

Sovereignty, Civic Participation, and Constitutional Law: The People versus the Nation in Belgium

Edited by
Brecht Deseure, Raf Geenens,
and Stefan Sottiaux

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Chapter 15

Sovereignty without sovereignty: The Belgian solution

Raf Geenens

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15 Sovereignty without sovereignty

The Belgian solution

Raf Geenens

“Let us delete the word sovereignty from our vocabulary”

Benjamin Constant (1830)

At least since 1950, Belgian constitutional law is in the grip of a myth: the myth of national sovereignty.¹ Framed as an originalist claim about the meaning of article 25 at the time of its ratification, scholars and judges alike hold that sovereignty in the Belgian context means ‘national sovereignty’.² National sovereignty is here understood as the opposite of popular sovereignty, in line with the conceptual dichotomy expounded by, among others, French legal theorist Raymond Carré de Malberg. In recent years, several authors have demonstrated that this interpretation of the Constitution is highly anachronistic (De Smaele, 2000; Deseure, 2016; Geenens and Sottiaux, 2015). The Belgian drafters, when working on the Constitution in 1830–1831, did not understand sovereignty in the terms that are now routinely ascribed to them. The national sovereignty myth, it seems, is a product of muddled thinking. In order to stave off the push for more – and more direct – democracy, subsequent generations of legal scholars applied ever thicker conceptual layers to the Constitution, up to the point where it has come to say nearly the opposite of what it said in 1831.

Although the myth is increasingly criticised for its lack of historical accuracy, some scholars cling to it (e.g. Clement and Van de Putte, 2018; De Schepper, 2018; Keunen and Bijmens, 2017). Others have abandoned the originalist claim and instead now suggest that the national sovereignty interpretation derives its authority from *opinio juris*: through a long line of precedents, the vague notion

1 As author of this text, I am solely responsible for all potential errors. However, to the extent that it contains something valuable, this is certainly owing to the colleagues and PhD students with whom I have been collaborating on this topic in the past years. I want to thank them explicitly for this: Olga Bashkina, Brecht Deseure, Bas Leijssenaar, Christophe Maes, Stefan Sottiaux, Nora Timmermans, and Ronald Van Crombrugge.

2 Article 25 is today article 33. When referring to articles of the Belgian Constitution, I will always use the numbering of 1831. The full text of the 1831 version of the Constitution can be consulted in Stevens et al. (2008, pp. 71–97). I will sometimes use ‘1831’ as shorthand for the 1831 Belgian Constitution. Likewise, ‘1791’ is shorthand for the 1791 French Constitution.

of sovereignty in article 25 has “crystallized” into the doctrine of national sovereignty, and this is enough to give the myth legal weight (Alen, 2015; Velaers, 2019, p. 8). This willingness to maintain the concept of national sovereignty suggests that the wide gulf that separates it from the mental world of 1831 is still not fully appreciated.

This, then, is the central aim of this chapter. I intend to present a coherent picture of what the authors of the Belgian Constitution thought about sovereignty so as to lay bare the multiple differences between the drafters’ ideas on sovereignty and the national sovereignty myth. These differences are important not only for historical reasons, but also for practical ones. If the conflict between the drafters’ understanding of sovereignty and the national sovereignty myth is as big as I claim it to be, resorting to *opinio juris* is a wrong-headed approach. It requires one either to discard the 1831 meaning of the text as irrelevant, or to accept as legally valid two incompatible interpretations of the Constitution. Both options are an affront to legal integrity. Understanding these differences also matters for philosophical reasons. The Belgian drafters’ thinking on sovereignty had a richness to it which the national sovereignty myth has completely obscured. Both 1831 and the myth can be understood as conceptual strategies to keep the full effects of popular sovereignty at bay, yet strategies that are far from identical. Of the two, 1831 is certainly the more elegant one.

In the following sections, I begin by interpreting article 25 in light of the intellectual and political circumstances in which the drafters found themselves in 1830–1831. I then seek support for this interpretation by looking at the debates in contemporary newspapers and by situating it in the drafters’ broader constitutional vision. In the second half of this chapter, I discuss the national sovereignty myth. After briefly presenting its core tenets, I explain why it is untenable and why it remains, even with slight alterations, indefensible. By way of conclusion, I turn to the constitutionality of referendums, as this is the question that has become the litmus test for interpretations of article 25.

Article 25 in 1830–1831

From 1815 to 1830, lawyers, journalists, clerics, and other members of the educated classes in the southern part of the Netherlands went through a roller coaster of political experiences and new ideas. The Belgian Constitution is, before anything else, a reflection of their collective trajectory. Two elements are particularly important in that trajectory. First, they were privileged witnesses to the decline of monarchical rule. As Markus Prutsch explains elsewhere in this book, constitutional monarchism might have looked attractive in 1814, but was doomed to be a transitional phenomenon.³ With tradition no longer available as a source of legitimacy, and the public – helped by the press – constantly watching over political decisions, kings lost their independence. Their legitimacy now depended on

3 See Chapter 2 and Prutsch (2013).

gaining the support of popular opinion and they were forced to find an entente with the press. William I, coming at the head of the newly united Netherlands in 1815, proved spectacularly inept at this, at least in the southern half of his realm. His attempts to concentrate all power in his own hands, his stubbornness in the debate on ministerial responsibility, and his heavy-handed tactics against the opposition press, taught his southern subjects that centralised power was to be distrusted, that parliamentarisation was the only way forward, and that a free press and public opinion were crucial guarantees for liberty. These 15 years were also formative for a second reason. In the course of the nineteenth century, citizens across Europe came to discover that constitutions are uniquely powerful tools: they can be used not only to justify political and legal institutions, but also to denounce incautious rulers (cf. Grotke and Prutsch, 2014). Southern activists learnt this lesson early. Their conflicts with King William I almost invariably concerned constitutional values: no matter whether they clashed about ministerial responsibility, freedom of the press, or clerical appointments, the interpretation of the Constitution was always involved. Publicists disseminated these conflicts through the numerous newspapers, thereby creating, in what would soon become Belgium, a politically aware public and a strong constitutional culture.⁴

If, shortly after the Belgian Revolution, the drafters managed to produce an exemplary and coherent constitution within a short span of time, it is because they had been writing and talking about constitutional matters for 15 years.⁵ The constitution that came out of this long gestation period expressed their central concerns: it was to guarantee liberty and stability by setting up counterbalancing institutions, by shuffling power away from the king, and by cementing the force of public opinion into the constitutional edifice. The keystone of this programme was article 25: “All powers emanate from the Nation. They are to be exercised as prescribed by the Constitution”.

In order to get a clear view of what this article is aiming at, we should start by carefully looking at its formulation. The second half of the article is, of course, rather straightforward: it reflects the drafters’ awareness of the importance of constitutions in maintaining liberty. But the meaning of the first half is more disputable. This first sentence is usually presented as a statement about sovereignty, but most commentators have failed to notice the obvious, namely that the word sovereignty is absent. This absence is significant because many other constitutions of the era (see, most famously, the French Constitution of 1791) contain lengthy, explicit statements about sovereignty, for instance claiming

4 The most striking illustration is the extensive courses in constitutional theory which Pierre-François Van Meenen published in serialised form in *L’Observateur belge* from 1815 to 1820.

5 The Belgian Constitution is often described as an “eclectic” or “mosaic” creation because fragments of the text can be traced to divergent sources (cf. Descamps-David, 1891; Gilissen, 1968; De Smaele, 2005). Even Joseph Lebeau, one of its authors, already described it as “eclectic” in December 1830 (Huyttens, 1844a, p. 416, 13 December 1830). Retrospectively, however, it is clear that the Constitution, at the level of content, is rather loyal to a coherent set of ideas, namely those of the so-called Coppet-liberals.

that it is indivisible or unalienable. Nothing similar can be found in the Belgian Constitution. Only the word “powers”, in the plural, is used. Equally remarkable is the choice of “emanate from” (in French: “émanent de”). Again, the comparison with other constitutions is instructive. The Revolutionary Constitution of 1791 states that sovereignty “belongs to” (“appartient à”) the nation. The constitutions of 1793 and 1795 use the even stronger formula “resides in” (“réside dans”).⁶ And then there is the choice of the term “nation” (“nation”) over alternatives such as “people” (“peuple”), which was used in 1793, or “the totality of citizens” (“l’universalité des citoyens”) as in 1795. The importance of this choice should not be overplayed. The members of the constituent assembly, as well as the contemporary newspapers, consistently used the terms ‘people’ and ‘nation’ interchangeably. And in the Constitution’s Dutch translation, produced by the provisional government in 1831, article 25 contains the word “people” (in Dutch: “volk”) rather than nation.⁷

What to make then of the entire statement? What does it say about sovereignty? My hypothesis is that this sentence is not about sovereignty strictly speaking. It does not indicate who is holding the highest office or who is wielding supreme command, nor does it name the author of all legislation.⁸ It is rather a statement about the origin of all constituted powers, that is, it is a statement about what can more accurately be called original constituent power. This is not surprising. The congressmen clearly thought that it was important to be aware of the source of their power. Again and again, they describe the constituent assembly as “emerging from the people” or “originating [...] from the nation”.⁹ Moreover, they made key declarations – such as the two eternity decrees – “in the name of the Belgian people”. Their constant references to the people (or the nation), both in speech and in article 25, unambiguously recognise the people as the origin of all powers and thereby confirm the modern idea that there can be no other source of legitimacy.

At the same time, the congressmen clearly believed that the people’s constituent power had been transferred to the National Congress and would, once its work was done, be relegated “to a nearly inaccessible sphere”, as Jean-Baptiste Nothomb, one of the leading drafters, put it (Huyttens, 1844a, p. 424, 14 December 1830). In other words, the founders did not believe that

6 Even though republican congressmen, like Pierre Seron, tried to claim that article 25 should be read to mean that sovereignty “resides in” the nation and that “sovereignty is inalienable” (Huyttens, 1844b, p. 15, 3 January 1831).

7 It does not follow that the choice of the word ‘nation’ was arbitrary. In French, as in other European languages, the word ‘people’ can refer not only to the citizenry as a whole but also to the lower classes. ‘Nation’, in contrast, always had more dignified connotations.

8 Of course, a lot depends on the definition of terms. According to Richard Tuck, sovereignty (in opposition to “government”) was the term that Hobbes and Rousseau used to indicate what is now usually called constituent power, i.e. the power to create or alter society’s basic laws and institutions (Tuck, 2016).

9 See the discussion in Chapter 7 of this book.

the people's constituent power would continue to play a substantial role. It had emerged out of the people into the constituent assembly and was meant to stream, beyond the assembly, into a constitutional system of powers. However, if the people's constituent power has no real role in this system, it is not obvious why it has to be mentioned in the Constitution. After all, a constitution is supposed to become useful once the constituent work is done. It seems that the drafters wanted to constantly remind all power-holders of the ultimate source of their powers. This means that the role of the people, *qua* constituent power, becomes primarily a symbolic one. The people are the discursive anchoring point that permanently provides the constitutional project with its legitimacy.

If article 25 is not truly a statement about sovereignty, how can we know what the drafters thought about sovereignty? First of all, we should give full weight to the observation that they chose not to say anything explicit about sovereignty in the Constitution. The fact that the Constitution's vocabulary does not include the word sovereignty suggests that its authors disliked this word or, at the very least, that they did not find it helpful in expressing their constitutional vision. This already tells us something about their constitutional vision. Secondly, we can look at what they said about sovereignty in the constituent assembly. As Brecht Deseure (2016) has demonstrated, the debates in this assembly show that an overwhelming majority of members accepted popular sovereignty as an indisputable principle for which there is, in modern times, no alternative. They clearly believed that the political regime they were creating encompassed the principle of popular sovereignty and that its norms and rules and all elements of its functioning would be compatible with this principle.¹⁰ With one lonely exception to confirm the rule, no member of the constituent assembly ever put into question the people's sovereignty.

This creates something of a riddle. If the drafters accepted the principle of popular sovereignty, why did they not explicitly include it in the constitutional text? What to make of this refusal to express the role of the people in terms of sovereignty? The context is crucial here. The Belgian constitutional project was driven by a double fear. On the one hand, the congressmen feared the concentration of excessive state power in the hands of a monarch, as they had so recently seen exemplified by the autocratic rule of William I. On the other hand, in line with post-revolutionary sentiment across Europe, they continued to be haunted by the Reign of Terror. The term 'sovereignty' was associated with both these dangers. Whether sovereignty belonged to a king or was exercised in the name of the people, either way it could collapse into despotism. Sovereignty, it seemed, was intrinsically connected with a monolithic 'will', with the concentration of all authority in one point, and with unlimited and arbitrary power. As the debates in

10 Speakers in the National Congress stated, for instance, that a parliamentary monarchy is always based on the "sovereignty of the people", or even that all modern societies are based on the "sovereignty of the people", without meeting any resistance or correction (cf. Huytens, 1844a, pp. 216, 603).

the National Congress demonstrate, the abhorrence for uncontrolled, centralised power was shared across the political spectrum, with the possible exception of the republican minority and some ardent monarchists.

The dominant liberals and liberal-Catholics also had their own, additional reasons for disliking sovereignty. Liberals were primarily concerned with individual liberty. And as they associated sovereignty with a strong state, they naturally viewed it as inimical to the liberty of individuals. Moreover, they feared the volatility and capriciousness of a strong collective will. If liberals were in favour of monarchy, it is because they believed the stability provided by a neutral king would help to curb the unpredictable effects of popular sovereignty: “Hereditary and inviolability are two political fictions, two public necessities [...]. Opposite these fictions appears, ever menacing, the sovereignty of the people” (Huyttens, 1844a, p. 193, 19 November 1830). This statement by Nothomb is exemplary of the views of the liberal congressmen, who were worried about the potential hazards that come with an unrestrained collective will.

The Catholic position was less uniform, running from liberal-Catholics who supported modern political ideas to deeply anti-modern, ‘intransigent’ ultramontanes. Almost all of them quickly perceived the practical benefits of a liberal constitution: a weaker state would give them more leeway in, say, the running of schools or the appointment of priests. Liberal-Catholics also embraced individual liberty in a principled way, as a formal recognition of human dignity. But they also had principled reasons to rail against sovereignty. Leo de Foere, a leading Catholic, had argued in 1821 that popular sovereignty should not be understood in too strong – i.e. too collectivist – a way, because social order necessarily originates from individual wills: “One would judge me wrong [...] by attributing to me the doctrine of the exclusive and absolute sovereignty of the people. I believe sovereign power resides in the individual, or in individuals according to the modalities established by contracts” (De Foere quoted in Marteel, 2009, p. 313). This dislike of popular sovereignty remained widespread among liberal-Catholics. It seems that they associated sovereignty with the stifling, top-down imposition of homogeneity and uniformity. True vitality and unity, in contrast, “results from the autonomous life of every part of the social body”, as Lamennais put it in *L’Avenir* in December 1830, emphasizing the rich variety of “habits” and “moeurs” of different localities.¹¹ Liberal-Catholics did not join ultramontanes in fantasising about a corporatist, neo-medieval utopia,¹² but they did hope for a decentralised society, based on “the ‘sovereign’ rights of organic social units like family, commune and province”, who should be allowed “to administer their

11 Félicité de Lamennais quoted in Viaene (2001, p. 69).

12 Among intransigent ultramontane Catholics, the rejection of sovereignty was even stronger. In *De l’esprit de vie et de l’esprit de mort* (1831), Henri de Merode and Ernest de Beaufort explicitly deplore the replacement of God’s sovereignty by popular sovereignty, which they call “the sovereignty of individual reason” and which they see as an expression of the “spirit of death” (quoted in Viaene, 2001, p. 47).

own affairs as much as possible” (Viaene, 2001, p. 69). Thus, even if they mostly paid lip service to the principle of popular sovereignty, the idea of a unitary collective will ran counter to their preferred vision of a liberated, “bottom-up” community of Christians (cf. Marteel, 2018, p. 237).

Article 25 should be read as the joint outcome of these liberal and liberal-Catholic attitudes towards sovereignty. By wording article 25 as they did, they could recognise the people’s power as the legitimate basis of government, and thereby nod to the principle of popular sovereignty (a principle which they took for granted), without having to rely on the notion of sovereignty. They had no problem accepting the citizens as the source of legitimacy, but they feared the idea of a monolithic, supra-individual collective agent. Given this negative attitude towards sovereignty, it is not surprising that the Belgian Constitution is not about constructing a strong state that can channel the people’s united will, but rather about restraining sovereignty and cutting it up into a plurality of powers.

The newspaper debate

This picture is confirmed by the opinion pages of contemporary newspapers, where there was a vivid debate about sovereignty. Some newspapers assumed that the constitutional text simply enunciated the sovereignty of the people. But sharp-sighted observers noted that something more was going on.¹³ A good example is the exchange between the establishment newspaper *Courrier des Pays-Bas* (CDPB),¹⁴ with which many of the drafters were affiliated, and the conservative, ultramontane *Courrier de la Meuse* (CDM). This latter newspaper maintained that all power comes from God¹⁵ and argued that a regime of popular sovereignty would have disastrous consequences. In their editorials, journalists at *Courrier de la Meuse* repeatedly attacked what they perceived to be the majority position, namely the idea that the negative effects of popular sovereignty could be prevented by creating a system of opposing powers. According to them, this Montesquieu-inspired strategy was a mere illusion as sovereign power, in actual practice, is always located in one specific place: “Sovereignty is here, or it is there; but it is never in two places at the same time. It cannot be shared, it cannot be divided” (CDM, 9 December 1830, no. 296). *Courrier de la Meuse* insisted on the impossibility of dividing sovereignty from October 1830 all the way to March 1831, making this a leitmotiv of its opposition to the draft constitution. In an editorial at the beginning of March 1831, *Le Courrier des Pays-Bas* criticised them head-on for this. Sovereignty might be unitary in its source, but its

13 I owe the newspaper citations in this section to research by Christophe Maes (see Maes 2020).

14 Note that “des Pays-Bas” was dropped from its official name on 1 January 1831. I will refer to this newspaper by its original name.

15 Within the constituent assembly, this position had no traction. It was voiced only once, by Pierre Vander Linden. Arguing against popular sovereignty, he solitarily claimed that all power has its origin in God (Huyttens, 1844b, p. 14, 3 January 1831).

institutionalisation should be guided by the insight that power can only be limited by means of other powers. In absence of such a distribution of powers, we end up in despotism:

In a system of dependent powers [...] only the superior power is truly a power because only its will has to be executed: the inferiors can also will, but they can only will what the superior wills. This is exactly what we call unlimited or absolute or despotic power.

(*CDPB*, 5 March 1831, no. 64)

Thus, a system of independent powers is needed, rather than a system in which all powers can be traced to one, central seat of sovereignty. In the same piece, *Courrier des Pays-Bas* noted that all powers were currently vested in the National Congress, which flew in the face of the principle of power distribution which this assembly was preaching. As was to be expected, the journalists at *Courrier de la Meuse* saw this as a good opportunity to mock their opponents. In the process, they gave the best possible summary of the majority position on sovereignty:

The *Courrier des Pays-Bas* notices that our Congress possesses sovereignty (“est en possession de la souveraineté”) and is displeased by this. This is natural, for it wants sovereignty to be only in the nation, or rather, *it wants sovereignty to be nowhere*; because it actually wants there to be only powers that counterbalance each other, so as to assure order and liberty.

(*CDM*, 10 March 1831, no. 59, italics modified)

In the remainder of this opinion piece, they deride once again the idea of a division of powers by emphasising, in a political-realist way, that final authority is always located *somewhere*.

In contrast to this ultramontane view, republican newspapers insisted on the unity of sovereignty out of principle. Although some republicans were heartened by the fact that the Constitution sanctioned the principle of popular sovereignty, many of them realised that things were not that simple. Already in mid-November 1830, the republican journalists at *L’Emancipation* (*EMP*) warned their readers that they should not be so naïve as to think that “All powers emanate from the nation” means the same thing as “sovereignty resides in the nation”. The difference, they write, is “enormous” (*EMP*, 15 November 1830, no. 26).¹⁶ For *L’Emancipation*, sovereignty equals legislative power equals the general will equals the nation: “(T)he sovereign has no other force than the legislative power, it is simply the general will, and it is obvious that the general will or sovereignty can only exist in a general form, that is, in the universality of the nation” (*EMP*, 15 November 1830, no. 26).

16 This shows that even committed republicans did not think that the choice of the term ‘nation’ was meaningful. Much more important for them was the omission of the term ‘sovereignty’ and the choice of the verb ‘emanate’.

Over time, republicans will increasingly oppose the constitutional project as it moves further away from this simple scheme in which sovereignty, a unitary legislative will, and the nation are identified with each other. In the run-up to the vote over bicameralism, a desperate *L'Emancipation* argues once again that the general will is necessarily “one” and “indivisible” (*EMP*, 10 December 1830, no. 51). This plea is of no avail: the constituent assembly overwhelmingly votes in favour of creating a senate.

Although I am only providing snippets here, I believe these newspaper exchanges do help us to pin down how well-informed observers perceived the Constitution at the time of its writing. In the next section, I want to demonstrate how the meaning of article 25, as construed above, fits into the broader web of constitutional ideas advocated by the dominant drafters.

Public opinion and individual interests

Throughout the months of the constituent assembly, the drafters’ core ideas always displayed the same duality: they recognised the citizens as the permanent anchoring point of legitimacy, but they refused to define the citizens’ role in a holistic manner. Their recognition of the citizens as the source and the ultimate touchstone for every exercise of power, is most visible in the importance they attached to public opinion. The new Constitution was to create a variety of channels through which public opinion would play a political role. For starters, the Constitution gives the press a maximum amount of freedom. This is because newspapers, pamphlets, and books serve both to build and to express public opinion. Liberty, in the words of Catholic leader Etienne de Gerlache, would find a “guarantee in the omnipotence of public opinion through the press” (Huyttens, 1844a, p. 471, 15 December 1830).¹⁷ The freedom of the press, in turn, would find a guarantee in the jury. Whereas William I had muffled journalists with the help of the courts, in Belgium they would be protected by the better judgment of their co-citizens. Jury trials, it was hoped, would become a reliable check on judicial and executive power (Delbecke, 2012). Public opinion would also have other conduits. Petitions, for instance, were seen by the founders as an important tool for correcting and steering public powers. And then there was, of course, the second chamber, often dubbed “the chamber of opinion”. Liberal heavyweight Charles de Brouckère, when describing its role in the constitutional edifice, writes that the second chamber will be “the expression of public opinion” because it “represents the nation from which all powers emanate” (Huyttens, 1844a, p. 427, 14 December 1830). For good measure, he repeats: “public opinion, that is,

17 The term ‘guarantee’ is very recurrent in the drafters’ speeches and betrays their common way of thinking: their global concern is to establish guarantees that would maintain liberty and stability. In Van Meenen’s lectures on constitutional theory (published in *L’Observateur belge*), the theme of ‘guarantees’ was already omnipresent. On the role of “garantisme” in Coppet-liberalism, see Lacchè (2000, p. 141 f.).

the nation” (ibid.). The second chamber was not just involved in lawmaking but also, importantly, in holding the government to account through the mechanism of ministerial responsibility. This latter mechanism was crucial, as it meant that all holders of executive power were, ultimately, accountable to the opinion of the electorate.

The overall result, as Charles Blargnies put it in the constituent assembly, would be that “the law is the result of enlightened public opinion, as expressed by those who the people elect, by the press, and by petitions” (Huyttens, 1844a, p. 238, 22 November 1830). In the same speech, he described public opinion as the “true will of the people” (Huyttens, 1844a, p. 236, 22 November 1830). The theme of public opinion is also prominent in the publications of the key drafters. Charles-Hippolyte Vilain XIII, in his *Appel au Congrès* published in the fall of 1830, writes that, through the jury and the press, “public opinion becomes the state’s greatest asset” (Vilain XIII, 1830, p. 30). Joseph Lebeau, in his book on royal power, describes how, apart from counterbalancing powers, there is a further guarantee for liberty, namely “opinion”, which is connected to the press and works on parliament from the outside (Lebeau, 1830, p. 85). He even goes so far as to say that “representative government is the government of opinion” (Lebeau, 1830, p. 65).

Lebeau’s formulations betray how close the drafters’ ideas on public opinion sit to those of Benjamin Constant, who is probably the main intellectual inspiration for the Belgian Constitution.¹⁸ Although adopting Montesquieu’s division of powers, Constant discovered an additional, even more potent force that protects freedom, namely public opinion (Constant, 1815, p. 31).¹⁹ Arthur Ghins has recently brought to light just how important the notion of public opinion was for Constant. According to Ghins, public opinion came to function in Constant’s mind as an alternative to popular sovereignty (Ghins, 2021). Of course, Constant recognised the sovereignty of the people. His *Principes de Politique* starts, not incidentally, by explicitly stating that the principle of popular sovereignty cannot be contested (Constant, 1815, p. 13). But Constant was always worried about the voluntarist implications of sovereignty. In an article published in *Le Temps* in 1830, shortly before his death, he even goes so far as to “deny” popular sovereignty and he proposes to “delete the word sovereignty from our vocabulary” (Constant, 1989, pp. 176–177).

Constant’s preferred conceptual substitute for popular sovereignty was public opinion, and it seems that the Belgian drafters followed him on this point. And just as was the case for Constant, their attachment to public opinion had everything to do with their unwavering belief in the power of individual judgment. For

18 It has already been demonstrated that the Belgians were heavily influenced by Constant when it came to ministerial responsibility (Van Velzen, 2005) and freedom of the press (Delbecke, 2012).

19 On Constant and public opinion, see Fontana (1991, pp. 81–97), Fink (1998), Tenenbaum (1998), and Rosenblatt (2011).

Constant, as for other members of the Coppet Group, freedom found its ultimate guarantee in the individual's "right to judge and control laws and power" (Jaume, 2012, p. 42). Indeed, this is what distinguishes Coppet-liberalism from other currents of French liberalism, in particular from the Doctrinaires, who favoured and trusted the state as the final underwriter of freedom (cf. Jaume, 1997; Garsten, 2015). Similarly, in the debates in the National Congress, the idea of 'judgment' by the citizens is a recurrent trope. See, for instance, its appearance in Lebeau's intervention on bicameralism. In this imposing speech, arguably one of the high notes of the entire constituent period, Lebeau claims that a bicameral system turns the nation into a judge, which is a decisive advantage over a unicameral system. When the chambers disagree, each chamber will defend its opinion with reasons, majority against majority, giving the court of public opinion the opportunity to judge the strength of these opposing reasons (Huyttens, 1884a, pp. 413–414, 13 December 1830).

While the drafters emphatically wanted to empower the judgment of individual citizens, they never characterised the working of these judgments in a collectivist manner. In line with this, they always avoided talking in terms of a 'general interest' which the nation could come to recognise.²⁰ Instead, they repeatedly stated that the plurality of societal interests cannot be superseded. This theme was already prepared by Pierre-François Van Meenen's constitutional lectures, published in *L'Observateur belge* from 1815 to 1820. According to Van Meenen, terms such as "the state", "raison d'état", "general will", and "the common good" (and even "liberty" and "independence") can become dangerous abstractions, in the name of which too much blood has already been shed. The only entities that really exist, he emphasises, are individuals, as well as individual rights, individual interests, and individual happiness (Van Meenen, 1815, pp. 29–30). Some Catholics might have found this all a bit too individualistic, but this metaphysics clearly underpinned the dominant liberal view in Congress. This is, for instance, the basis of Nothomb's case for bicameralism and, more generally, of his preference for "mixed government" (Huyttens, 1844a, p. 192, 19 November 1830). According to Nothomb, "there is in society a plurality of interests" (Huyttens, 1844a, p. 425, 14 December 1830). Multiplying the sites of representation is therefore highly desirable. Rather than believing that any one representative institution can overcome this plurality, the different societal

20 And when they do use a term such as "general interest", they avoid using it in the singular. De Gerlache, for instance, talks of "the general interests of the nation" (Huyttens, 1844a, p. 472, 15 December 1830). Similarly, Van Meenen says "public interests" rather than "the public interest" (Huyttens, 1844a, p. 429, 14 December 1830). But not all speakers are so careful. Occasionally, one does find 'monolithic' expressions. Charles Destouvelles, for instance, describes the law as the outcome of "the general will" (Huyttens, 1844b, p. 253, 24 January 1831). Compare this with the more scrupulous formulation of De Brouckère, who speaks of "the wills of the nation" (Huyttens, 1844a, p. 427, 14 December 1830).

interests should find separate institutional expression. As Nothomb puts it: “I give to each the right of being represented” (*ibid.*).²¹

Again, this brings the drafters close to Constant. As Lucien Jaume has abundantly demonstrated, Constant’s individualism was directed against the French Revolutionary conception of representation as embodied in the Constitution of 1791. In the 1791 conception, there is an obsession with unity, “a Unity that can be read from the representative operation”. It is the state, and only the state, that “can define the general interest”. Thus, “representation can never be the expression of separate interests” (Jaume, 1998, pp. 159–160). Constant’s crucial move was claiming that particular interests do have a right of expression. Rather than organising politics in such a way that the true or correct interpretation of the general interest can be found and imposed in a uniform manner, priority should be given to individuals with their own local interests and ideas (cf. Garsten, 2016, p. 254 f.; Ghins, 2018).²² In line with Constant, the Belgian drafters were convinced that no unity or generality exists detached from the individuals involved (cf. Van Meenen, 1815, p. 30). When looking inside the black box of the so-called ‘general interest’, one finds nothing but a plurality of particular interests. Hence, unity can only be the result of a constant dialogue between different and opposing forces.

The republican minority clearly felt that this was the dominant mood in the constituent assembly and occasionally tried to push back. Eugène Defacqz, for instance, dedicated an entire speech to the theme of unity. He was careful enough to show his agreement on other key themes, explaining how the Constitution, the press, and public opinion would function as interlocking guarantees for freedom. But he was tired of the constant emphasis on plurality, on divisions, and on counterbalancing powers. Instead, he claimed that “unity” was “natural”, that the “truth” was “one”, and that “discord has to be weeded out” from all institutions if the citizens wanted to act in “unison” (Huyttens 1844a, pp. 421–424, 14 December 1830). Obviously, this solitary republican cry from the heart achieved nothing. It only emphasized how far all other drafters had moved away from the ‘unitarian’ spirit of the French Revolution.

In summary, the intent behind the whole constitutional framework was to activate individual judgments and give them political weight, without succumbing to any form of holistic thinking. Rather than excluding citizens from the legislative process and leaving it for representatives to proclaim the ‘general will’, the ‘public interest’, or other such dangerous abstractions, the aim was to mobilise public opinion as a permanent and reliable force in the political game. Article 25 naturally fits into this constitutional programme. It recognises the citizens

21 Compare this with the formulation of Sieyès in *Qu’est-ce que le tiers-état*: “citizens only have the right to being represented in virtue of the qualities they have in common, not in virtue of the qualities that distinguish them” (Sieyès, 1988, p. 173).

22 See also Chapter 3 of this book.

as the ultimate anchoring point of public powers, while avoiding the collectivist metaphysics of the sovereignty formulations from the French Revolution.

The national sovereignty myth

Surprisingly, most Belgian public law textbooks present an interpretation of article 25 that claims loyalty to the founders' intentions while clearly going against the grain of this constitutional programme. This 'mythical' interpretation gradually emerged in the nineteenth century and gained near-universal acceptance after the referendum on the royal question in 1950. From then on, virtually all textbooks – as well as the courts – have come to read article 25 in light of the doctrine of national sovereignty. The key tenets of this doctrine are as follows. The Belgian drafters consciously adopted the view on sovereignty embedded in France's 1791 Constitution (see e.g. Wigny, 1952, p. 223). In this view, purportedly developed by Sieyès (see e.g. Alen, 1995, p. 20), sovereignty is "unitary, indivisible, and unalienable" (Mast, 1966, p. 25) and belongs to "the nation" (see e.g. Van Goethem, 2002, p. 236; Velaers, 2006, p. 190), understood as an "indivisible collectivity comprising the citizens of the past, the present and the future" (Tilleman and Alen, 1992, p. 11). Because the nation, defined in this way, is an "abstract entity" – or even simply a "fiction" – that is "distinct from the individuals that compose it", it can only express itself through representative institutions (Uyttendaele, 2005, pp. 34–35). This latter point is what distinguishes, in practice, national sovereignty from popular sovereignty, which supposedly entails direct democracy (see e.g. Vande Lanotte et al., 2015, pp. 208–209).

The textbooks regularly quote Carré de Malberg to give more substance to this doctrine.²³ In its full Malbergian version, the doctrine of national sovereignty is bound up with a positivist legal philosophy that sees the state as the supreme source of law. This state finds its legitimacy in the fact that it embodies the nation, a nation that is, however, nothing more than an intra-legal effect. It is postulated by law and expresses itself through legally constituted representatives or rather, in Carré de Malberg's preferred terminology, *organs*. It is only through its organs, such as parliament, that the nation comes to have a will. This will, Carré de Malberg stresses, is "general": it "cannot be understood as the sum of particular wills", but "is itself part of the unity and indivisibility of the nation" (Carré de Malberg, 1922, p. 255). Thus, elected politicians do not represent "the totality of citizens individually considered, but their indivisible and extra-individual collectivity as a whole" (Carré de Malberg, 1922, p. 223).²⁴ And it is in this whole, "in this total and indivisible body, that exclusively resides sovereignty" (Carré de Malberg, 1922, p. 255). Note that this positivist logic deliberately presents law

23 It is generally assumed that Carré de Malberg has provided the authoritative formulation of the national sovereignty doctrine, but the doctrine is of course not exclusively his (see the work of Adhémar Esmein, Julien Laffèrière, Paul Bastid, and others).

24 Translation taken from Brunet (2016, p. 434).

as a closed system without an outside. Although the will of the nation should be considered the joint will of all its members, Carré de Malberg's theory cannot provide resources to connect the content of the law to any reference point that exists outside or before it (cf. Mineur, 2012). The will of the representatives can be attributed to the nation only on the basis of constitutional rules, "not in virtue of the conformity which that particular will may have with the actual will of the people who elected the representatives" (Brunet, 2016, p. 434).

In a bold anachronistic move, Carré de Malberg traces this positivist theory of the state to 1791 and to Sieyès. In passing, he also names Belgium's 1831 Constitution as an example of his doctrine (Carré de Malberg, 1922, p. 169). Jurists in post-war Belgium got Carré de Malberg's hint and gratefully pushed the doctrine to its full practical conclusions. For instance, the Council of State would come to claim that the Belgian drafters consciously bestowed "sovereignty" on "the nation", a nation that "encompasses past and future generations of citizens".²⁵ And it used this as an argument against the introduction of referendums, stating that it is "impossible to give a certain number of today's citizens the power to replace the national representation, which is constitutionally established to express the will of that abstract being which our foundational act calls 'the nation'".²⁶ Similarly, André Alen, the former president of Belgium's Constitutional Court, writes that from "a constitutional perspective, there is an irrefutable presumption that the will of the representatives is the will of the people" (Alen, 1995, p. 21). In this way, the national sovereignty doctrine became an important brick in the constitutional line of defence against demands for direct participation in Belgium.

It is not a coincidence that many of the textbook authors quoted above held influential positions in Belgium's legal and political institutions. In the decades after the Second World War, in an increasingly divided Belgium, elite compromise-formation was seen as a crucial mechanism to pacify social relations and to maintain stability, a stability that was never more threatened than by the 1950 'royal' referendum. For those wishing to operate in the name of *raison d'état*, shielded from democratic pressure, Carré de Malberg's state-centric doctrine provided a convenient theoretical framework.²⁷ Thus, the misreading of article 25 in the national sovereignty myth was, just like the original formulation, moti-

25 Opinion of 15 May 1985, Part. Doc. Chamber 1983-84, no. 783/2, 8.

26 Ibid.

27 Note that, in post-war Italy and France, the anti-democratic implications of Carré de Malberg's conception of national sovereignty were clearly perceived and actively challenged by, among others, Costantino Mortati and Georges Vedel (see Rubinelli, 2020, pp. 147–150). Nothing similar has happened in Belgium. Note also that, later in life, Carré de Malberg became a critic of his own doctrine. Frustrated with its anti-democratic effects and with the increased power of parties in France, he started to advocate the introduction of popular referendums (Carré de Malberg, 1931). As Olga Bashkina explains in Chapter 10, Carré de Malberg came to the conclusion that one either had to provide a stronger connection between the parliament and the actual citizens, or else stop pretending that the parliament is democratically legitimate.

vated by a desire to keep the potentially threatening effects of popular sovereignty at bay. Having said that, the national sovereignty interpretation differs too greatly from the drafters' views on sovereignty to be tenable. But before going into these differences, let me point out some of the minor problems that beset the national sovereignty interpretation.

For starters, there is no textual or circumstantial evidence to support it, other than the choice of the word "nation" in the Constitution. However, no one in 1830–1831, not even staunch republicans, seemed to find this choice particularly significant. It is also difficult to claim, on the basis of the text, a direct connection between the Belgian understanding of sovereignty and the French Revolutionary Constitution of 1791. In fact, the Belgian Constitution differs from this latter Constitution in at least three important respects. (i) In the 1791 Constitution, article 1 of the third section extensively defines sovereignty (as, *inter alia*, "indivisible" and "unalienable"). The Belgian Constitution contains no trace of this article. If the Belgian drafters took their conception of sovereignty from the 1791 Constitution, it is at least remarkable that they did not copy any material from its article on sovereignty. (ii) Likewise, the Belgian drafters failed to copy any of the formulas that emphasise the representative nature of the regime. The Constitution of 1791 explicitly states that all powers can only be exercised "by means of delegation" and that the "French Constitution is representative". This is the core message of article 2 of the third section. Nothing similar can be found in the Belgian Constitution.²⁸ (iii) In order to defend the proximity of 1831 to 1791, scholars also point to article 32 of the Belgian Constitution. This article states that "(t)he members of the two Chambers represent the Nation, and not only the province or the subdivision of the province that has appointed them".²⁹ The corresponding article in the 1791 Constitution reads as follows: "The representatives [...] are not the representatives of a particular department, but of the entire Nation". What I find most striking is not the similarity but rather the difference between the two articles. In France, representatives are supposed to represent only the nation, whereas the Belgian Constitution declares that they simultaneously represent a specific locality. In other words, Belgian representatives are *not* supposed to purify themselves of partial interests. This should not surprise us. Many Belgian founding fathers believed that local powers (provinces

28 There is, of course, a textual semblance between the Belgian formulation "All powers emanate from the Nation" and the French sentence "The nation, from which all powers emanate, can only exercise them by means of delegation". The 1791 formulation might be the inspiration for the Belgian formulation, but the emphasis is certainly different. The French sentence is formulated to stress the element of representation, whereas the Belgian drafters left out the part about representation. Gilissen (1968, pp. 126–127) lists various potential sources of inspiration for the Belgian formulation and concludes that it is impossible to know which example the Belgian drafters followed.

29 This is the original formulation of article 32. The current formulation (of what is now article 42) reads as follows: "The members of the two chambers represent the Nation, and not only those who elected them".

and communes) were a useful counterweight against centralising tendencies. In this regard as well, the Belgians were in tune with Benjamin Constant.³⁰

The national sovereignty doctrine also has an important conceptual weakness. Its advocates assume that popular sovereignty is necessarily associated with direct democracy, while national sovereignty would have a necessary connection with representative procedures. But this assumption is unwarranted: citizens expressing themselves in a referendum could just as well be construed as an organ of the nation.³¹ A further problem for the national sovereignty doctrine is posed by Carré de Malberg's various historical inaccuracies. As is now generally acknowledged, he misread the views of the French revolutionary constituent assembly (which were more democratic and more influenced by natural law than he could allow for) and he distorted Sieyès' views (who cannot be presented as an advocate of the national sovereignty doctrine) (cf. Bastid, 1939; Bacot, 1985; Maulin, 2003; Rubinelli, 2020).

The major problem with the national sovereignty interpretation, however, is its utter incompatibility with the ideas of the Belgian founding fathers. The doctrine of national sovereignty, as worded by Carré de Malberg, involves a commitment to the logical priority of the state and a specific, positivist view on legal validity: the law derives its legitimacy from a fictive subject that only appears once its organs have been created and authorised by the law to speak on its behalf. Such views are alien to the Belgian drafters, who were decidedly not legal positivists. Their ideas had the shape of a political theory: individual liberty has to be safeguarded through interlocking institutional guarantees and through modern forms of democratic participation. Moreover, the ultimate basis of legitimacy was not an intra-legal construction (a postulated nation), but was to be found in pre-legal, empirical reality: the opinions of actual citizens. The dominant groups in Congress, including liberal-Catholics, clearly operated on a liberal scheme: everything that is relevant – individuals, individual interests, associations between individuals – already exists outside and before its appearance in the political or legal sphere. Moreover, they assumed that the most basic norms (in particular: the fundamental rights of individuals and the sovereignty of the people) do not derive their legitimacy from positive law, but are valid independently of it.

Even when cutting away Carré de Malberg's legal-positivist conceptualisation, the doctrine of national sovereignty continues to clash with the drafters' deep-rooted convictions. What the three references traditionally used to explain the Belgian conception of sovereignty – the Constitution of 1791, Sieyès's theory of the nation, and Carré de Malberg's model of representation – ultimately have in

30 On an anecdotal note it can be mentioned that Charles Rogier, an important liberal congressman, begins his 1826 dissertation in law with a long quote by Benjamin Constant. In this passage, Constant claims that politicians need to have very strong local attachments (Discailles, 1893, p. 112, n. I; cf. Garsten, 2016, pp. 255 f.). I owe this reference to Christophe Maes.

31 Inversely, it is perfectly conceivable for Carré de Malberg that the people are sovereign but transfer the exercise of their power to representatives.

common, is a typically French belief in the unity of the will: a will that is indivisible and that transcends, in some way or other, the wills and interests of individual citizens (cf. Mineur, 2010, pp. 89–144). In 1791, this unitary tradition expressed itself by writing a monolithic conception of sovereignty into the Constitution. In the case of Sieyès, this belief in unity can be perceived throughout his early writings and speeches. In a crucial passage in *Qu'est-ce que le tiers-état*, he writes that we need “one nation, one representation, and one common will” (Sieyès, 1988, p. 157). In a 1791 speech defending unicameralism, he stresses that “the general will has to be one”; bicameralism inevitably leads to “counteractions” and therefore threatens the necessary unity of the law (Sieyès quoted in Rubinelli, 2020, pp. 63–65).³² In the work of Carré de Malberg, this unitarianism shows itself in the need for an indivisible, supra-individual subject as the holder of sovereignty. It also reveals itself in his emphasis on the unity of the general will, a point on which he openly agrees with Rousseau (cf. Carré de Malberg, 1922, p. 255).

Belgium’s drafters, with their post-revolutionary sensibilities, wrote a constitution that is the exact antithesis of this French unitarianism. In doing so, they were inspired by Montesquieu and his disciples in the Coppet Group, who are the only ones to have systematically challenged this deep unitarian instinct in France. The Belgian Constitution can without exaggeration be described as a living monument to the Montesquieu-Coppet philosophy. In light of this, it is truly astonishing that so many textbooks use a combination of terms such as ‘sovereignty’, ‘unitary’, ‘will’, and ‘indivisible’ to explain the views of the Belgian founders. Paradoxically, such an explanation sits in many respects closer to the minoritarian republican position of 1830–1831 than to the majoritarian liberal and liberal-Catholic position.

In defence of the myth

The national sovereignty myth is premised on an originalist approach to the Belgian Constitution. When interpreting article 25 in light of the national sovereignty doctrine, authors and judges claim to explain the meaning of the text in the way its original authors, and well-informed readers at the time of writing, understood it. It is clear by now that this originalist strategy is untenable. The national sovereignty doctrine is simply too different from how the drafters thought about sovereignty. Does it follow that the national sovereignty interpretation cannot be defended at all? Actually, I believe there are three minimally plausible strategies one could follow if one really wished to hold on to it.

32 But note that Sieyès was also concerned with limiting the excesses of sovereign power (*inter alia* by means of the division between constituted and constituent power) and did come to see that the “very idea of general will was inherently wrong” (Rubinelli, 2020, p. 70). As such, he became an important source of inspiration for Constant and other Coppet-thinkers, cf. Pasquino (1988, 31 f.) and Laquière (2005).

1. A first possibility would be to tone down the national sovereignty doctrine to a mere belief in representation.³³ The claim would then be as follows: ‘The Belgian drafters did not find direct decision-making by the citizens desirable. Instead, they believed that formal political power should be exercised by elected representatives’. This claim is probably correct, but it is also very trivial. Virtually all nineteenth-century constitutions would then be examples of ‘national sovereignty’, so why use this particular term, with all its intellectual baggage? Moreover, by stating the claim in this way, detached from a more comprehensive view on sovereignty and political participation, it becomes difficult to assess how important representation was for the drafters in comparison with some of their other views.

2. Another slightly plausible strategy would consist in pointing out that elements of the national sovereignty doctrine were already available in 1830–1831. Even before the French Revolution, Jacques Necker toyed with the idea of the “wish” (“vœu”) of the nation, which he opposed to the short-term interests of the currently living citizens (Grange, 1974, pp. 269–270). Sieyès’s claim that indivisible representation is a precondition for national unity, which he formulated during the French Revolution, inspired the later doctrine of national sovereignty and could also have inspired the Belgian drafters. Moreover, in the French Revolutionary assembly there was a heated debate between supporters and critics of the imperative mandate,³⁴ a debate that contains *in nuce* the opposition between popular and national sovereignty.³⁵ Maybe the drafters never explicitly endorsed these ideas, but they might have silently absorbed them.

One could also mention the French Doctrinaire liberals, whose work gained steam and prominence during the 15 years leading up to the Belgian Revolution. According to the Doctrinaires, democracy and popular sovereignty contained “the seeds of tyranny” and might lead to the destruction of “the balance of opinions, interests, and classes” (Craiutu, 2004, p. 105). As an alternative, they proposed the sovereignty of reason and justice: rationality should become the norm for lawmaking and political power should be reserved, in perpetuity, for the

33 This seems to be the core of the strategy pursued by Clement and Van de Putte (2018) who, in a recent article, defend the national sovereignty doctrine against various criticisms. They emphasise the fact that the Belgian founders were deeply elitist. This is, of course, true. Despite accepting the principle of popular sovereignty, the founders defined the suffrage in a very narrow way. But it is not obvious that their elitism was a matter of constitutional principle. Many of them were convinced that, over time, further enlightenment would allow for a broad extension of the vote.

34 Note that, as opposed to what is often assumed, Sieyès did not fully side with the group that opposed the imperative mandate. Instead – because of his dislike for sovereignty – he sidestepped the debate by focusing on the distinction between constituent and constituted power (Rubinelli, 2020).

35 It appears that the first recognisable formulations of this opposition are to be found in an 1836 book by Simonde de Sismondi (cf. Paulet-Grandguillot, 2010, pp. 142 f.) and in an 1838 book by the Brussels-based philosopher Heinrich Ahrens (cf. Maes, 2020).

rational few.³⁶ These ideas, which would later be assimilated into the theory of national sovereignty, might have sounded tempting to Belgium's drafters. Thus, it is factually possible that they developed a view on sovereignty that was at least isomorphic to what would eventually become the national sovereignty doctrine.

However, one would have to show that some or all of these elements were indeed picked up by the Belgian drafters. This remains a tall order. The closest one probably gets is by explaining that the drafters rejected the imperative mandate and entrusted representation to assemblies whose members were elected by limited suffrage. These members were representatives, not just because they had been elected, but also because they carefully deliberated about the interests of the population. These points do betray the influence of the French Revolution and its intellectual aftermath. Proving more, however, seems difficult, as there is a wide gulf separating the Belgian drafters from the French cult of 'unity', 'nation', 'indivisibility', and 'sovereignty' that would eventually culminate in the national sovereignty doctrine. There is also a fundamental dissensus between the authoritarian *Doctrinaires* and the mood of 1830–1831: the newly minted Belgians distrusted the state, believed that the judgment of actively involved citizens is the ultimate and irreplaceable touchstone for political decisions, and would never sacrifice individual interests and opinions to an official policy of truth, reason, or justice.³⁷

3. A third strategy would be to abandon all originalist ambitions and instead claim that the national sovereignty interpretation receives its legal weight only from the accumulated opinions of later interpreters. This seems to be the option picked by André Alen (2015) and Jan Velaers (2019). Of the three strategies, this is certainly the most feasible one. After 1831, certain Belgian liberals (including some of the founding fathers themselves) tilted towards a *raison d'état* perspective and became concerned that article 25 would be interpreted in an overly populist way, which led to the emergence of a *Doctinaire* interpretation of the Constitution.³⁸ This *Doctinaire* view gained influence in the second half of the nineteenth century and, together with other elitist and socially conservative tendencies, contributed to the adoption of the national sovereignty doctrine as the main conceptual scheme for understanding article 25. Thus, the national

36 A good introduction to the notion of "sovereignty of reason" is provided by Aurelian Craiutu (2004, pp. 123–153), although he might be overstating the proximity to Constant (cf. Jaume, 2012; Ghins, 2018).

37 Surprisingly, Els Witte claims that the *Doctinaire* liberals were the dominant group among Belgian liberals during the run-up to the Belgian Revolution, that article 25 expresses the "sovereignty of reason", and that liberals in the National Congress championed the idea of "sovereign reason" (Witte, 2018, pp. 94, 105–106, 108). Unfortunately, she does not provide any evidence for these claims. Patricia Popelier also tends to read 1831 in *Doctinaire* terms (Popelier, 2007).

38 The *Doctinaire* reading seems to have emerged after the 1848 Revolution. The leading Catholic *De Gerlache* also moved away from the principle of popular sovereignty around 1850.

sovereignty account can indeed be presented as the product of a long, collective process of reinterpretation.

Despite its plausibility, this strategy has serious downsides. If one admits that the meaning of the constitutional text can be altered in unrecognisable ways through later interpretations, then one also has to accept that the national sovereignty view might wither away in light of changing needs and circumstances. One could even argue that the constitutional changes allowing non-binding referendums at the local level (article 41, since 1999) and at the regional level (article 39bis, since 2013) already signal the demise of the national sovereignty doctrine. My main objection to this strategy, however, is that it obscures the specificity and the ingenuity of the drafters' take on sovereignty in 1831. This is especially unfortunate because the ideas of 1831 might well be more appropriate and inspiring for today's needs than the stale doctrine of national sovereignty. Of course, two conflicting interpretations can flourish side by side, but only one can be granted legal validity.

Conclusion

Bruce Ackerman has famously stated that the American founding fathers "failed" in one important respect (Ackerman, 2007; 2010). Convinced that Congress would be "the most dangerous branch", they went to great constitutional lengths to contain its power. Yet the presidency has become much more dangerous as the rise of the party system turned it into a quasi-plebiscitary office. The founding fathers could not foresee this because "they were legislating for a world without national political parties" (Ackerman, 2007, p. 30).

Their distant Belgian heirs, it seems, made a similar error. They believed that setting up counterbalancing institutions would contain the threat of power concentrations, but they failed to foresee that well-organised parties could thwart their design. With their members sitting in all political bodies, the power of parties cuts across traditional divisions of power. In Belgium, this has created a situation where party leaders, who lack electoral accountability towards citizens and whose office is not described in the Constitution, have amassed astonishingly large amounts of power. Even the power-dividing mechanisms added after 1831, such as the Constitutional Court or federalism, have largely fallen victim to these same dynamics, leading some to claim that parliamentary democracy in Belgium is now a mere facade (Dewachter, 2001; 2014).

I believe these unforeseen circumstances should play a role in the interpretation of the Constitution, especially when it comes to the constitutionality of referendums – a question that is inextricably linked with article 25. Since 1950, all discussions about referendums have been conducted in light of the national sovereignty doctrine, which supposedly excluded referendums. But with the doctrine dislodged, we can again ask whether referendums are compatible with the

principles of the Belgian Constitution.³⁹ Referendums are not mentioned in the text of the Constitution, but neither is the role of political parties. And the discussion was never merely about the letter of the text: referendums were deemed irreconcilable with the general conception of participation and representation expressed in the national sovereignty doctrine.

Ultimately, when deciding upon the constitutionality of referendums, one has to weigh several elements against each other. The fact that the drafters only provided representative mechanisms for formal lawmaking, is one such element. Another element is the observation that the Belgian Constitution – in contrast to some of the constitutions that inspired it – does not explicitly state that lawmaking, as a matter of principle, should happen in an exclusively representative manner. If the drafters thought representation was crucial, it would have been logical for them to import the formulas on representation from 1791 into the Belgian Constitution, but they did not. A further relevant element is the prominent role the drafters wished to give to public opinion. They consciously created several channels through which the opinions of citizens would be expressed, would contest and would influence policy. And then there is, of course, the division of powers: deeply concerned about power concentrations, the drafters set up various power-dividing mechanisms.

There are more elements that can be taken into consideration, and it is certainly not obvious how much weight should be given to each. The only way to make such a judgment, as Ronald Dworkin has never stopped repeating, is by rising above the concrete elements at play and by stepping up on “the ladder of theoretical ascent” (Dworkin, 1997, p. 359). In difficult cases, triggered by new and unforeseen circumstances, one can only judge correctly by making use of abstract moral or political principles (Dworkin, 1996). Some claim that such a normative judgment is not necessary and that looking at the text is enough to declare referendums unconstitutional. But this smacks of hypocrisy. It means that one places all the weight on the first element to the exclusion of all other elements. Hence, one is making a normative judgment, albeit without admitting it and without disclosing the principles that motivate this judgment. Fortunately, most opponents of referendums have never claimed to be only looking at the words of the text. They usually acknowledge that it is necessary to climb up to the level of more abstract principles. This is precisely why they invoke the doctrine of national sovereignty. According to them, this doctrine, as a systematic articulation of the drafters’ views on sovereignty, provides a comprehensive scheme for thinking about representation and participation in the Belgian context.

My claim is that the doctrine is not at all suited to this purpose. The core of the drafters’ constitutional programme was to avoid power concentrations by

39 Of course, one can introduce referendums regardless of the ideas of the founders, especially because changing the Belgian Constitution is relatively easy. However, even in this scenario coherence with its general principles should be a matter of concern. Moreover, the argument against referendums was never simply “that they are not yet in the text”.

means of interlocking institutional guarantees and by empowering the judgment of individual citizens. It is only in light of this broad idea that we can cogently understand their concrete decisions, starting with the omission of the word sovereignty from the Constitution. I do not wish to take a position here on whether contemporary Belgians remain bound to the decisions of their long-deceased founders. But if the goal is to continue the 1831 constitutional project in a coherent way, then it is from this broad idea that one should start. When applying this idea to the question of referendums, the problem of participatory democracy looms large. The rise of parties has created the very power concentrations and lack of accountability which the drafters ardently wished to prevent.⁴⁰ Referendums naturally offer themselves as part of the solution. They are a strong means of activating and empowering public opinion, and they serve as a pillar in the decision-making process that cannot be colonised by professional politicians.⁴¹ Thus, rather than a break with the constitutional project, referendums might well be an effective continuation of it in today's circumstances.⁴²

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40 When political parties emerged in Belgium in the course of the nineteenth century, many argued that this new, alternative way of organising political power was unconstitutional because it was incompatible with the distribution and the exercise of power prescribed by the Constitution (Van Goethem, 2002, p. 242).

41 Referendums are often associated with the monolithic or even populist expression of a collective, not fully rational will. This association is clearly outdated. Referendums, when well regulated and properly organised, can be useful building blocks in an encompassing "deliberative system" (Parkinson, 2020) and are compatible with a pluralistic understanding of the people (Van Crombrugge, 2020). One can also claim, as Hans Lindahl and Bert Van Roermund (2000) have done in the context of the Netherlands, that referendums are a form of representative democracy: just like other procedures and institutions, a referendum creates a representation of the people. Thus, the fact that parliament represents the Dutch people does not exclude setting up other channels of representation next to it.

42 This conclusion requires more arguments than I can provide here. But see the many relevant considerations in Chapters 12–14.

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