¹⁰ In classical economic theory, a public good, in contrast to a private good, is one that is non-excludable (none can be excluded from the good's consumption) and non-rivalrous (the good's consumption does not reduce its availability to others). We can further sub-divide global public goods into three types, or, as they are often in some measure multi-type, three dimensions; namely single best efforts goods, weakest links goods, and aggregate efforts goods. Investment in technology to prevent an asteroid crashing into Earth, or the development of a vaccine against a particular deadly disease, is an example of a *single best effort* good – one where the averting of catastrophe is incentive enough for a single actor

¹⁰ For discussion of different types of global public goods and their treatment by international law, see in See G. Schaffer, 'Global Public Goods and the Plurality of Legal Orders (2012) 23 EJIL 669-693

to invest sufficient effort or resource, even as humanity as whole will also benefit and so the investor does not capture all the benefit. Eliminating infectious diseases and curtailing the proliferation of weapons of mass destruction are *weakest link public goods*, where the problem to be overcome is a ‘hold out’ on the part of a state actor either unwilling or unable to comply. In the case of both these types of public good, the collective incentive structure is such that powerful actors can fashion solutions that, far from involving radical transformation of the global order, are more likely to favour and to achieve conservative reinforcement of the existing order.

The most onerous type of public good to produce at any level, least of all the global level, is the *aggregate effort* public good., Here the extent of cooperation required between states gives rise to collective ‘free rider’ problems, where none have adequate incentive to cooperate unless and until all do. The optimal solution to *all* global public good problems tends to involve some dimension of aggregate effort, but in certain cases aggregate effort offers the predominant approach. Climate change mitigation, as opposed to technological adaptation (whose comparative popularity is not unconnected to its being treatable according to the somewhat less burdensome standards of a ‘single best effort’ public good) is clearly such a predominantly aggregate effort public good, as indeed are many other transnational environmental questions. However, climate change mitigation is a particularly profound example of the difficulties that can apply in aggregate effort cases, since the disincentive to cooperate in the absence of the co-operative efforts of others arises not just on account of allocative fairness and free riding, but, more deeply, because *any* significant non-compliance by any part of the relevant global aggregation may be fatal to the efforts of others. The threshold of confident expectation of others that is required for any party to commit fully in the necessary collective action, and so not avoid its share of the burden, is accordingly higher,

and the dangers of a self-fulfilling collective abdication of responsibility correspondingly greater.

Law is always implicated in the provision of global public goods, but In the case of aggregate effort public goods, international legal agreements and institutions clearly have a particularly important role to play. They seek to provide - through a mix of expertise, voice, positive and negative sanctions, and the distribution of positive and negative reputational capital - the secure expectation of collective compliance necessary to overcome the collective action problems. Yet law is prone to reproduce at one remove the very problem of collective commitment it seeks to treat. For in the absence of prior or emergent evidence of widespread commitment, individual state parties will be loath to make exemplary commitment to the very strong juridical institutions, exacting legal norms and strict forms of compliance verification required to stabilize collective commitments in the fight against climate change. One indication of this is found in the approach of 2016 Paris Agreement. Its main objectives, as stated in Art. 2 of the Agreement, are: (a) to contain the global average temperature rise within certain limits; (b) to enhance adaptability to the adverse impacts of climate change; and (c) to promote financial flows that achieve the above two objectives. Unlike the Kyoto Protocol, however, which set binding emissions limits, the Paris Agreement seeks to work on a more consensual basis, stipulating that each country will voluntarily submit its 'nationally determined contribution' In this way they should communicate the progressive efforts they will be making to achieve the intended objectives. So in this latest architecture of global regulation of climate change, where more exacting measures are sought than previously, the price of such ambition is diluted conviction: the replacement of binding norms with informal expectations, strict standards with broad exhortations, imposition with consensus. Rather than resolve the problem of collective action, a weakly empowered central legal institution may merely reflect it.

2. The Congenial Host – Elective Affinity

If self-interest, latency, complexity, political disengagement and inadequate collective commitment provide the basic drivers of climate change, and the immediate contextual explanation of the weak response to its accelerating dangers, what part, if any, do the framing ideas of property and sovereignty play in the background?

We can point in the first instance to a long historical process of intertwinement of certain conceptions of property and sovereignty that has favoured the kind of economic approach to our natural environment leading to harmful climate change. The notion of ‘elective affinity’, famously coined by Max Weber (to characterise the relationship between Protestantism and the rise of capitalism) captures something of the quality of this relationship. Though Weber himself did not define the term, it has been helpfully elaborated in the following terms:

‘elective affinity is a process through which two cultural forms – religious, intellectual, political or economic – that have certain analogies, intimate kinships or meaning affinities, enter in a relationship of reciprocal attraction and influence, mutual selection, active convergence and mutual reinforcement.’¹¹

¹¹ M. Lowy, ‘The Concept of Elective Affinity According to Max Weber’ (2004) 127(3) *Archives de sciences sociales des religions*

Sovereignty and property are each deeply rooted cultural forms. They supply certain framing ideas that set the terms within which we both comprehend the legal, social and political world and act within it. The aspect of their climate-change-conducive ‘reciprocal attraction’ and ‘mutual selection’ on which we focus concerns the emergence of certain augmented features of sovereignty in the modern age that are both dependent on and reinforcing of a certain extension in the range of entities considered to be the proper object of the full range of property rights.

(a) *Modern Sovereignty*

Let us begin with sovereignty and its evolution over the modern age. The exercise of sovereignty as a deep cultural form and framing idea involves complementary dimensions of power. It requires both *potestas*, the power dividend generated by an achieved sense of a common undertaking, a being-in-common that is comprehended and experienced as ‘power to’, and *potentia*, the capacity of the bearers of ‘power to’ to achieve intended effects, experienced as ‘power over’. ‘Authority is generated primarily by the former and deployed as the latter.’¹² So understood, sovereignty in today’s state system is divided into mutually supportive internal and external aspects. Internally, it designates ultimate legal and political authority over a determinate polity and its inhabitants. From an external perspective, sovereignty refer to the idea that the polity, as the locus of internal sovereignty, also has exclusive title to pursue relations with other entities, including other polities, without deference to or interference from any external authority.¹³

¹² Martin Loughlin, ‘Political jurisprudence’, 16 *Jus Politicum: Revue de Droit Politique* 15-32 26 (2016)

¹³ For a fuller taxonomy of the types of sovereignty, with ‘domestic’ sovereignty contrasted to three external types, - not only ‘international legal sovereignty’ (concerned with exclusive legal title in external relations), but

Where does the modern conception of sovereignty come from and how does it differ from earlier forms? We can track the modern evolution of the concept with reference to five key ideas.¹⁴ To begin with, *finality*, or the notion that whoever possesses sovereignty must have the last word, returns us to the etymologically primitive understanding of sovereignty, Or rather, a primitive understanding of *souveraineté*, originating as it did in 13th century France,¹⁵ just prior to the 300 year gestation of the modern state. Finality remains an essential component of the modern understanding of sovereignty, but its implications were originally quite different. First deployed as a rendering of divine authority, it then extended to the description of human-centred authority. However, final political decision-making authority in the mediaeval age was not yet concentrated in a single source, but was dispersed amongst manifold sources. It always attached to a concrete position, feudal or canonical, its command personal to the holder of that position. Each was sovereign in respect of a particular type of decision and over a particular constituency, and many of what we would today consider as private powers as well as public powers were included within the overall purview of sovereignty. And as another feature of its inherently limited quality, the domain of divided sovereign power was largely confined to executive acts, since the ultimate legislative and ordering power was viewed as a matter of divine authority.

In a narrow sense, mediaeval sovereignty *qua* finality also implied a second conceptual building block of sovereignty - namely *supremacy* on the part of the holder; for the final decision making authority would also by definition be the highest command in that particular domain. Some go further and argue that, such was their growing economic, administrative and

also ‘Westphalian sovereignty’ (based on exclusion of external actors from authority structures within a given territory) and ‘interdependence sovereignty’ (referring to the *de facto* ability of public authorities to regulate the flow of people, good, capital, information etc., across their borders) see Stephen Krasner, *Sovereignty: Organised Hypocrisy* (1999) 3-4.

¹⁴ See my, ‘The Sovereignty Surplus’ (2020) 18 ICON, 370-428, from which the present discussion draws.

¹⁵ See e.g. Dieter Grimm, *Sovereignty: The origin and future of a political and legal concept* (2015) 4-15.

political influence, the mediaeval monarchs of England and France had already come to acquire a broader supremacy by the 14th century.¹⁶ But while the monarch might be considered the ‘primary sovereign’¹⁷ in the sense of possessing more powers than other feudal Lords and final decision-makers, that relative ascendancy did not amount to overall authority within a unified hierarchical structure.

The modern conception of sovereignty required a formula that would join the various final and supreme powers into one. Responding to the post-Reformation religious wars of the 16th century and also to the gradual extension of the territorial authority of Kings, it was Jean Bodin who first articulated such a formula. As authority could no longer rest on the universalism of the *Respublica Christiana* under the Emperor and Pope, combined with a complex local feudal structure of rights and obligations between Lord and Vassal, order could only be secured by the concentration of power in a newly integrated secular authority. This, indeed, signalled the birth of the very idea of ‘the political’ as a general domain of authority, now including legislative authority - and also as a general locus of contestation of that authority – autonomous from and superior to particular private or ecclesiastical claims to power. It also signalled the birth of the modern state as the entity in which this consolidated sovereign authority rested.

Bodin called this power ‘absolute’, but that did not imply it was entirely without limit. Rather it implied a *comprehensive* final authority over matters of government. It was also a final authority that, absent any moderating effect that the erstwhile division of sovereign powers might have provided, began to be understood more clearly than any previous expression of royal power as contained in and by a specifically *legal* register. Sovereignty *qua* comprehensive authority should be exercised in conformity with the general rules

¹⁶ *Ibid* 15.

¹⁷ *Ibid* 14.

regarding its exercise, and within the jurisdictional limits specified for its exercise – namely, the domain of public rather than private interests and concerns.

For Bodin, and those who followed his direction of thought, the ‘absolute’ sovereign power should also be ‘perpetual’ and ‘undivided’. It should, therefore, possess the quality of ‘oneness’ in two perspectives. Looking beyond itself, its comprehensiveness implied that it was a singular and exclusive power in its own expansive domain. Looking inwards, sovereignty must still be conceived of as a unity, notwithstanding its unprecedented range and ambition. That is to say, it must be an authority that combined an unprecedented extension over space, time and subject-matter with an integrated structure. For this newly complex and capacious unity to be achieved, however, required that sovereignty be depersonalised and deconcretized. Indeed, a capsule way of conceiving of the overall process of transition from mediaeval to modern sovereignty is one of progressive abstraction from the personal, dynastic and singular to the impersonal, corporate and internally differentiated.¹⁸ The command function of the absolute, perpetual and singular sovereign remained, but was now attached to an *abstract unity* rather than a concrete entity.

In fact, even the representation of the figure of the mediaeval sovereign had involved some level of abstraction - the King coming to possess a ‘politic body or capacity’ in addition to his ‘natural body’.¹⁹ Gradually, as governing grew more extensive and consolidated, the abstract quality of the sovereign office, and of the relationship that constitutes sovereign authority, became more pronounced. Both the ruler and the ruled, became more formalized and detached categories, supplying a symmetry of abstract unities.²⁰ On the one hand, however complexly institutionalized and internally differentiated the expression of sovereign power

¹⁸ See e.g. Martin Loughlin, *Foundations of Public Law* (2010) ch.7.

¹⁹ *Calvin’s case* (1608) 7 Co Rep 1 10a, *per* Coke CJ.

²⁰ On the idea of the modern sovereign state’s ‘double abstraction’ from the interests of the particular ruler and the particular ruled, see Quentin Skinner, ‘The State’, in *Political innovation and conceptual change: Ideas in context* 90, 112-116 (Terence Ball, James Farr & Russel Hanson eds. 1989).

might be, for it to remain formally undivided entailed that it be sourced in a singular ruling authority. On the other hand, the comprehensiveness and perpetual horizon of sovereign power presupposed a stable object over which a monopolistic authority could be effectively and indefinitely exercised, an object that was supplied by the category of the people of a clearly territorially delineated entity.

This creation of ‘a unity [out] of a manifold’²¹ had a symbolic significance, involving the drawing of a persuasive picture of sovereignty from its scattered marks and signs. But it also had a practical import, necessitating for a first time a firm distinction between sovereign power and government – between the underlying authority and the mechanisms through which that authority was represented and exercised.²² Underscoring the growing reliance on the impersonal authority of legal rules, the treatment of that newly vital distinction was the catalyst for the emergence of modern constitutional method. For it was through constitutional method that the increasingly complex design of the political, elaborating the terms of the sovereignty/government interface and specifying the detailed form of the governmental apparatus, would be given distinct legal form and privileged standing.

The final and in many ways most distinctive piece of the jigsaw of modern sovereignty, building on the notion of abstract constitutionalised unity, consists of the idea of *self-creation*.²³ The working through of that idea finds expression at the level of political morality in the notion of popular sovereignty – that the ruled should also be the rulers. But behind the formation of that ethos of self-rule lies a deep if gradual shift in the social imaginary. This involved an emergent sense of the social world as something constructed through the instrumentalities of law and politics by its inhabitants, now conceived of as free and equal agents engaged in a process of individual and collective self-realization, rather than as the

²¹ Hans Lindahl, ‘Sovereignty and Symbolization’, 28 *Rechtstheorie* 347, 348 (1997).

²² See in particular, Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (2015).

²³ See Paul Blokker, ‘The Imaginary Constitution of Constitutions’, (2017) 3 *Social Imaginaries* 167, 185-6.

expression of an innate order of things in which all have a set place and to which all should conform. This sense of politics as a secular activity guided by the interests and interest-serving purposes of human agents required the claim to rule no longer to be justified according to pre-given dynastic prerogative or timeless transcendental values, but instead to be validated according to the adequacy of these purposes and their implementation.²⁴ And that validation would be bound to take increased account of the perspective of the governed and their interests.

If the declining weight of religiously or other metaphysically sourced claims to absolute truth lies behind the growth in the sense of the self-shaping capacities and responsibilities of individual and collective human agency, the crystallisation of the notion of popular sovereignty also owed much to the broader reordering of the supporting architecture of sovereignty that was taking place. The distinction between sovereignty and government may have allowed sovereignty itself to be conceived of in more abstract terms, but it remained difficult for those who had first drawn that distinction to imagine the holder of the abstract office of sovereign as any other than the hereditary sovereign.²⁵ With Hobbes in 17th century England however, we begin to find a serious exploration of an idea whose possibilities and challenges were to become a central thread in the story of sovereignty across the modern age; that, rather in the manner of the King's two bodies²⁶ – physical and noumenal – the people, as well as supplying a concrete multitude, and thereby providing the *object* of sovereign power, could also be conceived of as a singular sovereign abstraction and so become the *subject* of that power.²⁷

²⁴ See e.g. Neil Walker, *Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship*, 3 *Rechtsphilosophie & Rechtstheorie* 206 (2010).

²⁵ Hugo Grotius, however, already understood the sovereignty part of the sovereignty/government duality as a broader abstraction, as referring to the comprehensive relationship of supremacy and subordination between rulership (whatever its organs or offices) and subjects, See Hugo Grotius, *De jure belli ac pacis libri* [On the Law of War and Peace] (1625, Francis W. Kelsey trans., 1925) 259; For discussion, see Annabel Brett, 'The Subject of Sovereignty: Law, Politics and Moral Reasoning in Hugo Grotius', 17 *Modern Intellectual History*, (2020)

²⁶ See Ernst Kantorowicz, *The King's Two Bodies* (1957).

²⁷ On the earlier Roman law roots of popular sovereignty, see Daniel Lee, *Popular Sovereignty in early Modern Constitutional Thought*, (Oxford, 2016).

In time, this idea was filled out by those with a more committed approach to the idea of the people as the ultimate holder of political authority; in the mid 18th century by Rousseau with his notion of the *volonté generale*;²⁸ and then by Emmanuel Sieyès, one of the chief political theorist of the French Revolution, who characterized the distinction between sovereignty and government in terms of a division between the constituent power of the people (*pouvoir constituant*), and the duly constituted power (*pouvoir constitué*) according to whose terms and institutional arrangements the people bound themselves to be governed.²⁹ The idea of constituent power, indeed, signalled a profound change not only in the source but also in the direction of political authority. Whereas for Bodin the newly integrated and comprehensive sovereignty involved a reference back to the source of ‘the highest power of command’,³⁰ for Sieyès it was literally a ‘constituting’ authority, a forward-facing power to found and to posit.³¹ Reflecting the growing influence of the idea of collective self-creation, finality would gradually give way to originality as sovereignty’s basic impulse.

In addition, with the reception of Sieyès’ vision, and, more concretely, with the first successful case of state formation and government by authorization of ‘We The People’ initiated at Philadelphia in 1787, the idea of a canonical set of constitutional rules, typically showcased in a formal constitutional document, assumed an ever more prominent role. It did so as the vehicle for the expression of popular sovereignty, as the conformation of its realization, as the promise of its adaptable resilience, and as the articulation of the complex architecture of institutions through which that will could be both represented and contained. Sovereignty in the modern age, all the more so in its increasingly dominant popular variant, has, in short, come to require a constitutional form for its realization.

²⁸ Jean-Jacques Rousseau, *The Social Contract* (1772) (H J Tozer trans., 1889)

²⁹ Emmanuel Sieyès, *Political Writings* 136 (M. Sonenscher trans., 2003).

³⁰ Jean Bodin, *On Sovereignty*, 1 (J. Franklin trans., 1992).

³¹ See e.g., Andreas Kalyvas, ‘Popular Sovereignty, Democracy, and the Constituent Power’ · 12 *Constellations* (2005) 223-244.

In sum, more effectively than the late mediaeval and early modern dynastic monarchies that patented the idea of territorial sovereignty but lacked the systematic, expansive and impersonal plan of government expressed by a settled normative code, the constitutional state of high modernity declares and promotes a monopolistic sense of its own jurisdiction-bound legal and political authority. Its assertion of constituent power is also done in the name of sovereignty – in this case a self-determining popular sovereignty – and that necessarily precludes rival or complementary claims to power in the public domain.

(b) Modern Sovereignty and Property

It is at this point that we can begin to forge the link between modern constitutional sovereignty and property, for it follows that in the constitution's own terms all other forms of authority, *including the forms of economic and social power*, are effectively relegated to the private domain. Their position is one of subordination. They remain within the gift of the constituent power to break or remake, and so in the emergent perspective of modern constitutional democracy have only secondary and *derivative* standing.³²

Precisely that prominence of the derivative understanding of economic and social constitutionalism – a prominence due to the prior and all-pervading quality of the new constitutional state's claim to political authority, accounts for the relative inattention to the economic domain in the classical tradition of modern constitutional thought and practice. If constitutional authority trumps everything else, and if it provides the generative source upon which the formation and fate of all other capacities depend, then its formal authority over the economic domain is implicit, and does not demand textual specification still less detailed elaboration. Constitutional authority, therefore, could traditionally be somewhat 'indifferent'³³ towards economic power, and, indeed, could in principle accommodate any sort

³² Some of the following section is drawn from my 'Where's the "E" in Constitution? A European Puzzle' : available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3642534

³³ George Gerapetritis, *New Economic Constitutionalism in Europe* (Hart 2019) 6.

of economic model, whether or not capitalist. Just as there is no ‘e’ in the word ‘constitution’, there need be no or little explicit reference to the ‘e’ word in the constitutional text.³⁴ Instead, what are increasingly foregrounded, as modern constitutionalism’s commitment to an expansive sense of abstract unity and political self-creation takes shape in the late 19th and 20th centuries, are its own meta-political values, which can be summarized as the ‘trinity’ of democracy, human rights and the rule of law.³⁵

Yet the tale of a constituent power begetting monopolistic constitutional authority and this trinity of values, however influential, is just half the story – one told only from the standpoint of constitutional orthodoxy itself, and those who subscribe to that orthodoxy. Its modelling of economic power as merely secondary and derivative supplies but a partial perspective. And it is a partial perspective that is directly challenged beyond the mainstream of constitutional sovereignty by what has been called the paradigm of ‘progressive development’.³⁶ According to the development paradigm, the order of precedence between the economic and the political is turned on its head. Rather than treated as foundational, the constitutional meta-values of democracy, human rights and the rule of law are understood to depend for their realization, and also - crucially – for their sustenance, on certain underlying economic forces and technical means. The surface ‘formal’ constitution of text and doctrine, and its dividend of political values, is now seen as a product of a ‘material constitution’ of deeper economic and social forces.³⁷ And here the close, symbiotic link between constitutional sovereignty, property and the kind of economic production that produces climate change begins to emerge.

³⁴ Above n32.

³⁵ See e.g. James Tully, Jeffrey Dunoff, Antony Lang jr., Mattias Kumm and Antje Winer, ‘Editorial: Introducing Global Integral Constitutionalism (2016) 5 *Global Constitutionalism*, 1, 3

³⁶ *ibid* 3

³⁷ See e.g. Marco Goldoni and Michael A. Wilkinson, ‘The Material Constitution’ (2018) 81 *MLR* 567

A key thinker in this regard is Karl Polanyi. For him, alongside the emergence of the new constitutional sovereignty in the 19th century there also developed the model of a self-regulating ‘market society’. Central to such a society was a transformation in our conception of what was the proper object of the full array of property rights. Property, as it had since at least Roman times, consisted in a complex of jural relationships between a person and a thing through which a person’s ownership of that thing should be constituted and regulated. In particular, ownership implied exclusive rights of possession, use, and disposition. But whereas in earlier economic contexts, only goods that were specifically produced for sale could be treated as commodities for exchange, in the new market society, a number of what Polanyi calls ‘fictitious commodities’ were created.³⁸ First, there is the commodification of natural resources through the privatisation of the earth itself. Secondly, there is the commodification of human resources in the form of human productive capacities. And thirdly, there is the commodification of fiscal resources in the form of money. In commodifying these key resources, Polanyi argues, market becomes progressively separated from - indeed ‘disembedded’ from - social relations and political regulation. Instead, in a market society, all dealings must be determined by the market, which now includes land and labour and money. Land is just nature; labour is just human life; money is just a purchasing power. But when society acts as if these three elements are commodities themselves, then the market becomes the dominant measure of human interaction.

For Polanyi, it is these deeper economic processes and institutions that are truly *constitutive*. Recast within a legal register, it is the mechanisms of private law – and in particular the institutions of property and contract etc, that give juridical shape to the

³⁸ K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (first published 1944, Beacon Press 2004). Discussed in the broader context of global constitutionalism by Tully et al (n7).

increasingly commodified social world from which public constitutional law emerges and to which it responds. The new commodified forms, according to the development paradigm, are placed under the control of private corporations, their global spread facilitated by profit-driven competition among corporations as well as by military and financial competition among states during and after empire. Over time, the more advanced states and corporations establish hegemonic forms of governance of the capitalist economy, and only once that primary 'economic constitution' is established does the stabilization of the secondary constitutional qualities of human rights, democracy and the pervasive rule of law become possible.

In a nutshell, this deeper economic perspective posits the existence of two complexes of constitutive power rather than one. Previous and indispensable to the much heralded constitutive - or constituent - power of the people, we have the much less heralded constitutive power of the three processes of commodification of natural resources, labour and capital. Far from being faced with a *tabula rasa* and presented with an open mandate to make the world in their own terms, therefore, the constituting people has to address a world already constructed according to a particular economic template. The political agency available to the constituting people is no mirage; it is real and remains significant, but it is conditioned by these underlying economic forces.

Yet, except in the case of the new socialist constitutions in the USSR and elsewhere that followed the October Revolution of 1917, which involved an explicit rejection of the capitalist models of privatized ownership and a detailed endorsement of an alternative programme of social ownership, most of this pre-framing historically remained hidden from the documentary constitution itself. Importantly, moreover, the very fact that the basic commodification of economic relations took place beneath the official constitutional surface of capitalist states, and corresponded to the established forms of private law, helped legitimate

this economic model as the natural, taken-for-granted accompaniment of the new political constitutionalism.³⁹

Even allowing for the sparse economic vocabulary of the documentary constitution, therefore, this deeper economic reading sheds some light on the newly constitutionalised arrangements of the early capitalist states. For certain of the negative individual rights and freedoms that form part of the self-qualification of the sovereign public power, in particular freedom from interference in property ownership or private economic activity, are better viewed from this perspective, not as mere exceptions to and defences against the weight of public authority, but as the framework within which that authority is exercised.

As we leave behind the 19th century, and particularly following the financial crisis of the inter-war period, textual indifference or minimalism begins to be replaced by an approach in which the 20th century constitution pays rather more explicit attention to the economy in capitalist as well as communist states. In the words of one commentator, for the first time in the capitalist state ‘the Constitution acknowledges economy as a system with its own dynamics and incorporates structural stipulations that uphold economy as an activity of constitutional value’.⁴⁰ To be sure, the acknowledgment remains limited. The legacy of the original commitment to an encompassing political sovereignty continues to run deep in constitutional statecraft. Yet a new wave of recognition of the importance of the economy is evident. This manifests itself in a number of ways.⁴¹ Individual and collective economic rights are increasingly incorporated into constitutional texts. General principles relating to the management of the economy, concerning, for instance, taxation, expenditure and forms of property rights and their limits are more likely to be addressed, and the institutions responsible for the pursuit of these general principles are established. Economic considerations are

³⁹ Tully et al, above n35, 4.

⁴⁰ Gerapetritis, above n 33,10.

⁴¹ Ibid. See also T. Prosser, *The Economic Constitution* (2014) ch1.

increasingly used in the interpretations of general constitutional clauses, and to cash out abstract concepts such as social state, general welfare and public interest. What is more, the acknowledgment of the systemic properties of the economy brings with it a growing appreciation of its increasingly transnational scope. The constitution must take account of the fact that the operations of economic actors more and more transcend state boundaries, not least through recognizing organisations whose own regulatory authority responds to this globalizing trend; including, in the post-war, era, the World Trade Organisation and the European Union.

Yet the constitutive priority of the economic model bequeathed by Polanyi's fictional commodities remains significant. The underlying development paradigm retains a strong influence, not least in the expanding domain of transnational economy and regulation. Critical voices, particularly those operating under the sign of the 'new constitutionalism',⁴² have sought to demonstrate how neo-liberal politics from the early 1980s onwards sought to re-impose a rule-based discipline across public institutions calculated to ensure the global spread and consolidation of free-market capitalism. At the heart of this critique is a concern that the political constitution, with its proto-democratic commitment to the implementation of the popular will, is not merely being decentred and preconditioned, as in the earlier story of the pre-emptive 'constituent power' of the commodification of land, labour and money, but is in the process of being supplanted by a renewed transnational economic orthodoxy. Economic growth remains a paramount priority. But where, at least in those states, predominantly in the global and imperially centred North, where its fruits were most densely concentrated, the development paradigm was able to irrigate the meta-democratic values of constitutionalised sovereignty, that same paradigm now threatens to undercut these values through the

⁴² See e.g. Stephen Gill, *Power and Resistance in the New World Order* (2nd ed Palgrave 2003); Gavin Anderson, 'Beyond "Constitutionalism beyond the State"' (2012) 39 JLS 359.

precipitation of various ‘sustainability crises.’⁴³ Global inequality, militarism, mass migration and, of most immediate significance for us, environmental degradation and fossil fuel-induced global warming, are seen as the various mutually stimulating pathological accompaniments of contemporary advanced capitalism. And from this deeper perspective, the neo-liberal turn in contemporary constitutional politics is viewed as but the latest and most aggressive iteration of commitment to a model of unencumbered growth that can only accelerate these crises.

To sum up so far: Modern sovereignty, with its shift away from personal dynastic rule to a more abstract, (constitutional) rule-based, and increasingly democratically responsive register of authority, provides a congenial host for a property regime in which the range of appropriate commodification is significantly expanded. The host’s congeniality depends upon the kind of ‘reciprocal attraction’ and ‘mutual selection’ that we associate with the Weberian notion of elective affinity. For it is undoubtedly the case that sovereign authority in its more expansive, constitutionally articulate and ‘popular’ modern form is underpinned by and has long been fortified by an economic model that generates growth and material wealth. The wealth and legitimacy dividend associated with such a model explains why ‘the sovereign’ has proven its enduringly receptive host. Yet this long historical symbiosis relies upon certain precarious contingencies. Patently, not all sovereign authorities are born equal, and often the development model has involved the exploitation by the owners of productive property (which may be other sovereigns, or private interests closely associated with other sovereigns) of the resources of particular sovereigns in ways that detract from the material wealth available to their sovereign constituents. But if this merely indicates how what promotes the general system of sovereignty can be at the expense of particular sovereigns, the various sustainability crises of the 21st century, in particular the existential crisis of climate change, expose a more

⁴³ See e.g. Tully et al, above n35 5-7.

fundamental problem. For here the very system-underpinning and -fortifying development-oriented property regime *itself* becomes a fundamental threat to the sustainability of the system. In these circumstances the host's continuing receptiveness threatens to be its fatal undoing.

3. Deeper Connections

If the productive synergies and contingent benefits associated with the relationship between the modern conception of sovereignty and a property regime that takes an expansive approach to commodification are lost, or lessened, or indeed - in view of the various crises of sustainable development, and the danger of climate change in particular - reversed, what, if anything, remains of the supportive link between sovereignty and property? Certainly, mounting dangers notwithstanding, the general terms of their connection remain in place today. For we have already noted the remorseless progress of climate change in and across sovereign states, and the continuing imperviousness to significant change of the underlying economic growth model that feeds these destructive consequences. We have also noted that the immediate drivers of this remorseless progress are to be found in the combination of self-interest, of the latency and complexity of the problem set, of political disengagement, and of inadequate collective commitment. In what ways, if any, might these immediate drivers be explicable in terms of elements of sovereignty and property, and of their relationship, other than their now highly compromised historical symbiosis? In other words, if we go beyond, and indeed behind, the particular and passing historical circumstances in which their 'affinity' was 'elected', are there more basic features of sovereignty and property that account for the resilience of their connection?

In addressing this question, we consider both structural and aesthetic arguments.

(a) *Structural Arguments*

There is a significant literature on the supposed conceptual identity, convergence, or overlap, of sovereignty and property.⁴⁴ Does any of that help with our inquiry? There are certainly interesting historical data about the ways in which and extent to which we might conceive of sovereignty as a form of ownership, and, conversely, ownership as a form of sovereignty. It is telling, indeed, that both terms, ‘Sovereign Ownership’,⁴⁵ and ‘Owner Sovereignty’,⁴⁶ regularly occur even in contemporary literature, though often with strong reference to historical thought and evidence. In medieval and early modern feudalism, sovereignty could more easily be conceived of as a form of property, and an associated dynastic right, and many influential early theorists of sovereignty made claims along these lines.⁴⁷ And equally, within the same political age and vision, holdings of property, including those far below the level of the personal sovereign in the feudal chain, were often seen to be accompanied by certain obligations of ‘stewardship’.⁴⁸ But to flag these matters as relevant to our contemporary understandings of property and sovereignty is to pursue an argument about *homology* rather than identity. Where public and private right and obligation were not yet clearly distinguished, then - at least if we are prepared to deploy that modern understanding and vocabulary anachronistically - there existed domains of ‘private’ right with a ‘public’ dimension, and of

⁴⁴ See for a good overview, the Special Issue of *Theoretical Inquiries of Law* on ‘Sovereignty and Property’ (Vol. 18, No.2, 2017)

⁴⁵ See e.g. J. Waldron, ‘Exclusion: Property Analogies in the Immigration Debate’ (2017) 18 *Theoretical Inquiries in Law*, 469, 476-81

⁴⁶ See e.g. J.C. Smith, ‘Introduction: Property and Sovereignty in the 21st Century’ in J.C. Smith (ed) *Property and Sovereignty: Legal and Cultural Perspectives* (Ashgate, 2013). In its modern form this approach is often traced back to Morris Cohen’s influential essay, ‘Property and Sovereignty’ 1927) 13:1 *Cornell LQ* 8.

⁴⁷ E.g. Vattel, Grotius, and in some measure both Hobbes and Bodin

⁴⁸ See e.g. A. Ripstein, ‘Property and Sovereignty: How to Tell the Difference’ (2017) 18 *Theoretical Inquiries in Law* 243, 265

‘public’ right with a ‘private’ dimension. But as it is precisely the achievement of political modernity to set these domains apart - to separate the private realm from the public political realm categorically, then we run against the tide of history if we seek to make the argument that pre-modern mixity is somehow indicative of a continuing or underlying identity.

We will say more about the pivotal private/public distinction very shortly, but first it is worth focusing on how history *can* help us. For what an argument that points to a background homology - to a common rootedness in structures of authority that were once not as clearly distinct from one another as they would over time become, can help to explain. is an element of continuing ‘structural similarity’⁴⁹ between property and sovereignty. As one writer puts it, at ‘the core of both concepts is that what the owner, or the sovereign, says goes’; for ‘both ... get to say to certain other people something of the general form, “that is not up to you; it is up to me. I am in charge here.”’⁵⁰ In each case, then, there is a dimension of entitlement and of exclusive control within the domain in question.

Yet this element of homology only takes us so far. To the extent that there are fundamental structural features of property and sovereignty, and of their relationship, that feed into the basic drivers of climate change, they derive as much from certain key differences between the two concepts that accompany the element of homology. Arthur Ripstein cuts to the heart of the matter. For while, as he argues, the ‘external norm’ of each is structurally similar - ‘keep off’ in the case of property, and ‘don’t interfere’ in the case of sovereignty - only in the case of sovereignty is there an ‘internal norm’ which stands as the general rationale for the external norm. For shorthand, that internal norm consists in the idea that the sovereign should ‘rule on behalf of, and for the sake of the people’.⁵¹ To be sure, certain underlying justifying norms are

⁴⁹ Ibid, 244

⁵⁰ Ibid, 244

⁵¹ Ibid, 244

also regularly offered for the institution of property, in particular notions of ‘autonomy’ and ‘usefulness’ or efficiency,⁵² But these are contested, and none is vital to the very purpose of property in the way that sovereignty’s internal norm is vital to its purpose. And it is that basic difference between an institution which requires no generally affirmed internal norm and one that does so require, that is key to the distinction between private and public – between matters that remain within the discretion of private actors and those where considerations of the good of a particular public are paramount.

In turn, this basic difference leads to some additional important distinctions. One concerns the scope of the authority of the property owner. Absent a ruling internal norm, the authority the property owner possesses over other persons in relation to her property, in particular over whether and how these other persons might make use of her property or acquire her property, does not depend upon the purposes for which the owner is exercising that authority. In the case of sovereignty, by contrast, as required by its internal norm, authority flows from and – morally if not necessarily legally - is limited by the terms of the public mandate

A second distinction might be considered the obverse of the first. Whereas the property owner’s authority is negative and defensive, concerned only to protect her right to do as she pleases with her property and prevent others from so doing, the pursuit of a sovereign mandate on behalf of the public at large necessarily involves the capacity to impose ‘affirmative obligations’⁵³ on others. This, indeed, is a central feature of internal sovereignty, and it entails, *inter alia*, a capacity, within the limits of the constitutional scheme, to impose in the name of some conception of the public good the kinds of obligations on property owners concerning the use and disposition of their property that, as we have noted, would not be within the power

⁵² Ibid 249-55

⁵³ Ibid 257

of other private persons to impose. In addition, as part of their mandate to pursue the good of a particular public, the sovereign also possesses its own version of the property-owner's negative or defensive right. And here the element of homology between sovereignty and property re-enters, because in the name of its internal norm to promote and safeguard the public good, the sovereign, as an aspect of its external sovereignty, can also prevent the interference of others - in its case other sovereigns with their distinct publics – in managing how it operates in the interests of its own distinct public

A third distinction concerns transmissibility. A property owner, subject to any public interest limits set by the sovereign, can dispose of her property as she wishes. Sovereignty, by contrast, is inalienable. Indeed, following Rousseau, we may say that it is inalienable in a double sense.⁵⁴ In the first place, whoever possesses sovereignty, or acts on behalf of the sovereign, holds a public office. They may depart the office, but the office itself remains. It is tied to the continuing sovereign purpose and mandate, and so cannot be disposed of by a sometime holder. In the second place, in Rousseau's terms, the sovereign views itself as 'indestructible', as possessing its sovereign in perpetuity. Its claim to a monopoly of public authority, and so to an in-principle comprehensive authority, in order to be understood *as* comprehensive and only *self*-limiting, can no more be restricted by the horizon of time as by that subject matter. No longer a personal dynasty, but now an abstract unity acting in the name of and on behalf of a transgenerational collectivity, the modern sovereign is no mortal and so cannot contemplate its 'mortality', still less invite its death or irretrievable loss.⁵⁵ Rather, it must act as if its authority is timeless.

⁵⁴ See e.g. A. A. Mazrui 'Alienable Sovereignty in Rousseau: A Further Look' (1967) 77 *Ethics* 107-121

⁵⁵ On the state's maintenance of an ultimate power to govern considered as an 'inherently sovereign function', F. Megret, 'Are there 'inherently sovereign functions' in international law?' (2011) 15 *AJIL*, 452-492.

How, then, do these structural factors feed into the drivers of climate change? To begin with, the political co-articulation of sovereignty and property, viewed in light of their homologous characteristic of being ‘in charge’, may through a form of *double authorisation*, promote and amplify the kind of self-interest we associate with climate change. The sovereign is, of course, in a position to impose public limits on the property owner’s use or disposition of her property, including the exploitation of that property in a climate heating fashion; though, as we have seen, considerations of latency, complexity and political disengagement may make it less likely that such limitations be viewed by the sovereign authority as being vital or urgent for the protection of the public good. So the sovereign may be more permissive, and the permissive sovereign is also in a position to protect the property owner from the effort of any other sovereign or sovereign-derived ‘public’ authority (i.e. delegated to international institutions), to impose limits on the property owner’s use or disposition of her property.⁵⁶ The sovereign, in other words, may, through a combination of its internal powers to impose (or to *not* impose) affirmative obligations, and its capacity to offer protection from external interference, ‘authorise’ the self-authorising global warming actions of the property owner. And, of course, where the state is itself the full or partial property owner, which in the case of the many fossil fuel industries that feed public utilities is not uncommon, the link between these levels of (self) authorisation will be even tighter.

In the second place, the operation of external sovereignty contributes in a self-reinforcing fashion to the problem of inadequate collective commitment. The aspects of external sovereignty we are here concerned with is not only protection from external interference (Westphalian sovereignty) but also exclusive title to act on behalf of the state in international

⁵⁶ On this kind of double authority in the context of immigration exclusion, and with reference to Vattel’s distinction between the sovereign’s ‘high domain’ and the ‘useful domain’ that can be assigned to private property, see Waldron, above n45.

relations (international legal sovereignty),⁵⁷ both flowing from the same commitment of the sovereign to rule on behalf of and only for the sake of their particular people. International law today, of course, stretches well beyond the narrow protection of sovereign interests, but the notion of the sovereign equality of states remains an important backstop norm. It underpins the doctrine of *pacta sunt servanda* and the basic principle of non-interference, including the modern prohibition against aggressive war. As a backstop norm, therefore, sovereignty, given its strict division of ultimate authority between the states of the world, underscores the difficulties of achieving the levels of trust and common responsabilization necessary to achieve an aggregate effort public goods such as climate mitigation.

The inalienable and indestructible quality of sovereignty also plays into this difficulty. Sovereign authority cannot on its own terms contemplate the irreversibility of any alienation or delegation of that authority. Such an act would be a denial of sovereignty's self-identification as an inherently final authority. Though there are certain general features of international law – general principles, custom, *ius cogens* – which can today be claimed be sourced other than through the consent of sovereign states, international agreements remain by far the major part of international law - and so dependent on and vulnerable before the continuing consent of sovereigns who, as a matter of self-definition, cannot permanently limit or curtail their authority to decide otherwise. This is the deep shadow within which international law must operate, and is a factor that renders the achieved collective commitment of any particular global public good-pursuing measure more precarious. We need only think of Trump's 2017 withdrawal from the 2015 Paris Agreement to illustrate this point

If there is a danger of corrosive self-reinforcement in the absence of any guarantee against sovereign reversibility, this is exacerbated by certain systemic features of the reliance

⁵⁷ In Krasner's terminology; above n13.

on sovereignty as a backdrop norm. The international commitment to sovereignty possesses a deeply iterative quality of mutuality. The self-limitation of each (perpetually committed) sovereign to a particular bounded territorial jurisdiction is indispensable to the framework of mutual exclusivity that allows each sovereign to claim the monopolistic powers of the sovereign within that jurisdiction. This symmetrical patterning of rights and restrictions creates a highly path dependent framework of recognition, one that tends to exclude or marginalise ‘overlapping’ authorities (including regional authorities such as the EU, or global authorities such as WHO, or, in present point, the Rio climate framework) that don’t fit the statist pattern of mutual exclusivity, and that tends also to favour a conservative understanding of what properly remains within the sovereign legal jurisdiction of the state.

(b) *Aesthetic Arguments.*

Alongside these structural features, sovereignty also possesses certain ‘aesthetic’ features that tend to further reinforce the difficulties of overcoming the problems of political disengagement and collective commitment sufficiently to recognize and act upon climate mitigation strategies. Here I draw on, and endorse, recent work by Daniel Matthews, who has argued for a deeper sense than is conventionally appreciated of what is particular to the sovereign frame, and what is excluded from that frame.⁵⁸ Matthews seeks to move beyond critical understandings of the limitations of the sovereignty frame that attend only to the exclusionary effects of its assertion of a monopoly of political authority. He does so in order to focus on how the sovereignty frame also restricts the ways in which that monopolistic political authority can be conceived of and the range of matters it is deemed to be concerned

⁵⁸ See in particular, his *Earthbound: The Aesthetics of Sovereignty in the Anthropocene* (Edinburgh: Edinburgh University Press, 2021); see also D. Matthews, ‘Reframing sovereignty for the anthropocene’ (2021) 12 *Transnational Legal Theory* 44-77; see also in this vein, F. Capra and U. Mattei, *The Ecology of Law: Towards a Legal System in Tune with Nature and Community* (2015)

with. He prefers to call his approach ‘aesthetic’, rather than simply ‘interpretive’, or even ‘epistemic’. This recognizes that the way we imagine ‘the political’ is not confined to a narrow reading of texts or even a wider consideration of what is conventionally ‘known’ to be politically relevant, but embraces the entirety of our sensate life together. The processes of recognition, it follows, are as much about emotions, gut feelings and tacit sensibilities, as they are about discursively realised argumentation.

It is on the basis of that wider understanding of the perspective and affects of sovereignty that Mathews criticises understandings of sovereignty that are cast in anthropocentric terms.⁵⁹ In so doing, he claims, we become ‘*constitutively insensitive* to the multiple challenges that the Anthropocene poses to our understanding of social life,’⁶⁰- none more than those associated with climate change.

In particular, he seeks to stress the way in which an understanding of sovereignty as exclusively concerned with a relationship between people on a fixed territory takes a restrictive, indeed dangerously myopic, approach to the spaces, subjects and governance of our common life. The relevant spaces of political life do not simply track our mutually exclusive patchwork of sovereign territories, but also include the deep sea bed, international airspace and outer space, and many geographically distinctive transborder regions, each of which has a particular ecological significance which is not fully captured in our international legal treatment. The relevant subjects extend beyond to non-human species, and also to elements of the natural world that have non-instrumental value. The relevant forms of governance need to take account not just of the sciences of human administration and technology, and how we the people ‘act

⁵⁹ One (at least partly) justified target of his critique is my own work. See in particular his ‘Reframing Sovereignty, 50-54, discussing my treatment of the idea of the ‘sovereignty frame’ in ‘The Sovereignty Surplus’ above n

⁶⁰ ‘Reframing Sovereignty’ 52.

on' each other and the natural world, but the wider 'regulatory' forces that an Earth Systems Science approach might recognise, including the atmosphere, the biosphere and the hydrosphere. A common thread running through this critical reconstruction of the terms of sovereignty is that the environment with which humans conduct their political relations should not simply be seen as the incidental 'property' of these relations but as an integral part.

4. Conclusion (*to be expanded*)

What is striking about the 'aesthetic' critique of sovereignty, and also about the 'structural' critique, is that they tend not to call for the eradication of sovereignty, or indeed of the complex of rights that makes up its paired concept of property⁶¹ within our modernist public/private vision of the world. The conclusion that the institutions of sovereignty and property have been significantly implicated in climate change does not tend to invite the further conclusion that these should somehow be 'replaced' by other framing concepts.

There are both sobering and hopeful messages to be drawn from this. The sobering thought is that we cannot *choose* the profound legal and political frames through which we view the world. These are deeply embedded both at the level of perception and in our forms of social organisation. If they are part of the problem, even a large part of the problem, then they are also an inescapable part of the problem. The more hopeful thought is that if we have no choice but to persevere with these ideas, we can and must explore the ways in which they provide space to do things otherwise. The sovereignty frame may be structurally disposed to organising the world's people into mutually exclusive groups, each with their own discrete cluster of property rights. But if the survival of any group comes to depend on and be coterminous with the survival of all others, there is space within that mindset for more other-

⁶¹ Although there is, of course, a great variety of views over the optimal relationship between private, state and other forms of communal property.

regarding solutions, and, therefore, for the polity and population-specific ‘trust’ of individual sovereigns to combine as a more global form of trusteeship.⁶² Sovereignty may also be aesthetically disposed to treating the natural environment as a mere stage on which human affairs are performed. But as the stage palpably begins to collapse, even the most conventionally state sovereigntist outlook must widen its horizons and deepen its perspective if the play is to go on.

⁶² On this, see E. Benvenisti, ‘The Paradoxes of Sovereigns as Trustees of Humanity’ (2015) 16 *Theoretical Inquiries in Law* 535.

