American and European Conceptions of Sovereignty: Two Sides of the Same Coin

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A. INTRODUCTION: KEOHANE

This article argues that ideas of sovereignty vary over time and space in response to different geopolitical circumstances, interests and intellectual heritages. We show how dominant interpretations of sovereignty have changed over time, elucidate the contemporary interpretations of sovereignty that dominate American and European scholarship, and then consider the impact of geopolitical circumstance and interests. We conclude that the conceptions of sovereignty that dominate at any one time and place are not politically neutral but are ultimately, if unconsciously, self-serving.

In his 2002 article "The Ironies of Sovereignty", Robert Keohane offers four key insights. Firstly, America and Europe have different ideas about sovereignty.[1] Secondly, ideas of sovereignty and attitudes and policy preferences are mutually constitutive.[2] Thirdly, differing American and European interpretations of sovereignty are in part the result of geopolitical circumstances.[3] Finally, interpretations of sovereignty change over time.[4] We agree with these four insights, and disagree with how they are then applied. For Keohane goes on to argue that the US, from which the first republican critique of sovereignty emanated, has now become one of its staunchest defenders, whereas Europe, the home of the classical idea of sovereignty, has left the concept behind. He then – very problematically, in our view – argues that the EU can function as a model for re-envisaging ideas of sovereignty for "troubled regions".[5] In his capacity as intellectual observer of the sovereignty debate, Keohane shines; as a participant in that debate, he falls into repeating standard ideas about sovereignty for both the US and Europe.

[1] Robert O. Keohane, *Ironies of Sovereignty: The European Union and the United States*, 40 JOURNAL OF COMMON MARKET STUDIES 743, 743 (2002).
[2] *Id.* at 758.
[3] *Id.* at 745.
[4] *Id.* at 743.
[5] *Id.* at 754-7.

With respect to Keohane's first insight, dominant ideas about sovereignty can be identified in both the US and Europe. Within the vast American literature on sovereignty, two conceptions are clearly present: a statist conception that privileges the territorial integrity and political independence of governments regardless of their democratic or undemocratic character; and a popular conception that privileges the rights of peoples rather than governments, especially when widespread human rights violations are committed by a totalitarian regime. We argue that these two conceptions are, in fact, different manifestations of a single, uniquely American conception of sovereignty—one which elevates the United States above other countries and seeks to protect it against outside influences while, concurrently, maximizing its ability to intervene overseas. It is possible to hold these two ideas about sovereignty simultaneously because the statist idea of sovereignty is applied to the US whereas the popular idea of sovereignty is applied to other countries. This single, uniquely American conception of sovereignty is clearly identifiable in Keohane's own analysis – particularly when he begins talking about "troubled regions".

The European literature on sovereignty is more complex and falls into two camps: a body of writing produced by scholars of European integration, and a parallel literature produced by political scientists, philosophers and academic international lawyers. The academic treatment of sovereignty differs quite significantly between these two groups. European integration theorists see sovereignty as pooled or shared. Many of them have tried to move beyond this view, but, when they do so, they find themselves having to choose between a unitary and absolute sovereignty or some kind of post-sovereignty, neither of which accurately reflects the contemporary EU. As a result, the idea of pooled sovereignty retains considerable intellectual pull, and it is this pull to which Keohane has surrendered.

European political scientists, philosophers and academic international lawyers tend to view sovereignty in more theoretical terms and treat it in one of two ways: as a *concept* which is either redundant or incoherent and should therefore be abandoned; or as a *phenomenon*, the political impact of which can be observed. In viewing sovereignty as a phenomenon, two subsequent questions arise: is sovereignty in decline or not, and should we be happy about this or not? All these ideas of sovereignty intermingle throughout the vast European literature on sovereignty and this contributes to the confusion for which the sovereignty literature is famed.

We argue that a substantial amount of the confusion can be eliminated if scholars take the time to clarify the different ideas of sovereignty at play. Moreover, once we track how interpretations of sovereignty change over time, it becomes clear that the ideas of sovereignty which predominate in any one time or place are largely determined by the combination of geopolitical circumstances, interests and intellectual heritages. Historical understanding helps provide conceptual clarity. An awareness of conceptions of sovereignty as fluctuating over time and according to circumstance also forces us to be more questioning about ideas of sovereignty that powerful nations hold and propound and in turn to see the important role that self-interest plays and how powerful states use ideas of sovereignty to empower themselves. We believe that Keohane's analysis of the American and European ideas of sovereignty validates this point, for he does precisely this: reproducing the standard ideas of sovereignty, correctly identifying the importance of recognizing the historical contingency of sovereignty, but then failing to provide a more critical assessment of why these powerful actors hold the conceptions of sovereignty that they do. In short, Keohane is right, but not in the ways he thinks.

So what does Keohane do right? His four insights, as outlined above, may appear underwhelming but are in fact an important basis from which to re-envisage the sovereignty debate. His first insight – that the US and Europe have different ideas about sovereignty – is a powerful challenge to the implicit belief that there is one way to define sovereignty and we just need to discover what it is, much like a mathematical formula which is valid across time and space. His second insight – that ideas about sovereignty not only help to define policy preferences and attitudes but that policy preferences and attitudes in turn help to shape ideas of sovereignty[6] – is important because it undermines the idea that sovereignty is a historical constant and not subject to changing interests. This leads to his third insight, that differing American and European ideas of sovereignty are the result of "a combination of different social identities, different levels of interdependence, and vastly contrasting geopolitical roles".[7] Moreover, sovereignty is "associated historically with the use of military force, and more robust forms of sovereignty come naturally to more powerful states".[8] In other words, ideas of sovereignty are affected by power. Which brings us to Keohane's fourth insight: as circumstances change over time and superpowers wax and wane, the ideas of sovereignty held by any one nation will change correspondingly.

Important as these insights are, they are undermined by the fact that Keohane simply repeats the standard narratives about ideas of sovereignty in America and Europe. This unquestioning repetition of the standard accounts is then compounded by and reflected in Keohane's proposition that the EU should act as a model for troubled regions or societies.

With respect to the European conception of sovereignty, Keohane accepts without challenge the idea of European sovereignty as pooled. As he explains: "in many areas, states' legal

[6] *Id.* at 758.
[7] *Supra* note 1 at 754.
[8] *Id.* at 754.

authority over internal and external affairs is transferred to the Community as a whole, authorizing action through procedures not involving state vetoes".[9] Europe has done so in part because of her history but also because, once cooperation was initiated, it soon became clear that growing interdependence provided an incentive to share and limit sovereignty (749). In short, the EU member states have decided to pool their sovereignty for good, practical reasons, primarily a recognition that: "Under conditions of extensive and intensive interdependence, formal sovereignty becomes less a territorially defined barrier than a bargaining resource".[10] The traditional urge to nationalism which all nations feel has, according to Keohane, been channeled into "doing good, promoting values…and a sense of European self-esteem".[11] European foreign policy is directed by the twin motivations of "reinforc[ing] common European values and…mak[ing] Europeans feel good about themselves and the EU's role in the world".[12]

No such luxuries for the US, however. Instead, the US has a heavy burden to bear, with armed forces "stationed across the globe to help maintain international peace and security and to defend US allies and friends".[13] Whereas EU foreign policy is about compromise and "muddling through"[14], US foreign policy requires decisiveness, and therefore unfettered, external sovereignty. The state "needs to be able to act quickly, without warning, and in a co-ordinated fashion – none of which is easy with allies".[15] Such is Keohane's enthusiasm for decisive action that he fails to question whether acting decisively is necessarily acting morally, legally or effectively. In essence, his assessment is simply that Europeans prefer to see their sovereignty as pooled whereas Americans adopt a "classical conception" of

[9] *Id.* at 748.
[10] *Id.* at 748.
[11] *Id.* at 746.
[12] *Id.* at 746.
[13] *Supra* note 1 at 754, Keohane quoting then United States Ambassador-at-large for War Crimes Issues David Scheffer.
[14] *Id.* at 759, Keohane quoting Charles E. Lindblom.
[15] *Id.* at 758.

sovereignty that focuses on the maintenance of external sovereignty ("The Constitution upholds the concept of external sovereignty"[16]) and all the freedom of (decisive) action this entails. However, this is only half the story, for when we look at Keohane's scheme for "troubled regions" it becomes clear that the classical conception of sovereignty only extends to the US. For all his commitment to the preservation of external sovereignty, Keohane is surprisingly cavalier about the sovereignty of other states.

On Keohane's analysis, "[t]roubled societies are often unable to create order without external assistance".[17] As a result, "internal measures…consistent with classical external sovereignty…are unlikely to work in many troubled societies".[18] Keohane argues that the experience of European integration can teach us two important lessons: first, that there are gradations in sovereignty and, second, that regaining full sovereignty need not be one's long-term objective.[19] Indeed, full sovereignty, as Keohane terms it, has been "a disaster for the Cypruses, Somalias, and Afghanistans of this world. It was also a disaster for Germany, and the world, between 1933 and 1945." He concludes that regimes that are internally abusive or externally bellicose should not have full sovereignty because of the death and destruction they cause.

In a co-authored piece with Allan Buchanan, Keohane further explores these ideas, proposing a schema for preventive intervention which comprises *ex ante* and *ex post* accountability. The aim is to produce an institutional system which can allow preventive force to be deployed but block unjustified interventions. Before intervening, states would make an evidence-based claim concerning the need for action and agree to submit themselves to evaluation by an impartial body afterwards. If the action proved justified, those states that had not shouldered

[16] *Id.* at 745.
[17] *Id.* at 755.
[18] *Id.* at 756.
[19] *Supra* note 1 at 756.

the risk and costs of intervention would bear "special responsibility for financial support in rebuilding the country".[20] But if the action were found by the impartial body to have been unjustified, the intervening states would have to provide compensation. Moreover, they would not be allowed to control the political situation in the intervened-in-state. Only states that "have decent records regarding the protection of basic human rights should be allowed to participate in institutional processes for controlling the preventive use of force."[21] While the authors neglect to tell us who these countries are, it would seem a fair assumption that the US is one of them.

We believe that there are several problems with the schema. Most notably, no state would have the option of opting out or simply disagreeing with the intervention regardless of the outcome, or even just disagreeing over the evaluation. Likewise, an impartial, independent body—the UN Security Council—arguably already exists to validate uses of force, though there the veto power of four other countries constrains US power too much for Buchanan and Keohane's purposes.[22] Finally, under the schema, if a group of democratic, "morally reliable"[23] states wished to intervene in unjustified circumstances they would still be allowed to do so—providing that they paid for the privilege. This surely cannot be right. Buchanan and Keohane's schema reflects – and bolsters – a single, uniquely American conception of sovereignty that is absolute at home and seriously limited abroad.

[20] Allen Buchanan & Robert O. Keohane, *The Preventive Use of Force: A Cosmopolitan Proposal*, 18 ETHICS AND INTERNATIONAL AFFAIRS 1, 14 (2004).
[21] *Id.* at 10.
[22] Steven Lee argues that Buchanan and Keohane: "effectively run together preventive intervention and humanitarian intervention, two categories which should be kept distinct". Steven Lee, *A Moral Critique of the Cosmopolitan Institutional Proposal*, 19(2) ETHICS AND INTERNATIONAL AFFAIRS 99, 106 (2005). Moreover, Lee argues that a state which has not committed any aggressive acts is not morally liable to be attacked despite "the ease with which the authors sail across the morally relevant divide between actual and expected aggression." *Id.* at 104.
[23] Buchanan & Keohane, *supra* note 20, at 10.

The message is clear: certain states cannot be trusted with full sovereignty and should therefore be encouraged – or pressured – into following Europe's example and renouncing sovereignty and pursuing prosperity instead. In short, "troubled societies" should give away their external sovereignty in order to be shepherded into neoliberal, capitalist institutions by powerful states. Not only is this patronizing and paternalistic but it is also based upon questionable assumptions: are the failings and tragedies of "troubled societies" the result of their insistence on classical sovereignty, as Keohane claims?[24] Or, is it geopolitical positioning, conflict over resources and ideology, corruption, and neo-imperial exploitation which are merely *exacerbated* by the classical notion of sovereignty?

Keohane's assessment of sovereignty is a perfect illustration of the bifurcated America idea of sovereignty which retains unfettered external sovereignty for the US but is more than happy to compromise the sovereignty of others. The European experience of integration merely serves as a convenient intellectual staging post for Keohane's proposal to effectively denude potentially any state of its sovereignty, should "morally reliable" states deem it necessary. In all Keohane's exposition of the lessons to be learned from European integration, not once does he mention that Europe *chose* to integrate in a way that Keohane's troubled societies would be unable to choose. Keohane's analysis of European integration also lets the EU off the hook by portraying it as an overly bureaucratic entity which likes to spend its time working on its common European values, while being quietly prosperous and untouched by the harsh realities of life which America must face. This presumes that the EU is therefore incapable of using its idea of sovereignty to empower itself: how could it, when its sovereignty has been pooled? Later in this paper, we will demonstrate that Europeans can be just as ruthless in their use of the concept of sovereignty as Americans. But first, it is

[24] Keohane, *supra* note 1, at 743.

necessary to ground our analysis in the philosophical origins of sovereignty, and to further explore the American experience of sovereignty.

B. Philosophical Origins of the Concept of Sovereignty

Introduction

In this section, we trace the evolution of the concept of sovereignty, starting with Jean Bodin and continuing through Thomas Hobbes, John Locke and Jean-Jacques Rousseau. We then explore how the Federalists reinterpreted sovereignty to meet the needs of the fledgling United States. We argue that each of these philosophers, and the Federalists as a group, reinterpreted sovereignty in order to suit the prevailing geopolitical circumstances and their own interests in the light of their own intellectual heritage and the philosophical fashions of the time. Along with most scholars, we see the Bodinian definition of sovereignty as containing three elements: that sovereignty is absolute; unitary; and alienable. However, each of these elements has altered over time. This is an important step in our argument because it enables us to see that interpretations of sovereignty not only vary over time, but – because even the three foundational elements have changed – many of these interpretations are no less powerful than previous ones were. By identifying the different historical threads that come together in the contemporary sovereignty debate, we hope to clarify the concept of sovereignty as it is invoked and advanced today.

Dominant narratives of sovereignty share a common starting point. Most accounts vary in their assessment, and as to whether they treat sovereignty as a phenomenon or a concept, but nearly all begin with the assertion that the concept of sovereignty was developed in the sixteenth century and offer Bodin's definition of sovereignty as absolute, unitary and

supreme. Usually this is where historical exploration stops and the focus shifts to the present-day. We believe that more is needed in the way of historical philosophical analysis. By looking at the philosophy of such key thinkers as Bodin, Hobbes, Locke, Rousseau and Publius[25], it becomes easier to identify the different intellectual interpretations of sovereignty.

Works that begin with a simple reference to Bodin's definition of sovereignty as absolute, unitary and supreme immediately handicap themselves. For Bodin's conception of sovereignty was highly contextual, in that it was a sixteenth century interpretation designed to defend absolute monarchy. Works that begin with a simple reference to Bodin can run into difficulty when, later, they engage with alternative conceptions of sovereignty, often implicitly. Most frequently this will be an idea of popular sovereignty, namely the assertion that sovereignty resides in the people and not in the state. This then conflicts directly with the Bodinian idea of sovereignty upon which basis they began. As a result, confusion reigns and sovereignty itself is seen to be inherently contradictory, often leading scholars to decide that the concept should be abandoned outright.

In contrast, this article argues that different conceptions of sovereignty have been dominant at different times and that, by identifying these different strains of thought, it become easier to identity the different ideas of sovereignty at play in contemporary work. Moreover, by exploring the historical circumstances that led to the emergence of particular conceptions of sovereignty, we can more clearly see the linkages between them. Sovereignty is not a concept apart from the political world but one formed by and through it. Our approach exposes the extent to which sovereignty not only defines attitudes and policy preferences but is itself defined by attitudes and policy preferences. This interactive relationship is elided by the failure to challenge, firstly, the idea that there is one basic idea of sovereignty as a single

[25] Publius was the allonym adopted by the authors of the *Federalist Papers* – Alexander Hamilton, James Madison and John Jay – as a reference to Publius' role in founding the Roman republic.

undifferentiated mass and secondly, the idea that there have not been different interpretations according to geopolitical circumstance.

The Philosophical Origins of Sovereignty

So what did Bodin actually say about sovereignty? Quite simply, he defines sovereignty as "la puissance absolue et perpetuelle d'une Republique"[26]; that is, sovereignty as absolute and perpetual power. The sovereign cannot share his power with a subject, because sovereignty which is divided and shared is no longer sovereignty. Sovereignty is perpetual in that the sovereign will remain sovereign for as long as he lives. Moreover, the sovereign has the power to make the law and is not subject to it. However, despite Bodin's assertion that sovereignty is absolute, he also argues that it is "subject unto the laws of God, of nature, and of nations".[27] To modern eyes the role that natural and divine law play in limiting sovereign power can appear suspiciously like a fig leaf. But this would be to interpret such accounts in an unfairly modern way. Natural and divine law were considered genuine and significant limitations. As Bodin stated:

> But as for the laws of God and nature, all princes and people of the world are unto them subject: neither is it in their power to impugn them, if will not be guilty of high treason to the divine majesty, making war against God; under the greatness of whom all monarches of the world ought to bear the yoke, and to bow their heads in fear and reverence. Wherefore in that we said the sovereign power in a Commonwealth to be free from all laws, concerned nothing the laws of God and nature.[28]

[26] *Quoted in* Stéphane Beaulac, *The Social Power of Bodin's 'sovereignty' and international law*, *MELB. J. INT'L L.* (May 2003), available from http://goliath.ecnext.com
[27] *Quoted in id.* The original French text reads: "tous les Princes de la terre sont sujets aux lois de Dieu, et de nature, et à plusieurs lois humaines communes à tous peoples." A more accurate translation of "les lois humaines communes à tous peoples" is not the law of nations, but the laws of humankind. This implies laws which all people share and could agree upon, rather than the law of any one particular state.
[28] *Quoted in id.*

The key to understanding Bodin's idea of sovereignty therefore lies in understanding the role that religion played in Bodin's political world. He was a religious man living in a time of great religious conflict and his aim was to provide a system of order that would bring an end to that conflict and provide stability. And religion was both the problem and the solution. It was the problem in that the chaos and violence that surrounded Bodin were mainly due to religion. Bodin's solution was to concentrate power in the hands of one person and it was religion that enabled him to do this while providing at least some limitations on the power of the sovereign. With growing secularization, this limitation fell away and modern thinkers, looking back, now see Bodin's conception as resting on a simple assertion of sovereignty as absolute, unitary and supreme, and wrongly presume that the limitations of natural and divine law were little more than lip-service. But natural and divine law meant a great deal in Bodin's world. Sovereignty, as Bodin articulated it, was neither illogical nor contradictory. It offered a coherent, workable solution to the problem of religious conflict in Europe, something made immeasurably easier by not having to deal with the idea of democracy which, at that time, was inchoate and exerted little intellectual pull.

Similar pressures were felt by Hobbes in England. He too was faced with religious conflict and primarily concerned with defending absolute rule by the monarchy and consequently an idea of sovereignty as absolute, unitary and supreme. The only restriction that either author placed upon sovereignty was that it must not violate natural law (in Hobbes' case) or natural and divine law (in Bodin's). Both the Hobbesian and Bodinian sovereign is above the law, a logical conclusion given that he makes the law. Sovereignty is unlimited and vested in the body of a monarch.[29]

[29] Hobbes saw three types of commonwealth as possible – monarchy, democracy and aristocracy – but much preferred monarchy. THOMAS HOBBES, LEVIATHAN book 2, chapter 19 (1996). In all three types, sovereignty resides in one body: it is not divided.

Hobbes' *Leviathan* starts with the one of the most radical ideas of the seventeenth century: that individuals, before the creation of the commonwealth, exist in the state of nature. Here, each individual has the unlimited right to all. There is no mention of God, no natural order, no monarch. Each individual is on his own. And in this respect each individual is sovereign (though Hobbes never calls it this; he calls it natural freedom). However, life in the state of nature is solitary, brutish, nasty and short,[30] and so men covenant together to renounce their natural liberty in return for the protection of the Leviathan: "I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition, that thou give up, thy right to him and authorize all his actions in a like manner".[31] All that remains to the individual is three rights: the right to defend oneself (man's most basic right which cannot be alienated); the right to refuse to hurt oneself; and the right to refuse to accuse oneself of a crime. Against this the sovereign has considerable power.[32] The subjects cannot decide to change their sovereign or "un-enter" the covenant without the sovereign's permission. Moreover, the sovereign himself is not party to the covenant; the covenant is between the subjects, not between the subjects and the sovereign. Consequently, the sovereign cannot breach the covenant. There is no right to leave and no right to complain. Because "every subject is by this institution author of all the actions and judgment of the sovereign instituted",[33] the sovereign cannot commit injury or injustice, only "iniquitie".[34] The sovereign may not be killed, because the subjects are responsible for having created him. Finally, because it is the task of the sovereign to maintain peace and order, he may decide which opinions and doctrine are permitted. In short, the subjects, once they have entered into the covenant, must live with it, and they have no right of rebellion save when the sovereign is not longer able to perform his central duty of protection.

[30] *Id.* at book 2, chapter 13.
[31] *Id.* at book 2, chapter 17.
[32] See the twelve rights listed in *id.* at book 2, chapter 18.
[33] *Id.* at book 2, chapter 18.
[34] *Id.* at book 2, chapter 18.

There is only one restriction on the sovereign: natural law, and this is not a legislative obligation, only a prudential and moral one. The limitations of natural law cannot be a legislative restriction because the sovereign is above the law; rather, the sovereign should abide by natural law because it is prudent to do so and will make ruling easier. When we turn to the moral obligation, things become a bit trickier. So far it seems that the sovereign is not obliged to obey natural law, though it is probably a good idea to do so. But Hobbes also argues that the sovereign has a moral obligation to obey natural law. Although this seems logically incoherent, it is not, for while the sovereign has no obligation to his subjects, he does have obligations to God.

We thus take three things from Bodin and Hobbes. First, that sovereign power is absolute within the human world; the sovereign must only answer to God, and has an obligation to obey his law. Secondly, that sovereignty is unitary. And finally, that sovereignty is alienable. For Hobbes this is because individuals covenant together to essentially hand their sovereignty over to the Leviathan. For Bodin, sovereignty is not truly alienable, but only because the people have never possessed it: it has always been in the hands of the sovereign monarch. However, time moved on and, as circumstances changed, certain parts of the sovereignty triad were altered. Assumptions about the rectitude of absolute hereditary monarchy were challenged. Central among the challengers was Locke and his *Two Treatises of Government*.[35]

The Two Treatises was written as a refutation of Sir Robert Filmer's *Patriarcha,*[36] which defended the idea of a divinely-ordained, hereditary and absolute monarchy. Filmer's argument is based on the Bible and his interpretation that Adam possessed unlimited power

[35] JOHN LOCKE, TWO TREATISES OF GOVERNMENT edited and introduced by Peter Laslett (1960). It was originally published in 1689.
[36] SIR ROBERT FILMER, PATRIARCHA AND OTHER POLITICAL WORKS edited and introduced by Peter Laslett (1949). It was originally published in 1680.

over his children. The king is the heir of Adam and has inherited his ownership of the entire world. Locke refuted this argument in several ways. Firstly, he questions Filmer's interpretation of the Bible, arguing that fathers do not have unlimited power over their children, but share it with the children's mother. Locke then challenges the logic of Filmer's argument, pointing out that for Filmer's theory to be right, there must only be one king in the entire world: the heir of Adam, and unless a king can prove this, then no-one should obey him. Most significantly Locke rejects Filmer's argument that Adam and his descendents "own" the world. Instead Locke argues that the world was given by God to all mankind to be held in common. This is his central idea and it can be seen as a nascent form of the idea of popular sovereignty. Locke also used a second argument which would prove important to refute Filmer's idea of ownership: the idea that the law of nature forbids people from reducing others to material desperation while they themselves have more than enough to live on well.

Locke used the idea of slavery as an analogy for the state of a subject in an absolute, divinely ordained monarchy. He argues that no one can voluntarily contract to be a slave; that would mean giving absolute power over themselves to someone else, and that would be a violation of the law of nature. All slaves, Locke therefore contends, have a moral obligation to liberate themselves. By analogy, a right of revolution exists if the state oversteps its limits and exercises arbitrary power. By so doing the sovereign forfeits his side of the contract and renders it null and void. Again, the people have not only the right to overthrow the oppressor (in the form of the state), but an obligation to do so. Locke was therefore crucial in moving the status of the subject from that of having practically no rights, to having the right of consent and the right of rebellion. In the short distance from Hobbes to Locke, the nature of sovereignty was radicalized.[37]

[37] LEVIATHAN was written in 1651 and THE TWO TREATISES in 1689.

The most influential ideas about legitimate and effective forms of government from the sixteenth century onwards revolved around the idea of a social contract. The starting point was imagining what society would have been like in the absence of the state or government. Imaging a world without the monarchy or any notion of social organization was fairly radical, not least because it led authors to conclude that people were naturally equal. In the pre-civil state of nature, life was either hard (Hobbes) or inconvenient (Locke). As a result, individuals found it expedient to band together and form the social contract to end the anarchic state of nature. For social contract thinkers before Rousseau, this meant that the people would contract together to give away their freedoms to some other body. In this, Iain Hampsher-Monk argues, social contractarians "solved the paradox of natural liberty and social subordination by claiming that men had, as their freedom entitled them, given away their freedoms."[38] Rousseau radically reinterprets this central idea. He believes that to contract together to give away your freedom could only be the action of a mad-man and "madness creates no right".[39] Such a contract would be void and any ensuing form of political organization illegitimate. In other words sovereignty is inalienable: "I hold that Sovereignty…can never be alienated, and that the Sovereign, who is no less than a collective being, cannot be represented except by himself: the power may be transmitted, but not the will".[40] Instead, in order for the ensuing form of government to be legitimate, sovereignty must be retained by the people. What the people would lose in natural liberty, they would gain back in civil liberty. In the state of nature we have the freedom to follow our natural impulses. In civil society we have the freedom to obey the general will. To Rousseau this is a much greater freedom because instead of being slaves to our impulses, we are conforming to our higher selves. As a contributor and participant in the general will, the individual prescribes rules which he in turn as a private

[38] IAIN HAMPSHER-MONK, A HISTORY OF MODERN POLITICAL THOUGHT: MAJOR THINKERS FROM HOBBES TO MARX (1992) 176.
[39] JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT available at http://www.constitution.org/jjr/socon.htm, book 1, chapter 4.
[40] *Id.* at book 2, chapter 1.

subject obeys. This is true freedom.[41] This was an important step forward and the first clear articulation of popular sovereignty.

Rousseau also made a second important theoretical move: he altered the idea of sovereignty from being simply a question of who holds power to an idea of sovereignty as morally legitimate power. Rousseauian sovereignty is expressed through the general will, the articulation of what is best for the community: "I hold then that Sovereignty…[is] nothing less than the exercise of the General Will".[42] Each individual must set aside his own personal interests and vote for what is best for the community. The general will is therefore always abstract, or general, and should never be particular. If an individual, who has genuinely voted for what he perceives to be the general will, is out-voted, it must be that his perception is flawed and needs recalibration. The possibility that the majority of the people misperceive the general will is not satisfactorily answered by Rousseau, as he offers only the assertion that the general will is infallible. In order to ensure that it remains so, Rousseau ruled out the idea of political associations or parties, which would simply reflect the amassed particular wills of their members and confuse everyone as to what the general will really was. Rousseau's emphasis is very much upon the individual and his ability to reason, rather than the more emotive tendencies of parties and associations.

Importantly, Rousseau retains the idea of sovereignty as indivisible: the people are the sovereign and retain power. Any attempt to argue that sovereignty can be and is divided is simply "an illusion: the rights which are taken as being part of Sovereignty are really all subordinate, and always imply supreme wills of which they only sanction the execution".[43]

[41] The "forced to be free" paradox is frequently seen as the way to totalitarianism. However Hampsher-Monk argues that this paradox is only apparent, not real, because the individual is only constrained in respect of acts which jeopardize the freedom of the whole. *See* HAMPSHER-MONK, *supra* note 38.
[42] ROUSSEAU, *supra* note 39, at book 2, chapter 1.
[43] *Id.* at book 2, chapter 2.

Thus, there is a very sharp distinction for Rousseau between the sovereign and the government. The sovereign decides on what the general will is; the government implements it. While the sovereign includes all citizens[44], the government is a much smaller group chosen specifically for the job. While this may seem very similar to the representative democracy that Rousseau so abhorred, he denies this by arguing that the magistrates (the government) are not representatives but simply executors. They do not claim to represent the people, nor vote for them, but simply to do their bidding.

An obvious consequence of Rousseau's idea of the general will is that it relies upon the ability of the people to correctly identify and vote for it. This in turn is dependent upon a high degree of socialization and identification amongst members of the society: they must have similar beliefs and values. Hampsher-Monk argues that Rousseau understands this and that many of the actions of the sovereign body would consist of ceremonies designed to politicize and socialize the individual. Consequently, the smaller the state, the better the system operates. Moreover, the purpose of the state is not simply to possess power but to work for the common good, thus rendering the operation of political power legitimate.[45] And it is here that we see most clearly the impact of context on Rousseau's political thought. Throughout his life Rousseau maintained a deep admiration for the Swiss cantons[46] and the rural idyll that they enshrined for him. For Rousseau, progress was responsible for the corruption of man and he believed that earlier, less corrupted times should be the model of contemporary forms of political organization. It is this that is responsible for Rousseau's idealization of small, harmonious communities.[47]

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[44] This did not include all people: women were notably excluded.
[45] ROUSSEAU, *supra* note 39, at book 2, chapter 1.
[46] The feeling was not reciprocated: Rousseau was thrown out of Geneva after he offended the authorities. He escaped to Neuchâtel, which was then a Prussian possession. He was forced flee again, this time to Berne, but was expelled from there too.
[47] *See* JEAN-JACQUES ROUSSEAU, A DISCOURSE ON THE ORIGIN OF INEQUALITY trans. G.D.H. Cole, available at: http://www.constitution.org/jjr/ineq.htm.

The influence of European political philosophy in general and European ideas of sovereignty in particular were of seminal importance to the American political world. Although those seeking independence from Britain were clear in their rejection of many aspects of the Old World, they were profoundly influenced by European philosophy, partly because the nascent United States had little or no philosophical tradition of its own but also because many of the European philosophies of sovereignty could be used to bolster the case for American independence. Of particular relevance was the work of Rousseau and the notion of popular sovereignty: a notion that continues to be a powerful part of the American political psyche.

The American Reinterpretation of Sovereignty

The Federalist, also referred to as the Federalist Papers, is a series of 85 articles published between October 1787 and August 1788, advocating ratification of the US Constitution. The Federalist was written by Alexander Hamilton, James Madison and John Jay, under the allonym "Publius". Not only did the Federalist play a decisive role in the ratification of the US Constitution but it continues to be a source of authority for federal judges when interpreting the Constitution. The Federalist argues for the US Constitution to be ratified as a replacement for the Articles of Confederation which had created a loose association of states. Each state sent representatives to the Congress but it had no tax-raising power and only had power over the states, not individuals. Moreover, each state had its own constitution. As Hampsher-Monk points out, in two of its central functions "it was seen to fail badly. It was insolvent, and it was incapable of exercising external sovereignty."[48] The fledgling states were also under considerable threat from the European imperial powers of Spain, Britain and France, with the western part of America being particularly vulnerable. In essence, the Confederation lacked sovereignty and the US Constitution and the Federalist's defense of it

[48] HAMPSHER-MONK, *supra* note 38, at 202.

were designed to remedy this. They are therefore crucial to understanding the American idea of sovereignty.

Two key influences can be identified. Firstly, the influence of Britain, in the form of the reverence many felt for the British constitution and its balanced nature (if not for the actual actions of the British government), and in the form of Lockean philosophy. Secondly, the influence of the classical republicanism of the Roman and Greeks as well as the later republican theory of Montesquieu and Rousseau. From Locke, the Federalists took the liberal project of recognizing and protecting private interests and rights. From the republican project, they took the idea of establishing institutions which would create and foster civic virtue. However, a certain amount of intellectual gymnastics was required to reconcile their intellectual commitments with the reality of America. The primary problem was how to conform to the Rosseauian ideal in somewhere as large as the fledgling United States. The Anti-Federalists argued powerfully that only the individual states could be true republican sovereigns. However, as Hamilton pointed in the Federalist 9, each individual American state was already larger than the largest ancient republic that Americans so admired and held central to their political philosophy and identity. America was simply too big to reproduce the system of the ancient republics. And yet the very survival of the states would be jeopardized if they failed to unite. Hence the call to action: "join, or die".[49]

Another important factor was the fear that different factions would emerge, political life would descend into "mutual animosities",[50] and there would be no way of deciding which faction should win, bar sheer weight of numbers – the dreaded tyranny of the majority. The problem was made even more acute because Americans had self-consciously repudiated the

[49] "Join, or die" was a political cartoon created by Benjamin Franklin.
[50] PUBLIUS, THE FEDERALIST PAPERS, available at http://www.yale.edu/lawweb/avalon/federal/fed.htm, accessed May 2007, Federalist 10: *The Union as a Safeguard Against Domestic Faction and Insurrection* by James Madison, 23 November 1789.

hereditary, cultural or theological wisdom and authority of their forebears in Europe. And herein lay the heart of America's problem: It had very clear ideas of what it wanted and did not want but had no precedent; it defined itself by what it was not but had little idea of what it should actually be. The question of factions is a case in point. In Federalist 10 Madison solved the problem through more intellectual gymnastics: he argued that while two or three factions might threaten democracy, a multiplicity would actually enhance it.

So where does this leave sovereignty? The ultimate problem for the Federalists was their intellectual history and the kinds of idea about sovereignty this led them to have. The root of the problem lay in the fact that there was no natural fit between the ideal of government they held and the reality of America. Classical republicanism and Rousseauian philosophy led them to believe that it was only in small republics that sovereignty could operate properly. From their experience of the English constitution and their admiration for Locke and Montesquieu came the idea of a mixed constitution. However, America did not have, nor did it want, a society divided into estates. The solution necessarily had to be that sovereignty was divisible. In the end, they decided that the unity of the people and sovereignty could safely be broken – thanks to the intellectual construct of checks and balances.

While the Anti-Federalists saw the danger of tyranny as coming from federal government, Madison saw two potential sources of tyranny: the government and the majority.[51] By counterbalancing each against the other, Madison nullified the threat of each. Again, conventional wisdom at the time was that a free and limited democracy could either be a direct democracy, or a mixed republic based upon estates. Neither was an option for America. Rather, the Federalists proposed an unmixed representative republic. The division of power between federal and state level would reinforced the guarantees provided by the

[51] James Madison, *Federalist 46: The Influence of the State and Federal Governments Compared* 29 January 1788.

division of power *within* federal and state governments. Such a compromise was required because the individual states had a very powerful claim to sovereignty and the primary concern for most of the Anti-Federalists was that the federal government should never become strong enough to overpower individual states. Indeed, Madison believed that a mixed republic is actually better than a democracy.[52]

Eventually the Federalists were victorious and the Union was established in 1781. However, this did not mean that what was created was the United States as the sovereign entity we know today. Instead, the system that emerged was distinct from the Westphalian idea of states and sovereignty that dominated in Europe. This was the Philadelphian system and, according to Daniel Deudney, it combined "familiar forms of popular sovereignty, formal state equality, balance of power, and division of power on the basis of a distinct structural principle."[53] The key difference from the Westphalian system was that the individual states were essentially still sovereign units at the same time that the federal government was also sovereign. Clearly the intellectual ability to divide sovereignty was essential here. However, this unusual state of genuinely divided and contested sovereignty did not last. With the outbreak of the Civil War in 1861, the organizational system collapsed. And then, during the post-war Reconstruction era, the sovereignty of the individual states was considerably diminished: they could no longer secede, federal government expanded and was strengthened, and the executive was reinforced at the expense of the legislature. As Deudney sums it up: "The United States entered the war a states-union in crisis and emerged from it a

[52] In the Federalist 51 Hamilton or Madison (authorship is contested) writes: "In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments."

[53] Daniel H. Deudney, *The Philadelphian System: Sovereignty, arms control, and balance of power in the American states-union, circa 1787-1861*, 49 INTERNATIONAL ORGANIZATION 191, 193 (1995).

federal state with an intensified national identity. In saving the Union, Abraham Lincoln also transformed it."[54]

The Evolution of the Concept of Sovereignty

To summarize, almost every theoretical exploration of sovereignty refers to Bodin's assertion that sovereignty is absolute, unitary and supreme. This breaks down into three implications: that sovereignty is alienable, that it is indivisible and that it is absolute. Over time each of these elements has been compromised. While Bodin and Hobbes saw sovereignty as alienable, either naturally and permanently possessed by the monarch or contracted away by individuals acting together to escape the state of nature, Locke saw it as inalienable. Locke's primary concern was to reject the doctrine of the divine right of Kings. To do this he argued, like Hobbes, that humans existed in the state of nature and formed a contract in order to leave it. The difference from Hobbes is that, whilst individuals gave their individual sovereignty to the government in return for certain protections and advantages, that grant was not permanent or irrevocable. For Locke a right of rebellion existed and would always exist. Moreover, sovereignty could be divided. The ideal form of government was a mixed monarchy of checks and balances which would prevent the descent into tyranny.

The Rousseauian interpretation of sovereignty again altered the three basic components. For Rousseau, sovereignty is inalienable and resides in the people. However, Rousseau is very clear that sovereignty cannot be divided, for to divide sovereignty would be to destroy it. The idea of sovereignty as indivisible was possible in Rousseau's paradigm because he envisaged a small republic where a powerful linkage between the people and the government existed, something made all the more powerful by Rousseau's rejection of representative government.

[54] *Id.* at 220.

Because every individual was continually involved in the identification and furtherance of the general will, there was no need to provide the checks and balances that Locke proposed.

In America, the romantic Rousseauian ideal was admired but inapplicable. Likewise Locke's and Montesquieu's reliance on mixed constitutions could not work in a society that had no distinct political estates or classes. Sovereignty therefore had to be reinterpreted in order to make its division between the individual states and the federal government possible. This division was far greater than the tentative division of sovereignty between different governmental bodies: this was a significant and substantial division that introduced an entirely new form of political organization, not only within the US but worldwide. Again, the concept of sovereignty is not unchanging and singular but has been interpreted over time and according to circumstance. By identifying the different conceptual forms of sovereignty at play and their historical origins, we now have a firmer basis from which to examine how and why American and European conceptions of sovereignty are as presently constituted, and, potentially, to see the ways in which they might change in the future.

C. Contemporary Conceptualizations of Sovereignty: America

Introduction

The reinterpretation of sovereignty by the Federalists has effects that can still be seen today, in contemporary US conceptions of sovereignty. In this section, we examine American conceptions of sovereignty as they appear in a sample of recent writings by US scholars of international law, and those US international relations scholars who deal with international law. We find that the willingness to divide sovereignty does not extend to the sovereignty of the United States, writ large, but does extend to the sovereignty of other countries, in the

sense that it may – in certain circumstances – be limited, overridden or otherwise compromised.

At first glance, the US literature is dominated by two distinct conceptions of sovereignty: first, a statist conception that privileges the territorial integrity and political independence of governments regardless of their democratic or undemocratic character; second, a popular conception that privileges the rights of peoples rather than governments, especially when widespread human rights violations are committed by a totalitarian regime. However, on closer examination, the two conceptions are in fact different manifestations of a single, uniquely American conception of sovereignty—one which elevates the United States above other countries and seeks to protect it against outside influences while, concurrently, maximizing its ability to intervene overseas. The single conception of sovereignty is able to encompass both statist and popular sub-conceptions because their agendas are different, though not mutually exclusive. The statist conception is concerned with protecting the United States against outside influences and has little to say about the sovereignty of other countries. The popular conception is concerned with limiting the sovereignty of other countries and has little to say about the sovereignty of the US.

Two Conceptions of Sovereignty

Stephen Krasner and Louis Henkin provide us with exemplars of the two different US conceptions of sovereignty, with Krasner's work being representative of the statist approach. He argues that it is "[o]nly by creating a mythical past [that] contemporary observers have been able to make facile comments about the impact of globalization on sovereignty".[55] In actual fact, he writes, sovereignty has always been challenged. In recent years that challenge

[55] Stephen D. Krasner, (1999) *Globalization and Sovereignty* in, STATES AND SOVEREIGNTY IN THE GLOBAL ECONOMY 34, 49, (David A. Smith, Dorothy J. Solinger & Stephen C. Topik, eds. 1999).

has come from two different directions: globalization and the rise of human rights. Yet neither of these challenges alters the basic nature of rules, compliance and behavior in the international system: to Krasner, this will always be characterized by "organized hypocrisy".[56] Self-interest is still the defining cause of action, and sovereignty—despite seeming under threat—is not about to disappear, given the powerful state interest in its continued existence.

Henkin's work provides our exemplar of the popular conception of sovereignty, for he sees sovereignty as the primary obstacle to international law *as it should be*. He asserts that the term itself is both misleading and misguided, an anachronistic hangover from the days of princedoms that is "largely unnecessary and better avoided".[57] Whereas Krasner implicitly attributes normative value to state survival, Henkin argues: "The state system is a human creation and a human development; it ought to be continually examined, occasionally calibrated, and sometimes changed, the better to serve human purposes".[58] Indeed, Henkin believes that the international system has already moved toward human values as its organizing principle[59], that "human rights law has shaken the sources of international law, reshaped its character and enlarged its domain"[60], and thus radically derogated from and infringed upon sovereignty.

These two conceptions of sovereignty—statist and popular—permeate most of the US literature on international relations and international law. And, as is demonstrated by our engagement with the work of Robert Keohane, what appear to be different conceptions of

[56] STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).
[57] LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 9 (1995).
[58] *Id.* at 25.
[59] Louis Henkin, *Human Rights and State "Sovereignty"* 25 GA. J. INT'L & COMP. L. 31, 32 (1995-6).
[60] *Id.* at 36.

sovereignty more often than not collapse into a single conception—a conception which generally favors the US.[61]

Military Intervention

Military intervention is one of the key ways in which sovereignty is infringed and the US literature concerning it is particularly interesting for us—because conceptions of popular sovereignty are frequently deployed in justification.[62] Military intervention is often discussed by US scholars under the rubric of pro-democratic intervention, with a subsidiary discussion of pre-emptive/preventive self-defense.[63] So far these arguments have attained relatively little scholarly support—especially outside America. What is interesting for us, however, is to note the ways in which both the statist and popular ideas of sovereignty are used in the US literature. To put it in philosophical terms, Bodinian ideas of sovereignty as absolute, unitary and supreme are common in the literature on pre-emptive self-defense, whereas as more Rousseauian ideas of popular sovereignty are deployed to support pro-democratic intervention. Thus, we should always hold at the back of our minds the question of whose interests are served by the use of these differing philosophical interpretations.

Pro-democratic Intervention

In 1992, Thomas Franck seized upon the idea that governments derive their power and legitimacy from the consent of the governed, and used it to justify military intervention. He identified two emerging trends: legitimacy is increasingly dependent upon democracy; and, as a result, there is an emerging right to democratic governance. Franck attributed to democratic

[61] Keohane, *supra* note 1.
[62] Since 9/11 the academic literature on military intervention has moved away from discussions of humanitarian intervention, and towards work on pre-democratic intervention and pre-emptive self-defense. For this reason, and reasons of space, we limit our discussion here to the two latter forms of intervention.
[63] Pre-emptive self-defense is based upon the Webster doctrine and concerns actions carried out in self-defense once an attack is imminent. Preventive self-defense, on the other hand, does not require that attack be imminent and is of more questionable legal standing. Terming as pre-emptive that which is preventive is part of the attempt to expand the legal definition of pre-emption.

states the power to recognize other states as legitimate, and argued that new regimes "want, indeed need, to be validated by being seen to comply with global standards for free and open elections".[64] However, Franck failed to explain why democratic states chose to do this, and why new regimes felt compelled to prove their democratic credentials. Franck's explanation is simply that, since the end of the Second World War, international institutions—primarily the UN, regional organizations like the European Union and Organization of American States, and NGOs—have all sought to promote democracy. They did so primarily through the adoption of conventions such as the International Covenant on Civil and Political Rights. These conventions form the basis for Franck's right to democratic governance. He makes no mention of the power which accrues to rich countries as a result of the aid and trade they can offer smaller countries; nor is there any mention of the politics of democracy promotion.

What Franck does do is provide a clear link between democracy and sovereignty, or more pertinently, non-democracy and the absence of sovereignty. He writes: "undemocratic processes imposed on a people by their government are almost universally regarded as counternormative and not beyond the purview of the international community".[65] This is a crucial move as, according to Franck, it renders possible and justifies pro-democratic intervention. Of course, the United States, as an extremely powerful and more-or-less democratic country, is immune from such interference; its sovereignty remains intact.

Anthony D'Amato has also linked human rights and intervention, arguing that rules prohibiting intervention "do not constitute the real rules of international law but, rather, are quasi-rules, invented by ruling elites to insulate their domestic control against external

[64] Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AMERICAN JOURNAL OF INTERNATIONAL LAW 46, 48 (1992).
[65] Franck, *supra* note 64 at 83.

challenge".[66] Consequently, sovereignty is no bar to the protection of human rights.[67] Although D'Amato's preference is for multilateral intervention, ideally by the United Nations, his "bottom line is that… *any* nation with the will and the resources may intervene to protect the population of another nation against… tyranny."[68] Again, D'Amato's argument is inapplicable to the United States, except in so far as it facilitates US interventions elsewhere. Similarly, Michael Reisman contends that a coup, putsch, or even just corruption of the electoral process constitutes a violation of popular sovereignty and that the traditional idea of sovereignty, which would have prevented intervention by other states, is irrelevant to such situations. Thus, "a jurist rooted in the late twentieth century can hardly say that an invasion by outside forces to remove the caudillo and install the elected government is a violation of national sovereignty."[69]

Bolstered by the Monroe doctrine of 1823, which sought to bar the European powers from interfering in the Americas and position the US as the regional hegemon, the US entered into the Spanish-American war in 1898. This war was significant because it signaled the emergence of the US on the world stage and marked the creation of the US as a colonial power. The US's long history of involvement in the Americas moved toward the justification of intervening for democracy with the invasions of Grenada (1983) and Panama (1989). For D'Amato, both interventions were lawful and motivated by humanitarianism. The invasion of Grenada was, in his opinion: "a lawful and temporary humanitarian intervention to free the people of Grenada from the tyranny of thugs who had machine-gunned their way into power."[70] Detlev Vagts and Christopher Joyner are less impressed. Vagts argues that the

[66] Anthony D'Amato, *The Invasion of Panama was a Lawful Response to Tyranny*, 84 AMERICAN JOURNAL OF INTERNATIONAL LAW 516, 522-3 (1990).
[67] *Id.* at 522.
[68] *Id.* at 519-20.
[69] W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AMERICAN JOURNAL OF INTERNATIONAL LAW 866, 871 (1990).
[70] D'Amato, *supra* note 66 at 523.

justification for the invasion was flimsy at best. Two reasons were offered to Congress: to rescue US citizens in Grenada and re-establish governmental institutions capable of maintaining peace, order and protecting human rights.[71] However, few of the US citizens actually wanted to leave and the military operation was not a surgical strike to liberate them, but an engaged military maneuver. The second justification for invasion would only be valid if Grenada had actually requested assistance, which it did not. Joyner agrees that it is hard to find a legal justification for the invasion and concedes that the principal reason for intervention was the installation of a government that the Reagan administration did not like.[72]

Pre-emptive Self-Defence

In international law, the right of self-defense can be used to limit sovereignty at the same time that it is deployed to protect it. It has long been accepted that any state which attacks another state waives its right to the protections of sovereignty, within the limits of necessity and proportionality. But what about an attack that has yet to happen, and may never happen? John Yoo argues that the customary international law right to use force in anticipation of an attack is a "well-established aspect of the 'inherent right' of self-defense"[73], an argument he bases on Article 51 of the UN Charter. He claims that, with the concept of imminence having evolved since the development of nuclear weapons, there is a reformulated, expanded test for pre-emption. Yoo asserts that this reformulated test was used to justify the 2003 Iraq War, while accepting that, as a justification, it collapsed in the absence of weapons of mass destruction.

[71] Detlev F. Vagts, *International Law under Time Pressure: Grading the Grenada Take-Home Examination*, 78 AMERICAN JOURNAL OF INTERNATIONAL LAW, 169, 169 (1984).
[72] *See* Christopher C. Joyner, *Reflections on the Lawfulness of Invasion* 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 131 (1984) and SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION AND STATE-BUILDING CAPACITY (2004).
[73] John C. Yoo, *International Law and the War in Iraq* 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 563, 571 (2003).

Reisman, who distinguishes between anticipatory and pre-emptive self-defense, takes as his starting point the evolution of weaponry and the emergence of non-state actors and argues that the dominant conception of self-defense has become superfluous. But while a claim to anticipatory self-defense points to a palpable and imminent threat, a claim for pre-emptive self-defense can only point to a possibility, that which has yet to occur. In an international system where values and perceptions differ markedly, sometimes wildly, acts of pre-emptive self-defense can appear "like a serious or hysterical misjudgment to some actors, and like naked aggression to others".[74]

But the primary danger presented by a doctrine of pre-emptive self-defense is—according to Reisman—not legal or diplomatic but systemic:

> If writ-large and legally available in international law, it could, even more than anticipatory self-defense, lead to greater resort to international violence by further lowering the threshold for unilaterally determined contingencies that warrant acts of self-defense. This could create an imperative for all latent adversaries to strike sooner, in order to strike first, raising the general expectation of violence, and the likelihood of its eventuation.[75]

At this point, Reisman moves into a discussion of regime change—a topic that has not traditionally been singled out for treatment in international law—and argues that it may be lawful if it is appropriate to the context, as well as being necessary and proportionate. Reisman's argument here, in common with the arguments of many other US academics, blurs pro-democratic intervention, humanitarian intervention, self-defense and now regime change in a manner that seemingly justifies whatever the US decides to do, without threatening its sovereignty in any way.

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[74] W. MICHAEL REISMAN, *Assessing Claims to Revise the Laws of War* 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 82 87 (2003).
[75] *Id.* at 89.

Ruth Wedgwood argues that the United Nations should have authorized the invasion of Iraq. Apparently without irony she notes of the United Nations: "decision-making mechanisms that give voice to countries of diverse cultures and regions help to counterbalance self-regarding judgments and discourage unwarranted action".[76] However, she goes on to argue that the debate over the 2003 Iraq War was really a debate about the tension between substantive and procedural law, or between legitimacy and legality. It is clear that she has already decided that the Iraq War was morally right, if perhaps illegal.

Wedgwood argues that the invasion was justified under Security Council resolutions but also offers a supplementary argument: that legal procedure and substance must remain mutually engaged. Accordingly, the procedural common law of the UN Charter has changed in the past when core Charter ambitions were inadequately served by the halting politics of its mechanisms. In other words, it is—Wedgwood argues—quite normal for the UN, or rather its members, to overrule or ignore its procedures when these procedures are out of sync with substantive justice. And so, while "[u]nilateralism sits uncomfortably in a multilateral world", any "possible subjectivity of judgment [over Iraq] … was rebuffed by the Security Council's own diagnostics of the 1997-1998 crisis. The Council found Iraq to be in "flagrant violation" of its obligations".[77]

Curiously, Wedgwood does not consider whether the Council's position between 1998 and 2003 changed, or whether the access provided to UN weapons inspectors in 2002-2003 is relevant to the analysis. And she certainly does not consider the fact that only the most powerful states are able to override UN procedures concerning the use of force.

[76] Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Pre-emptive Self-defence* 97 AMERICAN JOURNAL OF INTERNATIONAL LAW 576, 576 (2003).
[77] Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction* 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 724 726 (1998).

Not all US scholars support unfettered freedom of action for the United States. Mary-Ellen O'Connell, in an article written before the Iraq War, argues that neither anticipatory nor pre-emptive self-defense are lawful and that the US has never supported either argument. She is particularly concerned about claims of pre-emptive self-defense setting precedents that could be used by other states and create systemic instability. For example, pre-emptive self-defense not only "undermines the restraint on when states may use force, it also undermines the restraints on *how* states may use force. Today states measure proportionality against attacks that have occurred or are planned. What measure can be used to assess proportionality against a possible attack?"[78]

Sean Murphy makes the important point that, although the Bush administration found the idea of pre-emptive self-defense attractive and used its rhetoric frequently, "ultimately, when explaining the legal basis for its action against Iraq, the United States did *not* assert that the invasion of Iraq was permissible under international law due to an evolved right of pre-emptive self-defense or that international law was irrelevant".[79] Instead, the US justified the war on the basis of Security Council resolutions, a claim that serves as a precedent "only for future circumstances where an open-ended use of force authorization is issued by the Security Council and then stayed by a cease-fire resolution".[80] In the end, the decision not to assert pre-emptive self-defense as the legal basis for the war left the statist conception of sovereignty intact, though the rhetoric of pre-emptive self-defense—and the arguments advanced in favor of it by some US scholars—still impinge upon that conception as it pertains to other countries. In any event, an extended right of pre-emptive self-defense is unlikely ever

[78] Mary-Ellen O'Connell, *The Myth of Pre-emptive Self-Defence* American Society of International Law 19 (August 2002).
[79] Sean Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L. J. 173, 175 (2004).
[80] *Id.* at 179.

to be used *against* the United States. And of course, the same holds true for other powerful countries. As Martti Koskenniemi points out:

> We deal with military intervention, peace enforcement, or the fight against terrorism in the neutral language of legal rules and humanitarian moralities, and so come to think of it in terms of a policy of a global public realm—forgetting that it is never Algeria that will intervene in France, or Finland in Chechnya.[81]

International law and US domestic law

The peculiarity of contemporary US conceptions of sovereignty is brought into sharp relief in academic discussions of the relationship between international law and US domestic law—a relationship that has generated a substantial literature within the US, not least because of the Alien Tort Claims Act of 1789. This legislation brings customary international law into US courts, and with it, its potential for curtailing the sovereignty of states.

Alien Tort Claims Act and Filartiga

International law considers some crimes so heinous that perpetrators can be brought to justice wherever they are found. This principle of "universal jurisdiction" entitles states to either prosecute accused persons or extradite them to another state that will. The Alien Tort Claims Act ("ATCA") extends the principle of universal jurisdiction to civil litigation, granting jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".[82] The ATCA was enacted as part of the Judiciary Act of 1789, but was largely ignored until 1980 and the *Filartiga*[83] case, when it was

[81] Martti Koskenniemi, *'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159, 172 (2002).
[82] Quoted in BETH STEPHENS AND MICHAEL RATNER INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 5 (1996).
[83] *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

interpreted as providing a cause of action in federal courts in cases involving torture committed by officials of foreign governments. In *Filartiga*, the Federal Court of Appeals, Second Circuit, had to resolve several issues, not least the fact that the ATCA was almost two centuries old. It ruled: "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today".[84] In subsequent cases, other federal courts have accepted this holding. Similarly the court rejected that view that violations committed by states against their citizens are not violations of international law, as "clearly out of tune with the current usage and practice of international law".[85]

The *Filartiga* approach has been attacked by a number of academics, as well as by the administration of George W. Bush. They argue that the ATCA, instead of applying to all torts committed in violation of international law, should only apply to those acts which violate rights under US law. However, in July 2004, in *Sosa v. Alvarez-Machain*[86], the US Supreme Court rejected this attempted reinterpretation. In fact, despite fears that *Filartiga* would unleash a flood of litigation, "only a handful of cases have sustained jurisdiction under the ATCA in the years since the *Filartiga* decision".[87] Beth Stephens, a supporter of the *Filartiga* approach, writes: "One must hope that as they become more familiar with the concepts of international law, US courts will begin to accept international law arguments in a wider range of cases."[88]

Harold Koh—another supporter, and now the Dean of Yale Law School—offers a theory of transnational public law litigation that focuses on the attempts of both state and non-state entities to adjudicate human rights cases, and the arising overlaps between domestic and

[84] *Filártiga* at 10.
[85] Quoted in *id*. at 11.
[86] *Sosa v. Alvarez-Machain*; *United States v. Alvarz-Machain* 124 S. Ct. 2739.
[87] *Id*. at 20.
[88] Beth Stephens, *Litigating Customary International Human Rights Norms*, 25 GA. J. INT'L & COMP. L. 191, 200 (1995-6).

international law.[89] Although "United States courts routinely applied international law in domestic cases" during the mid- to late-nineteenth century[90], more recently two factors have impeded the importation of international law. First, the doctrine of non-self-executing treaties (that is, treaties which must be implemented by statute to acquire domestic legal effect) has been invoked. However, Koh argues that the Supremacy Clause in the US Constitution, which makes treaties the supreme law of the land, does not distinguish between self-executing and non-self-executing treaties.

The second factor identified by Koh is the Act of State doctrine, solidified in *Banco Nacional de Cuba v. Sabbatino*[91], where the US Supreme Court indicated that national courts lack judicial competence to inquire into the legality of acts by foreign states. The *Sabbatino* ruling cast "a profound chill upon the willingness of United States domestic courts to interpret or articulate norms of international law".[92] However, two important trends arose in the late 1970s to counteract this: a growing public acceptance that federal courts should restructure wrongful systems; and an unprecedented growth in transnational commercial litigation, with federal courts increasingly deciding cases brought by individuals and private entities against foreign governments. This led to the question: "if contracts, why not torture?"[93] The two trends came together in the *Filartiga* case.

The history and current interpretation of the ATCA clearly shows the prevalence of a popular conception of sovereignty in US academic discourse. Consider, for instance, the impact on Paraguayan sovereignty of the *Filartiga* case, where the defendant had been a police chief at the time of the torture. However, the ATCA does *not* apply to the US government or its

[89] Harold H. Koh, *Transnational Public Law Litigation* 100 YALE LAW JOURNAL 2347 (1990-1).
[90] *Id.* at 2353.
[91] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).
[92] *Id.* at 2363.
[93] *Id.* at 2365.

officials as defendants (because of "sovereignty immunity" and the "political questions doctrine"), nor to acts committed within the United States. So supporters of the ATCA are in no way challenging the sovereignty of the United States. For this reason, one might ask why the Bush administration and some academics regard the *Filartiga* line of cases as a threat. As the following section suggests, it is not just sovereignty they perceive to be threatened, but the balance of power between the federal government and the constituent states of the United States.

The Anti-Internationalist Response

International Law as US Law

Curtis Bradley and Jack Goldsmith argue against what they refer to as the "modern position", which Bradley defines as "the proposition that customary international law has the status of federal common law"—and therefore pre-empts inconsistent state law.[94] Bradley claims that one of the modern position's central arguments, that customary international law had the status of federal law in the nineteenth century, is false. Instead, the relevant precedent is *Erie Railroad Co. v Tompkins* (1938),[95] which the modern position contradicts. According to Bradley, *Erie* was significant because it rejected two principles which had previously underpinned the jurisprudence: that federal courts can apply law not derived from a sovereign source, and that courts merely discover the common law rather than make it. Thus, to Bradley, *Erie* ended the debate as to whether customary international law is federal law, and whether federal courts can apply customary international law which has not been incorporated by the political branches.

[94] Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position* 110 HARVARD LAW REVIEW 815 (1997).
[95] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

Bradley and Goldsmith are particularly concerned about what they identify as "new" customary international law, which arose mainly in the twentieth century, predominantly concerns human rights, and is "less consensual and less objective than traditional customary international law, and … more likely to conflict with domestic law".[96] More to the point, they fear that this new law will "regulate many areas that were formerly of exclusive domestic concern".[97]

From a similar political standpoint, John Yoo and Eric Posner argue that the US Constitution recognizes no judicial body as superior to the Supreme Court, and that this renders international courts irrelevant. Yoo and Posner even write that the International Court of Justice "insults American sovereignty by attempting to bypass the executive branch, which is constitutionally charged with conducting foreign policy for the nation."[98] They are particularly incensed that the Federal Republic of Yugoslavia could bring a case against the United States during the 1999 Kosovo intervention, despite the fact that the case was dismissed on jurisdictional grounds. Curiously, this disdain for international law does not extend however to the Security Council—presumably because of the US veto—since Yoo relies on Council resolutions to justifying the 2003 Iraq War.[99] In any event, it is clear that Goldsmith, Bradley, Yoo and Posner ascribe to a statist conception of sovereignty, or at least US sovereignty. But what of those who oppose their views?

Koh disagrees that allowing treaties to have direct effect in US law is an affront to US sovereignty:

[96] Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts – Before and After* Erie, 26 DENV. J. INT'L L. & POL'Y 807, 822 (1998).
[97] Bradley, and Goldsmith, *supra* note 94 at 821.
[98] Eric A. Posner, and John Yoo, "International Court of Hubris," *Wall Street Journal* 7 April 2004.
[99] Yoo, *supra* note 73.

> [I]f one uses 'sovereignty' in the modern sense of that term—a nation's capacity to participate in international affairs—I would argue that the selective internalisation of international law into US law need not affront US sovereignty. To the contrary … the process of visibly obeying international norms builds US 'soft power,' enhances its moral authority, and strengthens US capacity for global leadership in a post-September 11 world.[100]

Koh argues that the desire to remain unfettered by international law is "ultimately… more America's loss than that of the world"[101] because it means that the US rarely gets credit for the good it does, including by providing leadership on democracy and human rights. Moreover, "by opposing the global rules, the United States can end up undermining the legitimacy of the rules themselves… [and] disempower itself from invoking those rules, at precisely the moment when it needs those rules to serve its own national purposes."[102]

Although he has a positive view of international law, we should note that Koh focuses on the law's ability to re-enforce US power and thus, presumably, its sovereignty—or at least its ability to not worry about the negative consequences of diminished or shared sovereignty.

Koh believes the correct reading of *Erie* and *Sabbatino* is that federal courts retain legitimate authority to treat established rules of customary international law as federal common law: "Far from being novel, the "modern position" is actually a long-accepted, traditional reading of the federal courts' function. Both before and after *Erie*, the federal courts issued rulings construing the law of nations. *Erie* never intended to alter or disrupt that practice".[103] "At bottom," Koh argues, "Bradley and Goldsmith's complaint reduces to this: 'unelected federal judges apply customary international law made by the world community at the expense of

[100] Harold H. Koh, *On American Exceptionalism*, 55 STAN. L.REV. 1479, 1479 (2002-3).
[101] *Id.* at 1485.
[102] *Id.* at 487.
[103] Harold H. Koh *Is International Law Really State Law?* 111 HARV. L. REV. 1824, 1841 (1997-8).

state prerogatives'".[104] And to this he responds: "So what else is new?"[105] Moreover, "Bradley and Goldsmith nowhere explain why explicit federal legislation—a process notoriously dominated by committees, strong-willed individuals, collective action problems, and private rent-seeking—is invariably more democratic than the judge-driven process they criticize."[106]

On the issue of a "new" and subversive customary international law, Koh replies that there is "no clear line [which] separates the 'old' from the 'new' customary international law because both have influenced American law through precisely the same transnational legal process."[107] Moreover, since the United States has long been the most influential country in the making of customary international law, including in the human rights field, it is hardly being forced into positions it opposes. But Koh, Bradley and Goldsmith, despite their differences, share a statist conception of US sovereignty. They simply differ in their assessments of where US interests lie.

Is International Law really Law?

A final strand of the anti-internationalist literature denies that international law is really law and therefore should not bind the US at all. This school of thought focuses primarily on the law regulating the use of force, and is motivated by a desire that nothing whatsoever should stand in the way of US sovereignty, including its sovereign right to assert itself abroad.

Michael Glennon argues that, since the 1999 Kosovo intervention, the rules concerning the use of force are "no longer regarded as obligatory by states" and "the [UN] Charter's use-of-

[104] *Id.* at 1852.
[105] *Id.* at 1852.
[106] *Id.* at 1854.
[107] *Id.* at 1859.

force regime has all but collapsed".[108] The international system has become split into a *de jure* system where "illusory rules" govern the use of force and a *de facto* system where states follow self-interest and the legal rules are all but ignored. Maintaining the fiction that states are constrained by international rules is, according to Glennon, more dangerous than having no rules at all because it engenders a false sense of security.

Glennon argues that the United States and NATO have decided to follow a "vague new system that is much more tolerant of military intervention but has few hard and fast rules".[109] In essence, the US and other powerful Western states may act as they choose; they are bound only by those rules they wish to follow, as they interpret them. But we should not mourn the death of the old system, for it was incapable of recognizing a simple truth: that the core threat to international security comes, not from interstate violence, but from state sponsored terrorism.[110] In this context, "[t]he risks posed by a universal system that provides no escape from lawfully centralized coercion remain greater than the risks of a system that lacks coercive enforcement mechanisms."[111] Glennon does offer an alternative however: an acceptance that states are not equal in power, wealth or their commitment to human rights, and that some are less sovereign than others. Securing justice requires power, not law, though if "power is used to do justice, law will follow".[112]

In a *Wall Street Journal* op-ed in 1997, John Bolton, who was then a Fellow of the American Enterprise Institute and later became US Ambassador to the United Nations, wrote: "Treaties are law only for US domestic purposes" and that, "[i]n their international operation, treaties

[108]Michael J. Glennon, *The Fog of War: Self-Defence, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 539, 540 (2001-2). MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO (2001).
[109] Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, 78 FOREIGN AFFAIRS, 2, 2 (1999).
[110] *Id.* at 2-3.
[111] *Id.* at 5.
[112] *Id.* at 7.

are simply political obligations".[113] In other words, unless a treaty has been implemented by legislation, it is simply a political consideration and may be ignored. The same approach is evident in Bolton's take on the International Criminal Court, which he rejects on the basis of sovereignty and the separation of powers doctrine. Similarly, Bolton believes that what is at stake in the debate over the United Nations is "the basic principle underlying constitutional representative government: legitimate sovereignty ultimately rests with the citizens".[114] Thus Bolton's approach, like that of the other anti-internationalists, has popular elements that—with regard to the United States at least—work to reinforce a strongly statist conception of sovereignty.

Although it is easy to score points off Bolton, his central argument needs to be addressed. Is the international system simply about power? Does might make right? Why is it not in the interest of the United States to acquire what it wants, however it can, regardless of international law? At present critics respond to the argument in moral terms, but this is a weak defense because Bolton's argument is implicitly moral. Those who argue that it is in the self-interest of the United States to garner world support rely upon the assumption that the United States needs that support. This, Bolton et al. deny.

Jeremy Rabkin likewise believes that international politics cannot be constrained by international law and that it is dangerous to allow restrictions on what could be entirely legitimate actions, such as anticipatory self-defense. Any supposition that there could be an underlying consensus which renders force unnecessary is greatly mistaken[115] and the US "will

[113] *Quoted in* Profile of John R. Bolton, International Relations Centre, available at http://rightweb.irc-online.org/ind/bolton/bolton.php , accessed 1 October 2005.
[114] John R. Bolton, *Downer is Right to Tell the UN to Get Lost*, AUSTRALIAN FINANCIAL REVIEW, August 31 2000, available at http://www.aei.org, accessed 1 September, 2005.
[115] JEREMY A. RABKIN, THE CASE FOR SOVEREIGNTY: WHY THE WORLD SHOULD WELCOME AMERICAN INDEPENDENCE 7 (2004).

not entrust its security to 'authorities' that have no means of protecting the United States".[116] Since international authority cannot compel the deployment of forces it cannot protect nations when needed; international organizations simply cannot perform the functions of states. Yet Rabkin insists that unfettered US sovereignty should not be feared; indeed he doubts that the world is scared of America. Most importantly, Rabkin considers sovereignty to be a good thing: it can promote peace among states but it can also enable people within a particular state to focus on how to improve their state without the distraction of intervention.

We thus see several elements in the anti-internationalist conception of sovereignty. First, there is an overriding concern that international law not impede US actions. Any attempts to impose international rules upon the US are mistaken and ill-conceived. Moreover, compliance is not guaranteed and states will defect if it is in their interest to do so.[117] Both these elements lead to the questioning of whether international law is really law. According to this school of thought, international law is little more than wishful thinking and incapable of meeting the demands of international politics. All the anti-internationalists share the same underlying cynicism about the ability of law to constrain power. In the end, their conception of US sovereignty involves little more than that—unadulterated, overwhelming power. At the same time, this conception is counterbalanced by the popular idea of sovereignty – an idea that continues to shape the American political psyche.

Extra-territoriality

Kal Raustiala argues that there are two principal elements to the traditional idea of sovereignty. First, states have the power to participate in the creation of their legal obligations and are not subject to rules to which they have not agreed. Second, states are not subject to

[116] *Id.* at 11.
[117] *See* JACK L. GOLDSMITH AND ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) and Andrew T. Guzman, *A Compliance-based Theory of International Law,* 90 CAL. L. REV. 1823 (2002) for an application of rational choice to international law.

other states' jurisdiction—and here again sovereignty is being challenged. Raustiala argues that "territoriality has been slowly unbundled from sovereignty".[118] He explains that US law on jurisdiction has undergone a substantial evolution over the last two centuries, de-emphasizing strict territoriality in favor of a more flexible interpretation. Raustiala points out that since the 1940s US federal statutes in a number of areas have been seen as having extraterritorial effect (antitrust, securities, criminal law, intellectual property, for example). Moreover, the Bill of Rights, which was initially seen as only applying within US territory, now applies to all US citizens regardless of their physical location. What does this mean for sovereignty, for, as Raustiala puts it, "jurisdictional notions draw so deeply from international concepts such as sovereignty and statehood".[119] The traditional Westphalian idea of sovereignty, which brooked no violation of sovereignty save in very limited cases such as self-defense, has gradually been altered. As Raustiala argues, the unbundling of territoriality from sovereignty has removed the central limitation upon states' ability to interference in other states' affairs. But while US law has acquired extraterritorial effect, there has been no corresponding application of another state's law to the US: "extraterritoriality – particularly the à la carte extraterritoriality of the last fifty years – is … unilateralist".[120] This leads Raustiala to a second argument, that: "the existing pattern of legal spatiality reflects power and interest".[121]

So how did this evolution happen? Raustiala argues that the Westphalian revolution transformed state power from being status-based to being location-based. In an attempt to limit conflict and create a settled order, the idea of sovereign states was solidified. The autonomy of sovereign states still held good in 1891 when the Supreme Court ruled in *Ross*

[118] Kal Raustiala, *The Evolution of Territoriality: International Relations and American Law*, in TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION 219,220 (Miles Kahler & Barbara Walter, eds. 2006).
[119] *Id.* at 220.
[120] *Id.* at 247.
[121] *Id.* at 220.

that the Constitution could have no operation in another country.[122] But by 1957 *Ross* was declared by the Supreme Court to be "a relic from another era".[123] What happened in between these two cases to undermine this aspect of sovereignty so completely—and in such a short period of time? Empire, *tout court*. In 1891, America was not an imperial power, or even a particularly significant one. By 1898, the US had annexed Hawaii and defeated the Spanish to gain control of Puerto Rico, Cuba, Guam and the Philippines. Until then, the US had never had to deal with the question of legal extraterritoriality. But now the US needed to resolve the legal standing of US law in its colonies. Legal spatiality was further stretched in the 1940s when federal courts started using the "effects" test for asserting prescriptive jurisdiction. This meant that effects on domestic markets were enough to trigger jurisdiction over foreign conduct. It no longer mattered where the activity in question took place but only where its effects were felt. Moreover, a double standard exists when it comes to the application of the Constitution: it applies to all US citizens no matter where they are, but only to non-US citizens when they are in the US.

Now, many may want to attribute the loosening of legal spatiality to the inexorable rise of globalization, rather than American malfeasance. To this, Raustiala counters: "why does the current wave of globalization correlate with a decoupling of territory from sovereignty in American law, while the first wave correlated with the height of legal spatiality?"[124] Quite simply, these changes do not reflect normative commitments of American constitutional theory or wider legal principles. They correspond to shifts in underlying political incentives and capabilities. When strict territoriality has benefited the US, more territorial approaches have been favored. As US power has grown, and with it US interests abroad, the US has been increasingly willing and able to assert its law extraterritoriality. Raustiala is explicit: "With

[122] *Ross v. McIntyre* 140, U.S. 453 (1891).
[123] *Reid v. Covert* 354 U.S. 1 (1957) *quoted in* Raustiala, *supra* note 118 at 225.
[124] *Id.* at 235.

few exceptions, extraterritoriality has been asserted to benefit the United States, and spatial limits to the law have been used to limit the rights and powers of outsiders."[125]

Equally as convinced that the US uses the sovereignty discourse to advance its interests via extraterritoriality, Nico Krisch argues that the principle that states are not subject to the jurisdiction of other states has "come under severe pressure from the United States".[126] In addition to stretching the traditional boundaries of international law by applying US law extraterritorially, Krisch argues that the US has attempted to place itself above the law, and has often succeeded in so doing. Krisch sees this happening in a number of ways: firstly, through the United Nations Security Council. Because of the restricted membership of Council, the US has a disproportionate amount of influence and has used the Council more and more over recent years. The Council has broadened its powers, including establishing itself as a law-enforcement organ in matters of peace and security. This is important because the stronger the Council is, the stronger the US is, and yet when the Council opposes US interests, the US will attempt to step outside of its strictures. The US also enjoys a privileged position in the World Bank and the International Monetary Fund. The World Bank's focus on "good governance" has justified even greater intrusion into the internal affairs and structures of states, even specifying which kind of democracy they should have. The US also benefits from exclusive rule-making and informal networks, for example the Organization for Economic Cooperation and Development (OECD) establishes standards which other states must observe if they wish to gain access to OECD markets.

According to Krisch the US also strengthens its hand by applying US law extraterritorially. This includes certification mechanisms which, if not complied with, can result in sanctions.

[125] *Id.* at 236.
[126] Nico Krisch, *More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law* in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135, 144 (Michael Byers & Georg Nolte, eds. 2003).

Likewise aid is often contingent on the fulfillment of certain criteria. The Africa Growth and Opportunity Act of 2000 requires the establishment of market economies, political pluralism and anti-corruption measures—and compliance is assessed on a yearly basis.[127] The use of unilateral sanctions such as the Helms-Burton Act is, according to Krisch, "a tool for the enforcement of law as defined or interpreted by the United States; international law does not necessarily play a role".[128] Through the Alien Torts Claims Act, the US has used its courts as international courts. However, the ATCA does not apply to the US government or its employees. Thus Krisch concludes: "One can hardly avoid the impression that, in the United States' view, international law is subject to US governmental powers and, specifically, to the US constitution".[129] This is partly due to the reverence with which the Constitution is viewed but also, and importantly for our argument, the increasing emphasis on popular sovereignty in constitutional theory.

The case of Guantanamo Bay seems to confirm Raustiala's and Krisch's analyses. The legal status of Guantanamo Bay remains unclear. While the US essentially rules it absolutely, it is in fact leased from Cuba, which retains ultimate sovereignty. This has meant that the Bush administration has felt able to argue that Guantanamo Bay is outside of US jurisdiction. This argument was rejected by the US Supreme Court, but then endorsed by Congress, which effectively overruled the Court by denying federal courts jurisdiction over Guantanamo Bay. Given the willingness of the US to extend its jurisdiction extraterritorially, such reticence may seem counterintuitive. In reality it simply suited US interests – or, at least, US interests as perceived by the Bush Administration – to create a "legal black hole".[130] Essentially, the US government deliberately avoided bringing the detainees within the territorial sphere of its own

[127] *Id.* at 160-1.
[128] *Id.* at 162.
[129] *Id.* at 165.
[130] Guantanamo was termed a "legal black hole" by Lord Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 27TH F. A. MANN LECTURE November 27 2003, available at: http://www.statewatch.org/news/2003/nov/guantanamo.pdf.

absolute sovereignty, to a place where severe limitations on the sovereignty of another state gave them absolute power without any sovereign responsibilities.

The Bush administration has similarly sought to avoid the constraints of international law by designating Al Qaida and Taliban fighters as "enemy combatants" and not prisoners of war (POWs) who would have the protections of the Geneva Conventions. Essentially, by refusing to treat their opponents as state actors, the Bush Administration was denying them any of the recognition or rights associated with sovereignty. As with Guantanamo Bay, the move entailed maximizing the sovereign prerogatives of the US while denying any such prerogatives to its opponents.[131] Yoo, for example, argued that Al Qaida members are not protected because Al Qaida is a "non-State actor…[and] cannot be a party to the international agreements governing war".[132] Moreover, the Taliban are not protected either because, although Afghanistan signed the Geneva Conventions and its Protocols, it is a failed state[133] – and therefore implicitly not sovereign.

Yoo buttressed his position with a claim to preventive self-defense, as discussed above: "we are in the middle of an unconventional war. Our only means for preventing future terrorist attacks, which could someday involve weapons of mass destruction, is to reply on intelligence

[131] Jay S. Bybee, *Department of Justice Memo to White House and Defense Department Counsels regarding the Application of the War Crimes Act and the Geneva Conventions*, Jan. 22, 2002, 1. There are multiple memos concerning torture but the preceding memo and the two following are the most significant Jay S. Bybee, *Department of Justice Memo to the White House Counsel regarding the Definition of Torture*, Aug. 1, 2002; and John C. Yoo, *Department of Justice Memo to White House Counsel Stating that Interrogation Methods used on al Qaeda Prisoners Comply with International Treaties Prohibiting Torture*, Aug. 1, 2002. All available at George Washington University's National Security Archive: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/index.htm.

[132] *Id.* at 2. Yoo initially denied that he was involved in any of the torture memos but, in January 2005, he wrote: "I worked on and signed the department's memo on the Geneva Conventions and helped draft the main memo defining torture". John C. Yoo, *Commentary: Behind the 'torture memos*, UC BERKELEY POINT OF VIEW, January 4, 2005, downloaded from: http://www.berkeley.edu/news/media/releases/2005/01/05_johnyoo.shtml, accessed 19 June 2007.

[133] *Id.* at 2.

that permits pre-emptive action".[134] The denial of sovereign prerogatives extended to the question of prosecuting the detainees or eventually releasing them. Goldsmith and Posner argued that Al Qaida and Taliban fighters should not be put on trial because they are unlike anything we have witnessed or fought before and therefore new approaches and new rules are needed. However, Goldsmith and Posner were willing to draw on the sphere of sovereign prerogatives for analogies, if not as a source of binding law when they wrote that: "the laws of war permit detention of enemy soldiers without charge or trial until hostilities end".[135] Provided that the status of enemy combatants (note: not POWs) is determined by "a rigorous process … that includes some form of representation for the detainee", then indefinite detention is, for Goldsmith and Posner, legally acceptable.

Clearly then sovereignty is not an historical constant nor does it reflect an inescapable truth about the nature of states. Rather, as this section has sought to demonstrate, sovereignty has been re-interpreted to further US interests: the sovereignty of the US is absolute and beyond challenge, whereas the sovereignty of other states is dependent upon an ever-changing set of criteria. In truth however, the loss or diminution of sovereignty is less about the actions of the target state than it is about US interests. Sovereignty is there to be manipulated, to defend or advance US interests, and so far the US has proved remarkably adept at re-casting sovereignty to suit its needs.

D. CONTEMPORARY CONCEPTUALIZATIONS OF SOVEREIGNTY: EUROPE

[134] John C. Yoo, *Commentary: Behind the 'torture memos*, UC BERKELEY POINT OF VIEW, January 4, 2005, downloaded from: http://www.berkeley.edu/news/media/releases/2005/01/05_johnyoo.shtml, accessed 19 June 2007.
[135] Jack L. Goldsmith & Eric A. Posner, *A Better Way on Detainees*, THE WASHINGTON POST, August 4, 2006, available from http://www.law.unchicago.edu/news/news08.04.2006:posnersaysterroristtrialsunwise.html donwloaded June 1, 2007.

We now turn our attention to the contemporary conceptions of sovereignty which dominate European scholarship. We begin by justifying our decision to use the EU as our referent object, rather than the individual European states (not all of which are members of the EU). And the complexity does not end there: the European literature is divided into two camps: the literature on European integration in which sovereignty is a key question, and the literature on the concept of sovereignty, mainly conducted by international relations theorists, political philosophers and international lawyers. However, once the differing ideas have been untangled, our central argument is that, despite an apparent unwillingness to recognise it as such, European conceptions of sovereignty are as affected by geopolitical circumstances – and therefore just as self-serving – as American ones.

Sovereignty, the EU, and the EU as a sovereign entity

Is the EU a sovereign entity? And is it meaningful to speak of a European conception of sovereignty, rather than a French, German, British, etc. conception of sovereignty? No one seriously argues that the EU member states have lost their sovereignty entirely. And the primary way in which we see European states using ideas of sovereignty, unsurprisingly, relates to the EU. Michael Newman points out: "it is easier to generate opposition to the Maastricht Treaty or to entry into the European Union by suggesting that the 'nation-state', 'sovereignty' and 'democracy' are in danger than to concentrate on detailed technical issues".[136] However, while ideas of sovereignty are most frequently deployed by Eurosceptics, such arguments can also be used to support European integration. Here we see arguments about sovereignty blending into arguments about power and autonomy: being in the EU makes a state stronger, richer and more influential.

[136] MICHAEL NEWMAN, DEMOCRACY, SOVEREIGNTY AND THE EUROPEAN UNION 3 (1996).

So individual member-states use the sovereignty discourse to define and affect their relations with the EU, but can we talk of the sovereignty of the EU? Is the EU a sovereign actor which is capable of using the sovereignty discourse itself? The case for EU sovereignty rests upon the supremacy of EC law. Grainne De Búrca identifies two main questions here. Firstly, does the supremacy doctrine necessarily entail or presuppose a claim to sovereignty on behalf of the EC, or even the EU? And secondly, does this mean that member-states have lost or abandoned their sovereignty?

A claim to something like sovereignty was implicitly made by the European Court of Justice (ECJ) through its assertion of direct effect in the *Van Gend en Loos* case (1963)[137] and the supremacy doctrine in *Costa* (1964)[138]. As De Búrca points out, the member states have had the opportunity to challenge *Van Gend* and *Costa* but have not and the twin principles of direct effect and supremacy remain central to the legal conception of the EC.[139] But does the supremacy of EC law entail sovereignty as such? The argument that it does rests upon the idea that the EC is sovereign, not because of the supremacy of EC law, but rather vice versa: EC law could only ever be considered as supreme because the claim to sovereignty was already implicit in the nature of EC. The original logic for creating the Common Market established four main objectives, as outlined in *Van Gend*. First, that a common market should be established. Second, that "institutions endowed with sovereign rights", or law-making institutions, should be set up. Third, the creation of embryonic democratic elements (this was 1963) and, finally, the preliminary reference mechanism which asserted that community law could be invoked. It is these four founding ideas of the EC that has created the fledgling claim to sovereignty. This argument is also reinforced by the fact that the majority of member states accept the primacy of the European legal order most of the time. However, as De Búrca points

[137] *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62 ECR 1 (1963).
[138] *Flaminio Costa v. E.N.E.L.*, Case 6/64 ECR 585 (1964).
[139] Gráinne, De Búrca, *Sovereignty and the Supremacy Doctrine of the European Court of Justice* in SOVEREIGNTY IN TRANSITION 449 (Neil Walker, ed. 2003).

out, although member states acquiesce in practice, they have different theoretical explanations for why they do so. And, significantly, "[v]ery few of these perspectives expressly include recognition of the EC or the EU as a fully sovereign polity and may involve the assertion of a residual but ultimate national constitutional control over the recognition of the authority of the EU legal order".[140] De Búrca goes on to argue that the absence of more vociferous assertions of member states' sovereignty can be seen as evidence of the fact that some of the more traditional ideas of sovereignty are changing.

So if the EU is sovereign, what does this mean for the sovereignty of member states? De Búrca makes an interesting point: since *Costa* and *Van Gend* there have been very few judgments in which reference has been made to the term "sovereignty", either in relation to the member states or in relation to the EU itself. Maybe this tells us all we need to know about the thorny question of sovereignty in the EU and of the EU: the question is assiduously avoided. Bruno de Witte draws a distinction between the limitation of sovereignty on the one hand, and the transfer of sovereignty on the other. The former is possible under a number of national constitutional provisions, and is also reflected in the judgments of the ECJ. At the same time, few if any member states are willing to accept that their membership in the EU has entailed a transfer of ultimate legal authority. Their position is that states have delegated authority, which they can take it back at any time, and have not transferred or alienated their sovereignty.

Another approach would be to treat sovereignty as "shared" or "divided", meaning that sovereignty has been transferred in certain spheres but not others. This idea of sovereignty is useful in that it enables us to accept the reality that ultimate authority is split between different jurisdictions or bodies. However the idea of functionally limited sovereignty is

[140] *Id.* at 455.

oxymoronic. Ultimately De Búrca concludes that neither of these accounts – a complete transfer of sovereignty or functionally limited sovereignty – provide a satisfactory account "in conceptual or in practical terms"[141] for the reality of today's EU: the question remains unanswered.

Things may be further complicated by the way in which EU accession is handled. It is the EU as a collectivity, an entity in and of itself, that imposes entry requirements on potential members. Although different member states have different positions and push for different outcomes, to non-EU states, the EU presents a remarkably united front. So, is the EU using the discourse of sovereignty to empower itself? Later in this paper we take Turkey as our primary case study because it, more than any other potential or recently acceded member state, has provoked strong resistance and fears—many of which have been expressed through the sovereignty discourse.

The European approach to sovereignty has two principal dimensions: a theoretical debate and an effort to assess the phenomenon of sovereignty within the context of European integration. In this latter aspect the European approach is broadly similar to the American approach, that is, it is concerned with sovereignty as a phenomenon, rather than a concept or how the debate around the concept operates. This section will therefore start by exploring the European approach to the sovereignty debate, then turn to the European integration (EI) literature and its assessment and interpretation of sovereignty. But before moving into analysis, one final difference from the US literature should be noted: for reasons of recent history and geopolitical circumstance, Europe lacks the luxury of certainty and clarity which characterizes the American conception of sovereignty. In short, Europeans have been forced to ask harder questions about sovereignty.

[141] *Id.* at 460.

The European Sovereignty Debate

While Keohane accepts the standard interpretation of European sovereignty as pooled, European scholars who write as observers of the sovereignty debate, rather than as analysts of European integration, adopt a more questioning attitude toward sovereignty. Indeed, in Keohane's picture of the European idea of sovereignty, this literature is absent.

Taxonomy

The principal way in which European scholars have dealt with sovereignty is through taxonomy, that is, focusing on how to categorize and define sovereignty. However, we argue that such approaches fall into the standard form of conducting an intellectual inquiry into sovereignty, that is, they focus on sovereignty as either a concept or a phenomenon. When sovereignty is seen as a concept, European scholars divide into two camps: they see the concept either as incoherent, or as redundant. When sovereignty is viewed as a phenomenon, they generally ask whether it is in decline or not, and whether we should be happy about this or not. In both of these permutations, the idea that sovereignty is historically contingent and multifaceted is absent. Consequently, much confusion results as sixteenth century Bodinian ideas of sovereignty are mixed together with eighteenth century Rousseauian ideas of popular sovereignty.

We begin this section by identifying these differing uses and conceptualizations of sovereignty and, in this respect, will share the core concern of this literature: the effort to bring clarity to the concept of sovereignty. The first step taken by most European theorists embarking on this task is to distinguish between the legal and political uses of the term "sovereignty". In this respect the legal use of sovereignty is the least controversial and most agreed upon. Legal, or jurisdictional sovereignty as Alan James calls it, is the "extent to

which a state is under no specific or general international obligations regarding its internal behavior and decision making".[142] Similarly, Andreas Hasenclever et al's division of sovereignty into institutional and material amounts to a division between the legal and political. [143] They define institutional sovereignty as a potential source of power but not a form of power itself. In other words, sovereignty is "an institution … constituted by certain norms and rules which depend on the recognition by, and the reproduction in the practice of, other actors, first and foremost other *states*".[144] However, this last definition hints at a serious problem: most European authors are unsure whether sovereignty is a legal or a political concept, and, indeed, whether the two different meanings of sovereignty can be split apart. And if they can be split, does one concept have meaning without the other? What seems to be implied in most of the literature is that the political and legal definitions of sovereignty are two sides of the same coin.

The political side of the concept is defined in broadly similar ways. Hasenclever et al define their material sovereignty as "the *de facto* power and control of the state vis-à-vis domestic sovereignty and the external environment". One of the seminal European definitions of sovereignty, F. H. Hinsley's, is set in primarily political terms: "The idea that there is a final and absolute political authority in the political community…and no final and absolute authority exists elsewhere".[145] Sovereignty is, in essence, about the relationship between political society and government, which in turn produces the desire to see society and government as identical or aspire that they may be so.[146] This definition introduces us to another key element of the definition of sovereignty in Europe: the relationship between

[142] Alan James, *The Practice of Sovereign Statehood in Contemporary International Society* 47 POLITICAL STUDIES 457, 457 (1999).
[143] Andreas Hasenclever; Peter Mayer; Volker Rittberger; Frank Schimmelfennig; & Christina Schrade, *Sovereignty, International Democracy, and the United Nations*, (Tübinger Arbeitspapiere zur Internationalen Politik und Friedensforschung, Nr. 26).
[144] *Id.*
[145] Robert Jackson, *Introduction: Sovereignty at the Millennium* in SOVEREIGNTY AT THE MILLENNIUM 1, 11 (Robert Jackson, ed. 1999).
[146] See the section on Rousseau at 2.4.

sovereignty and the state and the implicit statism in the vast majority of definitions of sovereignty. For Hinsley, sovereignty is essentially a question of the political organization of society. Indeed, law makes few entries into Hinsley's magnum opus.

European academic lawyers are, however, no clearer on the concept—despite the fact that a relatively uncontested notion of legal sovereignty exists. Both Neil MacCormick and Gerry Simpson argue that to define sovereignty in purely legal terms is to miss a very great part of what sovereignty is. Both authors question whether sovereignty is a political or a legal concept.[147] MacCormick notes that the concept of sovereignty "hovers on the edge of the political and yet also on the edge of the legal. Is it a politico-legal concept, or rather two concepts, one a political one and one a legal one, each happening to be signified by the same word in the English language?"[148] Thus, while MacCormick offers a legal conception of sovereignty, he offers a political one too: "a question of who obeys whom, only the ultimate commander in a chain of command being a sovereign."[149]

Simpson, in asking whether sovereignty is a political or legal concept, offers up two types of sovereignty: juridical and social, which comport, like Rittberger et al, to the traditional legal/political split. What is interesting, however, is Simpson's point about these two sovereignties. He argues that typically the sovereignty literature commits two errors. Firstly, it conflates social and juridical sovereignty, thus the penetration of Coca Cola into states is seen as having an impact upon the juridical notion of sovereignty. The second error is the opposite mistake: to radically separate the social from the juridical.[150]

[147] Simpson, Gerry, *The Guises of Sovereignty*, (Working Paper to be presented at Sovereignty and its Discontents Seminar, November 2005, (never presented) available at http://www.said-workshop.org, accessed January 2006).
[148] Neil MacCormick, *Beyond the Sovereign State* 56 MOD. L. REV. (1993) 1-18.
[149] *Id.* at 12.
[150] Simpson, *supra* note 147.

And so the double concept of sovereignty is common within the European literature. Robert Jackson sums up the division nicely when he writes that there are two notions of sovereignty: "The first is a notion of authority and right, but the second is a notion of power and capability."[151] He argues that historians, international lawyers and political theorists tend to operate with the first concept, while political economists and political sociologists tend to employ the second. However, both MacCormick and Simpson are unhappy with the idea that one notion of sovereignty would suffice, with good reason as MacCormick makes clear. He writes: "From a jurisprudential point of view, unease about sovereignty is perhaps antediluvian. There are not many unreconstructed Austinians to be found anywhere now."[152] To MacCormick, the Austinian idea of sovereignty as requiring no higher body is rather superfluous. From a jurisprudential point of view: "there is no compulsion to regard 'sovereignty', or even hierarchical relationships of superordination and subordination, as necessary to our understanding of legal order."[153]

Yet despite MacCormick's disdain for positivism it remains a powerful force in international legal theory. The classical criteria for recognition are traditionally found in the 1933 Montevideo Convention on Rights and Duties of States. For a state to be legally recognized it must possess "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States."[154] However, as Ian Brownlie notes, while these criteria form the foundation of jurists' definition of statehood, they are "no more than a basis for further investigation".[155] James Crawford (an Australian who has spent the last fifteen years teaching at Cambridge University) adds two more criteria to the list:

[151] Jackson, *supra* note 145 at 2.
[152] MacCormick, *supra* note 148 at 2.
[153] MacCormick, *supra* note 148 at 10.
[154] Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 LNTS 19.
[155] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 72 (4th ed.1990).

independence, that is, exclusive competence of a state in regard to its own territory[156], and sovereignty. Crawford notes that the term "sovereignty" is sometimes used in place of "independence" but a better meaning of sovereignty is "the plenary competence that States *prima facie* possess".[157] To this list Crawford adds five more criteria which are sometime seen as necessary: 1) permanence, 2) willingness and ability to observe international law, 3) a certain degree of civilization, in the sense of "a certain minimum of order and stability",[158] not a certain level of culture or development, 4) recognition by other states and 5) legal order.

In Crawford's opinion, the term "sovereignty" is a "somewhat unhelpful, but firmly established, description of statehood; a brief term for the State's attribute of more-or-less plenary competence."[159] He argues that it is not a right or, somewhat confusingly, a criterion for statehood,[160] but rather that the way in which the term is used is really quite separate from what it actually means. It actually means plenary competence but it is most commonly used to mean "the totality of international rights and duties recognized by international law as residing in an independent territorial unit – the State."[161] It should not be confused with the constitutional question of supreme competence within a state: "the 'sovereignty of Parliament' could coexist with the effective abandonment of the sovereignty of the United Kingdom."[162] Moreover, it should not be confused with the exercise of "sovereign rights". According to Crawford a state may continue to be sovereign even though important government functions are carried out elsewhere. And finally, "sovereignty" does not mean actual equality of rights or competences. A state's competence may be restricted by constitution, treaty or custom and still be "sovereign". The point is that the term "accurately

[156] *Island of Palmas Case* 2 R.I.A.A., 829, 838 (1928).
[157] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 71 (2nd ed. 2006).
[158] *Id.* at 73.
[159] *Id.* at 27.
[160] *Id.* at 27.
[161] *Id.* at 26.
[162] *Id.* at 27, cf. MacCormick's position.

refers not to the totality of powers which all States have, but to the totality of powers which all States *may*, under international law, have."[163]

Ultimately the centrality of politics leads many European authors to employ a conceptualization of sovereignty which is primarily political and in which the legal aspects act as a kind of frame within which political sovereignty operates. In other words, legal sovereignty provides the parameters but not the substance. While this undoubtedly constitutes the principal way of dividing sovereignty, the taxonomy of sovereignty is not yet complete. Sovereignty can be sliced and diced another way.[164] Here, it is not so much a case of the technical classification of different types of sovereignty but the ways in which the term is used. James identifies four uses or narratives: rhetoric, power, competences, and status. When sovereignty is used for rhetorical purposes it has no fixed referent, rather the purpose is to "influence the audience and not to refer to some clearly-defined aspect of statehood".[165] This usage is possible because of the positive associations most people have with sovereignty. MacCormick sees the same rhetorical usage of sovereignty, especially in regard to the British debate on European integration. He writes: "There is a widespread, but perhaps misguided, belief that there are a lot of sovereign states in the world, that this is a good thing, that the United Kingdom is one, and that it will be a bad thing if the United Kingdom ceases to be

[163] *Id.* at 27 (emphasis added).
[164] There is another way of dividing sovereignty: internal vs. external. Hasencleverer et al add this dimension to their institutional/material division. To them, sovereignty is inextricably linked to territory and the hierarchical organization of rule within that territory: hierarchy within, anarchy without. Internal sovereignty has two aspects: "the way in which policies are formed and selected and the way in which they are implemented" (*supra* note 143). The authors then provide their own taxonomy of sovereignty. Internal sovereignty reaches its peak in authoritarian or dictatorial regimes and its nadir in fragmented political systems. Similarly, external sovereignty reaches its peak in completely independent or autarchic regimes and its nadir in dependent or highly penetrated states. This produces three different models of sovereignty. First there is the absolutist, totalitarian model which has high internal and external sovereignty. Secondly, there is the liberal model, which is externally and internally limited but still retains positive sovereignty. And finally, there are neo-medieval states, which are completely penetrated by outside forces and are politically fragmented. These would be referred to by Jackson as "quasi states", *see* ROBERT JACKSON, QUASI STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD (1990) and Robert Jackson, *Surrogate Sovereignty? Great Power Responsibility and "Failed States"*, (Institute of International Relations, University of British Columbia, Working Paper, 1998).
[165] Alan James, *Sovereignty in Eastern Europe*, 20 MILLENNIUM 81 (1991).

so".[166] Thus the use of sovereignty in this debate has little to do with the reality of sovereignty or informed debate. Rather sovereignty is an emotive term deployed because it represents something else, something indefinable, intangible, yet desirable.

The second usage – sovereignty as power – is equally as vague. Here, sovereignty means a state's ability to get what it wants, or its capacity to influence others. The third usage – sovereignty as competences – refers to the legal competences which attach to statehood, "sometimes spoken of as the state's sovereign powers of right"[167], for example, a state's sovereign right to defend itself. Finally, sovereignty is used to refer to the status that is required for a state to "play the game of international relations".[168] Sovereignty in this sense is constitutional independence.

John Hoffman, however, is unhappy with the current ways of categorizing and deploying the concept of sovereignty and identifies three broad schools of thought where sovereignty is concerned. The first school adopts the abandonment thesis, namely that the concept of sovereignty is too confused, politicized and controversial to be of any genuine intellectual use and should therefore be abandoned. This was the approach taken by E.H. Carr, who argued that the confusion surrounding sovereignty actually stemmed from theorists' constant desire to divide it up and distinguish it. Carr argues that discussions of sovereignty are

> either legal arguments on the question of what powers the authorities in those areas are constitutionally entitled to exercise (in which case the use of the term 'sovereignty' gives little help), or else arguments

[166] MacCormick, *supra* note 148 at 1.
[167] James, *supra* note 165 at 82.
[168] *Id.* at 83.

> of pure form on the question of whether it is convenient to use the label 'sovereignty' to describe situations which diverge to a greater or lesser extent from a common pattern.[169]

More recently, European authors like Thomas Biersteker and Cynthia Weber have argued that the concept should be abandoned because it is inextricably tied to the state and the (increasingly outdated) statism of the international system.[170] A second school of thought adopts the indefinability thesis, which as one might expect, sees sovereignty as impossible to define but does not think it should be abandoned. As Jens Bartelson argues:

> Since sovereignty constitutes the basis of knowledge and truth, it cannot be part of that which it establishes. It is the precondition of all 'essences' and therefore has no essence itself. Instead of trying to say what sovereignty *is*, we should examine what happens when others try to answer this question.[171]

Finally, there is a realist approach which is characterized by what Hoffman calls the "separatist" thesis, namely that "sovereignty can be 'separated' from the contention which would otherwise make the term impossible to define".[172] The contention is that realism simultaneously holds two ideas about sovereignty: firstly, that sovereignty simply denotes constitutional independence, and secondly, that sovereignty means the capacity of a state to exercise force. What realism does, according to Hoffman, is collapse the two ideas so that when they collide, it is ultimately state effectiveness that matters. Thus, while realists such as James argue that constitutional independence involves neither a parity of economic or military power, what matters when the constitutional independence of a state is in question is how effectively it is able to control its territory. Sovereignty is therefore reduced to power. This

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[169] E. H. CARR, THE TWENTY YEARS' CRISIS, 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 231 (1964). Carr was ultimately mistaken in his belief that: "It is unlikely that the future units of power will take much account of formal sovereignty…Any project of an international order which takes these formal units as its basis seems likely to prove unreal" (231).
[170] *See* THOMAS J. BIERSTEKER & CYNTHIA WEBER (EDS.) STATE SOVEREIGNTY AS SOCIAL CONSTRUCT (1996).
[171] JENS BARTELSON, A GENEALOGY OF SOVEREIGNTY 16 (1995).
[172] JOHN HOFFMAN, SOVEREIGNTY 21 (1998).

assumption "plunges realism into the very contention it seeks to avoid. For what makes the state supremely contentious is the fact that it claims a monopoly of legitimate force which it does not and cannot possess".[173] Contention can only be kept at bay as long as the state itself seems unproblematic. Indeed, it is the association of sovereignty with the state that makes sovereignty an insoluble concept. To Hoffman, the confusion and dislike of sovereignty as a concept can be avoided if we sever the link between sovereignty and the state.[174] Once this is done sovereignty can be reformulated and reclaimed. And this, essentially, is what cosmopolitanism does—as will be discussed at length below.

Westfailure or the continued relevance of the state

After taxonomy, the second principal concern of the European theoretical literature is to assess and predict the future of sovereignty. Here, current approaches fall into two broad categories. First, there is a camp that sees sovereignty as possessing continuing relevance. Combined with this argument is the assumption that sovereignty really is not that bad; indeed, not only do we lack a viable alternative, but sovereignty is actually a reasonably benign or even beneficial concept. James is located on the positive side of the divide. For him, sovereignty remains, and seems likely to remain, the "constitutive principle of interstate relations".[175] The creation of international institutions and organizations is not indicative of the end of the sovereign state because "such bodies are created by states and remain their creatures. Organizations do not have independent lives of their own… All they have comes from or [is] loaned to them by states".[176] James does not see the day of the sovereign state as coming to an end but, instead, it "could (almost) be argued that the day of the sovereign state

[173] *Id.* at 3.
[174] Hoffman's solution is to separate sovereignty from the state and relocate it in the individual. He sees the individual as a collectivity of relationships; we are defined by our identifications with the various social groupings to which we belong. Consequently, individuality does not exist apart from, but is only manifest through, organizations which are constructed domestically, regionally, nationally and globally. The state is the first stage of a post-statist conceptualization of sovereignty and will "self-dissolve". *Id.*
[175] James, *supra* note 142 at 468.
[176] *Id.* at 468.

has only just begun".[177] Moreover, it is unclear to him that the "innumerable" crimes committed in the name of the state would diminish if the world were organized on some other basis. Rather, we should not let such crimes blind us to the advantages sovereignty *does* offer, primarily order and the predictable and smooth functioning of international relations.

The majority of European authors fall into the second category, that is, they see considerable problems as resulting from, or at least not solved by, the Westphalian system of sovereign states. Hasenclever et al argue that growing internal violence, ethnic strife and human rights abuses necessitate a reassessment of sovereignty as the basic ordering principle of the international system. Millions, if not a billion, live in conditions of deprivation and exploitation which can in some measure be attributed to the organization of the international system along statist lines.

Susan Strange concurs, identifying three major failures of the "Westfailure" system, problems which the system, "by its very nature, is incapable of solving".[178] First, there is the major failure to manage and control the financial system. Second, there is the failure to act to protect the environment. And third, there is the failure to preserve a socio-economic balance between the rich and the poor, the strong and the weak. However, "It is not that we do not know the answer…", Strange writes. "But applying that answer to world society is frustrated by the Westfailure system, so closely tied in as it is with the 'liberalized' market economy".[179] In other words, "it is the state… that is the roadblock, stopping remedial action".[180] We have to escape the state-centrism that colors our world view. In other words, statism blinds us to the reality of the international system and our capacity to change it.

[177] *Id.* at 469.
[178] Susan Strange, *The Westfailure System*, 25 REVIEW OF INTERNATIONAL STUDIES 345, 345 (1999).
[179] *Id.* at 352.
[180] *Id.* at 351.

Cosmopolitanism and Post-statism

It is this dissatisfaction with the Westphalian state system that has led many thinkers to seek to re-envisage the relationship between political society and government. The greatest strength of these arguments lies in their identification of the arbitrariness of the state as an organizing principle. David Held questions the adequacy of the nation state as a container of democratic forms of government.[181] Democracy must move beyond the state to international civil society, with both being considered as equally legitimate. Andrew Linklater adeptly points out the historical arbitrariness and philosophically indefensibility of dividing people up into separate units called "states".[182] Justice and moral obligation do not stop at national borders. Instead decision making should extend to include everyone who is affected by it. This can be achieved through a dialogic community where people resolve conflict and injustice through dialogue. Chris Brown agrees: "there is nothing inevitable, much less natural, about the understanding of systems of inclusion and exclusion which has been promoted, explicitly or implicitly, by the discourse of (Western) political theory over the last three or four hundred years".[183] While for Brown there is no moral reason for the continuation of the state system, he wonders why – given the weight of argument against the state system – it has endured. Ultimately he concludes that this is less because of any inherent advantages of sovereignty, and more because of a "lock-in" effect.[184] In other words, sovereignty endures because, once established, "it is very difficult to shift … even in circumstances where the reasons for the arrangement no longer apply, because the costs of change are prohibitively high".[185] In essence, "once the system was up and running it took on a life of its own".[186]

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[181] David Held, *Beyond Liberalism and Marxism?* in THE IDEA OF THE MODERN STATE (Gregor McLennan; David Held, & Stuart Halls, eds. 1984) and David Held, *Democracy, the Nation-State and the Global System'* 20 ECONOMY AND SOCIETY (1991).
[182] Linklater, Andrew, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era*, (Cambridge: Polity Press, 1998).
[183] CHRIS BROWN, SOVEREIGNTY, RIGHTS AND JUSTICE: INTERNATIONAL POLITICAL THEORY 21 (2002).
[184] *Id.* at 39.
[185] *Id.* at 30.
[186] *Id.* at 40.

The Constitutionalist Approach to Cosmopolitanism

It is not just IR theorists who have been preoccupied by the question of cosmopolitanism; international lawyers have similarly considered the idea of an emerging post-statist cosmopolis. The legal approach to cosmopolitanism has a different focus to that of IR theory. Here, the argument is that the international legal system is gradually becoming constitutionalized. The constitutionalist approach to international law is predominant in the European academe and counts as its adherents Andreas Paulus, Bruno Simma, Jost Delbrück, Stephan Hobe and, in his own distinct way, Philip Allott. To put it simply, the international legal system is undergoing an intense period of evolution, maybe revolution, prompted by globalization. The challenges of globalization and the changing nature of the state have forced the international legal system, and the international society it regulates, to reinvent itself. This reinvention has taken the form of an expansion. The aim, as Paulus puts it, is the "development of a true international community or society on the basis of a new societal consciousness encompassing the whole of humanity".[187] This will be achieved through global institutions designed to implement the international constitution.

Delbrück argues that international law is in the process of transforming into a World Law or World "Internal" Law, which encompasses states, NGOs, corporations and individuals.[188] Such a change is not without precedent; international law has already undergone one such transformation when it shifted from the era of the sovereign state and the right to war, to its present day incarnation in which that right has been severely curtailed. The motor for this innovation is globalization: as states have gradually lost more and more control within their territory, they have increasingly turned to the extraterritorial exercise of public authority in an

[187] Andreas Paulus, *The Influence of the United States on the concept of the 'International Community'* in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 57, 67 (Michael Byers & Georg Nolte, eds. 2003).
[188] Jost Delbrück, *Prospects for a 'World (Internal) Law?': Legal Developments in a Changing International System*, 9 IND. J. GLOBAL LEGAL STUD. 400, 402 (2002).

attempt to retain some level of control. But this produces a feedback loop, as the relocation of public authority outside of the state further erodes the power and importance of the territorial state. And so we have seen a move away from state consent as the basis of international law and the transformation of that law into an "objective legal order".[189] This objective legal order has its basis in public discourse in various fora which are open to all states and include the participation of non-state actors. This is the crucial part of Delbrück's argument:

> In order to ensure the necessary coherence of this comprehensive legal order, and particularly to preserve those fundamental principles of the rule of law that were hard fought for in previous centuries, there is a need for basic constitutional norms that serve as the integrating foundation of the composite new legal order. Contemporary international law has entered into a process of constitutionalisation.[190]

The function of "world law", in Delbrück's schema, is to provide the framework for the emerging international or global civil society under law.

What impact does this have on sovereignty? Delbrück claims that sovereignty has never been absolute, only relative "in the sense that the sovereignty of one state found its legal limits in the sovereignty of the other states".[191] Here, Delbrück uses the insights of Georg Jellinek, arguing that sovereignty is not the essence of statehood but an accidental attribute. It was only through historical accident that sovereignty and the state become inextricably intertwined. Thus Delbrück, like Hoffman, questions whether this linkage is unbreakable. At a minimum the idea of sovereignty must be redefined. It is no longer the freedom of states to act independently, but rather it is the freedom to act within the constraints of international society. In other words, freedom to act within the framework of international law.

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[189] *Id.* at 417.
[190] *Id.* at 430.
[191] *Id.* at 427.

Hobe too questions "whether the era of globalisation marks an end to public international law".[192] Globalisation marks an era of change, one in which non-state actors will have an increased role but states will remain "one of" the major pillars of the international system. Hobe argues that the role of the state will be transformed. States will become more permeable and will increasingly act as a "pouvoir intermédiaire"[193] between different legal orders: the national, the (European) supranational, and the international. Through a process of constitutionalization the basic pillars of the domestic legal realm—respect for the rule of law, respect for human rights, and democratic governance are increasingly becoming the pillars of the international legal regime too.[194]

In contrast, Allott's embrace of cosmopolitanism stems, not from the pressures and challenges of globalization but from the failure of the "bizarre"[195] Vattelian worldview. He writes:

> In the 20th century, people who are otherwise decent and caring could regard it as regrettable, but natural, that countless millions of human beings should live in conditions of life which are a permanent insult to their humanity, or in chaotic societies dignified by the name of 'state', or in subjection to criminal conspiracies dignified by the name of 'government'.[196]

That such an idea has survived for so long is a tribute to the power of simple ideas. Allot argues that we need to fundamentally overhaul our thinking about international society, not least because we are witnessing "a beginning of the end of the Vattelian worldview"[197] and a universal legal system is emerging in its place. This evolution involves a transformation of law at three levels, and in the relationship between those three levels: the national legal

[192] Stephan Hobe, *The Era of Globalization as a Challenge to International Law* 40 DUQ. L. REV. (2001-2002) 655, 657 (2001-2).
[193] *Id.* at 663.
[194] *Id.* at 664.
[195] Philip Allott, *The Emerging Universal Legal System* 3 INT'L L. FORUM 12, 12 (2001).
[196] *Id.* at12.
[197] *Id.* at 14.

systems; the coexistence of national legal systems; and the international legal system. However, for Allott this is fundamentally a question of social organization and how "we, the people, take power over the power of the social systems which govern us".[198] And this, in essence, is a question of international constitutionalism, of which the first step is to articulate the eventual structure of a universal legal system, from its metaphysical foundations up. Allot refers to international society as "an unsocial international society"[199] meaning that it is a society that has not conceived of itself as such. It is this failure to recognize itself as a society that has produced so many of the ills of international society: poverty, human rights abuses, war. Only when the international society conceives of itself as such will we be able to solve these ills and "eunomia" will be possible: the good order of a self-ordering society.[200]

The taxonomic approach to sovereignty has one clear contribution to make: it illuminates our ideas of sovereignty in a self-conscious manner by taking a step back and looking at how ideas of sovereignty are used in different ways. While for many authors this merely adds to the confusion for which the sovereignty debate is famed, we believe that showing the multiplicity of different uses of sovereignty actually clarifies our argument about sovereignty: that the first step to a clearer understanding of sovereignty must be the recognition of it as multifaceted, and that searching for *the* definition of sovereignty will only produce greater confusion and much intellectual frustration. Failure to recognize the multifaceted nature of sovereignty undermines our ability to see the ways in which different ideas of sovereignty are used to further interest, most commonly by the world's most powerful states.

The European Integration Sovereignty Debate

[198] *Id.* at 16.
[199] PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 418 (1990).
[200] *Id.* at 404.

The European literature on sovereignty, in both work that focuses on sovereignty and work that focuses on European integration, lacks the clarity of the American literature. There are two reasons for this. First, the process of European integration has fundamentally shaken our settled understandings about sovereignty. The European literature on sovereignty therefore asks more, and more difficult, questions about sovereignty. Secondly, and as a consequence, the European literature on sovereignty is far more complex and pluralistic than the American literature. In part this is a natural consequence of the phenomenal institutional complexity of the EU itself, but it is also a result of the nature of theorizing about the EU. Granted, the EU as an entity is not amenable to generalizable theory or simple assertions, but theorists of the EU have become obsessed with complexity – perhaps as a result of the discrediting of the grand theories of integration. This is not a judgment, simply an observation, and one that is germane to our task of identifying what the European conception of sovereignty is.

So far we have looked at work that deals with the concept of sovereignty and is carried out by European academics. Here we saw that sovereignty as a term is used in different ways at different times by different people. There are multiple meanings of sovereignty (James), as well as a debate about sovereignty which falls into the same arguments time and time again (Hoffman). Moreover, this literature displays a strong dissatisfaction with the traditional Westphalian idea of sovereignty, including by recognizing the ills which are perpetrated in its name or left unsolved by it. Just as we have identified the main contours of this literature, so too can key ideas and approaches be identified in the dauntingly complex literature on European integration.

We begin with Samantha Besson's assessment of the European integration literature's understanding of sovereignty, and then turn to the empirical example of Turkey. Besson argues that three main ideas are apparent. First, there is the idea of sovereignty as absolute

and unitary.[201] By this Besson means the belief that sovereignty is only ever located in one place at one time. This belief is held by "intergovernmentalists" as well as by authors who recognize the pluralistic nature of European political and legal cooperation but remain wedded to an idea of sovereignty as a "unitary phenomenon according to which ultimate decision-making authority ought to be exercised in a one-dimensional way".[202] According to Besson, when it became clear that this model of sovereignty failed to reflect the European reality, the second idea of sovereignty emerged: of sovereignty as pooled or shared. Although this idea of sovereignty was ascendant from the 1970's to the 1990's and then largely discredited, its continued importance should not be underestimated.[203] William Wallace's account of pooled sovereignty is typical. He argues that: "Sovereignty has not been transferred to a state-like federation… But sovereignty is increasingly held in common: pooled among governments".[204] The European states opted for this pooling of sovereignty because they were no longer able, without European cooperation, to supply the benefits European publics had come to expect.[205] Keohane makes a similar assessment of the conscious decision by European states to surrender some elements of sovereignty in return for certain benefits. He argues that Europe: "has moved toward a conception of sovereignty as a resource to be used in international regimes"[206] and defines pooled sovereignty as "states' legal authority over internal and external affairs… [being] transferred to the Community as a whole, authorizing action through procedures not involving state vetoes".[207]

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[201] Samantha Besson, *Sovereignty in Conflict* in TOWARDS AN INTERNATIONAL LEGAL COMMUNITY: THE SOVEREIGNTY OF STATES AND THE SOVEREIGNTY OF INTERNATIONAL LAW131, 166 (Colin Warbrick & Stephen Tierney, eds. 2006).
[202] *Id.* at166.
[203] *See* John Peterson, *The European Union: Pooled Sovereignty, Divided Accountability* 45 POLITICAL STUDIES 559-578 (1997) for the example of how the idea of pooled sovereignty is taken for granted.
[204] William Wallace, *The Sharing of Sovereignty: The European Paradox*, 47 POLITICAL STUDIES 503, 506 (1999).
[205] The most important account of the material and practical reasons for integration remains ALAN MILWARD'S, THE EUROPEAN RESCUE OF THE NATION-STATE with the assistance of George Brennan and Federico Romero. (2nd ed. 2000).
[206] Keohane, *supra* note 1 at 745.
[207] *Id.* at 748.

Besson's third category is post-sovereignty, which encompasses all scholarly work on the EU which believes that the concept of sovereignty can be dispensed with. She argues that, however well-founded the arguments are regarding the negative consequences of sovereignty: "[s]overeignty is too deeply entrenched in our legal and political language and too prevalent in public debate to be ignored as an object of serious theoretical reflection".[208] What unites this idea of sovereignty and the unitary idea of sovereignty that Besson first outlines is that both are underpinned by a notion of sovereignty as tangible and locatable (what Besson refers to as absolute and unitary). The unitary and pooled ideas of sovereignty both believe that sovereignty is located somewhere and, like some sort of tangible resource, can be found and sized up. But despite the prevalence of the idea of pooled sovereignty, this terminology is misleading, as Wæver points out. "[H]ow", he asks, "does a state with two-thirds sovereignty look? How sovereign has the EU become, one-fifth? One quarter? Sovereignty is an indivisible quality, which a unit either enjoys or does not. There is no fraction of it sitting in Brussels; rather, its scope is redefined."[209] This idea of sovereignty as a tangible resource, with location and size, is quite possibly the most powerful implicit idea about sovereignty, from its historical origins with Bodin to even the most theoretically adventurous accounts. For Bodin, all sovereignty (it could not be divided) is located in the monarch; we know where (all of) it is. The pooled idea of sovereignty employs much the same logic: the member states chose to pool some elements of their sovereignty. This idea hamstrings Besson's first two ideas of sovereignty, whereas the third – the post-statist approach – is undermined by its "blindness to the essential epistemic and normative role of sovereignty".[210]

Besson's answer is cooperative sovereignty, which she argues can conceive of sovereignty as both ultimate and pluralistic. This would enable us to "retreat from the assumptions of post-

[208] Besson, *supra* note 201 at 168.
[209] Ole Wæver, *Identity, Integration and Security: Solving the Sovereignty Puzzle in E.U. Studies* 48 JOURNAL OF INTERNATIONAL AFFAIRS 389, 417 (1995).
[210] Besson, *supra* note 201 at 167.

sovereignty without giving in to the rigidity of the unitary approach or the false promises of pooled sovereignty".[211] In the cooperative model both national and European authorities retain their sovereignty but, "in having to be sovereign together, they cannot escape a certain degree of competition, emulation and cooperation which characterizes sovereignty in a pluralistic constitutional order, thus paradoxically fortifying rather than diminishing their individual sovereignties."[212] Besson argues that sovereignty here becomes reflexive and dynamic in that "it implies a search for the best allocation of power in each case, thus putting into question and potentially improving others' exercise of sovereignty as well as one's own."[213]

However, while this idea of sovereignty does manage to get beyond the idea of sovereignty as tangible, it still retains the idea of sovereignty as being about the allocation of power. What is different is its conception of power, which is diffuse—though not in the Foucauldian sense. It also assumes a certain morality. Besson argues that cooperative sovereignty is both needed and possible because the actors share the same values and goals and are committed to cooperating in order to achieve them. The goals in question are human rights and democracy, and, while it is difficult to argue against them, it is important not to forget the extent to which both human rights and democracy are culturally situated and partial. Human rights are generally interpreted to mean civil and political rights first, and economic and social rights second, a convenient construction in a capitalism international system. Equally so, democracy itself lacks a concrete definition and is prone to abuse[214] (see, for example, the section on pro-democratic intervention above). One might also ask where the democratic accountability is in

[211] *Id.* at 168.
[212] *Id.* at 168.
[213] *Id.* at 168-9.
[214] *See* Gregory H. Fox & Brad R. Roth, *Democracy and International Law*, 27 REVIEW OF INTERNATIONAL STUDIES 327 (2001).

states' decisions to cooperate through the EU, given that organization's infamous "democratic deficit".

The EU as a Self-interested Entity (Case Study: Turkey)

Turkey submitted a formal application for EU membership in 1987. However, the country's involvement in Western institutions started much earlier, with the Kemalist program of Westernization which re-shaped Turkey as a secular, democratic state based upon Western principles of governance. Turkey has been a member of the Council of Europe and NATO since 1952. The European Commission rejected Turkey's application in 1989, on the grounds that no new members could be considered until after the completion of the Single Market. However, as Charlotte Bretherton and John Vogler explain, the rejection also cited numerous concerns over human rights, democracy and Cyprus, and "Turkish opinion was inevitably offended by the political nature of the Commission's comments".[215] In short, the rejection "signaled that Turkey's membership aspirations would be treated with less enthusiasm…than those of other potential members".[216] As a sop to Turkish opinion, a (highly asymmetrical) customs union was hastily concluded between Turkey and the EU. Relations deteriorated further in 1997 when Turkey was not accorded candidate status, but all ten Central and Eastern European Countries (CEEC) candidates were. Turkey partially suspended relations with the EU in response, and was finally accorded candidate status in 1999.

Clearly then, the road to Turkish candidacy, let alone membership, has been a long and winding one. The blatant privileging of the CEEC states over Turkey was the clearest demonstration yet that Turkey was not considered "European" and that there would be substantial opposition to its membership. We argue that Turkey's non-Europeanness has

[215] CHARLOTTE BRETHERTON & JOHN VOGLER, THE EUROPEAN UNION AS A GLOBAL ACTOR 142 (2006).
[216] *Id.* at 142.

substantially threatened the sovereignty of the EU members and that, as a result, the EU has imposed the most stringent requirements yet on Turkey. In short, Turkish accession to the EU potentially threatens the interests of the EU member states, and in response they have sought to protect their sovereignty. While the predominant conceptualization of sovereignty within the EU is that sovereignty is pooled, when faced with Turkish accession, the EU and its members deploy more classical ideas of sovereignty, where the sovereignty of the EU cannot and should not be compromised, but the sovereignty of Turkey may be thoroughly undermined. The fact that the EU is capable of using sovereignty and conceptions of sovereignty to empower itself over weaker states is masked—but not diminished—by the strength and centrality of the belief that sovereignty is pooled.

The idea that the EU might be a powerful actor which operates to maximize its own interests is disguised by the self-conscious portrayal of the EU as a "civilian" or "normative" power.[217] In short, the idea that the EU is a civilian/normative power is based upon the belief that the EU's *sui generis* nature predisposes it to act normatively. And, according to Helene Sjursen, this "argument has perhaps been forwarded most systematically with regard to the EU's enlargement policies."[218] Such is the potency of this idea of the EU that it is hard to find any academic literature that questions the assertion that the EU is a value-based community promoting norms of protection of human rights, democratic governance and environmentalism.[219] Rarely is the promotion of neoliberal or free-market economics mentioned. The only way in which the EU is seen to wield power is through "soft power"—negotiation, persuasion and compromise. But, as Adrian Hyde-Price points out, the EU is

[217] *See* François Duchêne, *Europe's Role in World Peace*, in EUROPE TOMORROW: SIXTEEN EUROPEANS LOOK AHEAD 32 (Richard Mayne, ed. 1972), Ian Manners, *Normative Power Europe Reconsidered: Beyond the Crossroads*, 13 JOURNAL OF EUROPEAN PUBLIC POLICY 182 (2006), and in response: Adrian Hyde-Price, *'Normative' Power Europe: A Realist Critique*, 13 JOURNAL OF EUROPEAN PUBLIC POLICY 782 (2006); Helene Sjursen, *The EU and a 'Normative' Power: How Can This be?*, 13 JOURNAL OF EUROPEAN PUBLIC POLICY 235 (2006) and Helen Sjursen, *What kind of power?*, 13 JOURNAL OF EUROPEAN PUBLIC POLICY 169 (2006).
[218] Sjursen, *The EU as a 'Normative' power*, *supra* note 217 at 239
[219] BRETHERTON & VOGLER, *supra* note 215 at 56.

more than capable of wielding "hard power", in the form of "coercive economic state-craft, primarily in the form of 'conditionality clauses', in order to impose its vision of political and economic order".[220] Hyde-Price flatly denies that the EU is a normative power; instead, it "serves as an instrument of *collective hegemony*, shaping its external milieu through using power in a variety of forms: political partnership or ostracism; economic carrots and sticks; the promise of membership or the threat of exclusion".[221] The absence of an awareness of the power hierarchies that operate within the EU means that we fail to see the way in which the EU is "used by its most powerful member states to impose their common values and norms".[222]

The arguments for Turkish accession are four-fold. Firstly, Turkey has a dynamic and rapidly modernizing economy. Turkey may be economically backward when compared to the rest of the EU, but with a growth rate of over 7% for 2004 and 2005 it will surpass the poorer EU countries within a few years. This dynamism, combined with a young population which can counteract the graying of the EU population, make Turkish accession an appealing prospect for much of Europe. Secondly, Turkey is a Muslim country. This is an advantage in that it might provide the EU with a bridge to the Muslim world, improving the EU's attempts at multiculturalism, and hopefully, turn Turkey into a model of a "good" Muslim state. This idea is popular within the US, which supports Turkish membership, in part because it would extend the borders of the EU up to Iraq, Iran and Syria, which would undoubtedly make the EU's position on the Middle East more cautious and more similar to the US position. Thirdly, Turkey does have some very European attributes and has historically been entwined with

[220] Hyde-Price, *supra* note 217 at 227.
[221] *Id.* at 227 (emphasis added).
[222] *Id.* at 227.

Europe. Most importantly it is a partially secular state, which for a Muslim country makes it a rare prize in European eyes.[223]

However, there are significant obstacles to Turkish accession, not least widespread popular resistance ranging from Austria, where 81% are against accession, to Sweden, where 61% support Turkey's membership. The March-May 2006 Eurobarometer[224] showed that 48% of the EU-25 citizens are opposed and 39% are in favor. The primary stumbling block concerns the degree of Turkey's Europeanness—is Turkey culturally European and, if not, does this render membership impossible? So far, the EU has rejected membership bids from Morocco and Israel on the grounds that neither is geographically in Europe. Turkey just qualifies here; 3% of Turkey is west of the Bosphorus and therefore in Europe, arguably making the whole country eligible. The fact that Turkey is a Muslim country should not technically be a problem because the EU is not founded on religious grounds; it explicitly made that choice early on. Misgivings about the effects of Turkish accession would probably be less severe if Turkey were not so populous. With 70 million inhabitants Turkey would have the second largest number of representatives in the European Parliament after Germany. Potentially, Turkey might even have *surpassed* Germany by the time it acceded, making it the most influential nation in the Parliament. The prospect of migration from and through Turkey to other EU states is also worrying for many, especially as Turkey's eastern and southern borders are difficult to seal.[225]

Probably the greatest concern for the EU stems from Turkey's size and widespread poverty: the cost of absorbing the country into the EU would be very high. The fact that the Turkish

[223] Discrimination against all religions other than Sunni, of ethnic minorities and of dissenting opinions places Turkey outside of European ideas of secularism.
[224] *See* http://ec.europa.eu/public_opinion/archives/eb/eb65/eb65_en.htm.
[225] *See* Harry Flam, *Turkey and the EU: Politics and Economics of Accession*, 50 CESIFO ECONOMIC STUDIES 171 (2004) for a forecast of migration from Turkey to Germany. Germany is the most likely destination for migration due to the already high number of Turkish immigrants living there.

economy is heavily dependent upon agriculture would make Turkey a net recipient of subsidies[226] at a cost to the EU of between 36 and 40 billion euros annually.[227] Indeed, Kirsty Hughes argues that it would cost the same to absorb Turkey as the ten new EU members combined.[228]

There are two other difficult issues for Turkey: Cyprus and human rights. The Turkish government's refusal to recognize Cyprus, which is an EU member, technically nullifies any negotiations between Turkey and the EU and is seen by many as the single greatest obstacle to accession. At the same time, the prospect of accession gives Turkey an incentive to resolve the Cyprus question. The human rights issue works in much the same way: many see the carrot of EU membership as a way of improving Turkey's human rights record. That said, if Turkey is unable to meet EU requirements or worse, meets them, accedes, and then relapses, membership would have achieved little on the human rights front. Moreover, states like France and Germany, which have relatively large Muslim populations, fear the impact that an only partially secular Turkey may have on those groups. At present, Turkey sends state-financed imams to the EU, as policy seen by many as constituting interference in domestic affairs.

Regardless of the arguments for or against, the earliest date for Turkish accession is 2014,[229] with 2020 being a more realistic date. By that point Turkey must have adopted 80,000 pages of EU law and satisfied the 1993 Copenhagen Criteria concerning political, economic and legislative matters. Politically, a prospective member state must be democratic with a free press and freedom of expression. It must also have the rule of law, human rights protections

[226] *Id.* at 177.
[227] Kirsty Hughes, *Turkey and the European Union: Just another enlargement? Exploring the implications of Turkish Accession* (A Friends of Europe Working Paper for the European Policy Summit 17 June 2004) at 20.
[228] *Id.* at 22.
[229] This is because the budget for 2007-2013, which is now being debated, takes no account of the costs of Turkish accession.

and protections for minorities. Economically, it must have a functioning market economy that is able to cope with the competitive pressures and market forces of the EU. Finally, all prospective members must bring their laws into line with European law, known as the *acquis communautaire*. For each admission the *acquis* is split into separate chapters, each dealing with a different policy area. Bulgaria and Romania have 31 chapters; Turkey has 35, only one of which has been concluded.

Even if Turkey does satisfy the Copenhagen Criteria, the governments of France and Austria have promised to hold referenda on whether they should ratify Turkish accession. What is more, because current treaties allow the EU to expand to only 27 countries (which allows for Bulgaria and Romania) a new treaty would need to be concluded before Turkey could join. Ultimately, the reality is that Turkey is a populous, rapidly growing Muslim country with a dubious human rights record that many Europeans still do not see as being sufficiently "European": it is neither Christian nor a liberal democracy in the European sense, and it is economically backward and culturally different. Moreover, as Hughes points out: "some fear that Turkey as a member state may be rather too similar to the UK – an awkward partner, defensive of its sovereignty, and strongly leaning to intergovernmental approaches".[230] All these factors bear upon sovereignty.

Indeed, in the context of Turkish accession and sovereignty, the opinions of individual member states are so decisive that it is hardly meaningful to talk of the EU as a sovereign entity. Yet arguments for and against accession are frequently posed in terms of sovereignty – the sovereignty of the individual member states – even though the consequences for Turkish sovereignty are probably much more severe. Because the EU requires the pooling or giving up of sovereignty in some areas, member-states are unwilling to allow the accession of a state

[230] Hughes, *supra* note 227 at 33.

that might damage their interests through its influence on EU decision-making, or through its claims to a share of the EU budget. These concerns become more acute when potential members differ significantly from the EU norm—in the former Soviet bloc states this is primarily poverty and size; for Turkey, poverty, size *and* religion. And these fears for the sovereignty of existing member states are used to comprehensively undermine the sovereignty of potential members. Acceding states must jump through more and more hoops as the EU worries about its capacity to absorb new members and questions its long-term goals. EU enlargement has also placed the aim of *deeper* integration on the back burner for the foreseeable future, with the failure of the European constitution reflecting widespread concerns about sovereignty within a number of member states. Instead, the EU has opted for enlargement, which, while it also affects member-states' sovereignty, does so to a lesser degree and only in ways that the member-states have already accepted and experienced. Seen in this light, the sovereignty discourse among EU members has been so strong that it has forestalled deeper integration in favor of enlargement—though only up to a point.

E. CONCLUSION

The central argument of this paper is simple: *ideas of sovereignty vary over time and space and in response to geopolitical circumstances, interests and intellectual heritages*. Moreover, just as interpretations of sovereignty are shaped by these three elements, so too are circumstances, interests and intellectual heritages shaped by prevailing conceptions of sovereignty. In order to both clarify and prove this claim we traced how interpretations of sovereignty have altered over time from Bodin's original articulation of sovereignty in the sixteenth century. Bodin's idea of sovereignty reflected his world: a religious, medieval world which was wracked with religious war. Bodin's primary concern was to produce a form of political organization strong enough to end these conflicts, and to him this could only mean

absolute monarchy. Hobbes also inhabited a world torn asunder by war and reached a similar conclusion: that the only viable form of political organization was one which was strong enough to end all conflict, regardless of the price. For both thinkers, sovereignty was absolute, unitary and supreme. The only brake was natural and divine law. Hobbes, however, did differ from Bodin in one important respect. Where Bodin had never seen sovereignty as residing in the people, Hobbes did. In Hobbes' idea of the social contract, each individual was sovereign, albeit in a rather unpleasant world where being sovereign simply meant being solitary and vulnerable. For Hobbes, the people, realizing the awfulness of their existence, decide to contract together in order to leave the state of nature. They agree to hand over their sovereignty to the Leviathan but, once they do so, that sovereignty is essentially gone forever, with no way of getting it back. Only if the Leviathan breaches his central purpose – keeping his subjects alive – can they revolt.

Locke inhabited a vastly different, far more secure world in which conflict had lessened and the hypothetical state of nature had mellowed from being nasty, brutish and short[231] (in Hobbes' view) to being merely inconvenient, because it prevented the accumulation of property and wealth. As the fear of conflict receded, Locke was able to put forward a different interpretation of sovereignty: just as in Hobbes' theory, the people covenanted together in order to leave the state of nature; but unlike Hobbes, Locke argued that the people always retained their sovereignty and thus the right of rebellion. This shifted power more effectively to the people and served Locke's political purpose of refuting the divine right of Kings.

Rousseau again offered a new interpretation of sovereignty. His intellectual world was shaped by the romanticization of small communities (especially the Swiss cantons) and his idea of the

[231] Hobbes, *supra* note 29 at bk 2, ch. 13.

"noble savage". To Rousseau, it is progress that has made man unhappy and immoral.[232] We should aim instead to return to a golden age of small, self-governing communities where each individual member is involved in the running of the community. Such a romantic idea of small communities made Rousseau's central idea possible and desirable: the idea of the general will, where each individual simply voted according to his perception of the general will. By obeying the general will, each individual was simply obeying himself and thus attained true freedom. For Rousseau there is a perfect synergy between the individual, the community and the sovereign: they are one, and because of this sovereignty, need not, indeed cannot be divided.

To the Federalists, Rousseau's republican ideal was vastly appealing as it saw no separation or disjuncture between the people and the sovereign. The Americans' experience of rule by a distant British parliament made them strongly reject the idea of a sovereign government that was too separate from the people. Equally so, however, the Federalists feared the potential tyranny of the majority. And so they deeply admired the balance of mixed constitutions, like the British system, where different groups controlled different parts of government and thus no one part could become predominant. However, America lacked estates and was ideologically opposed to the idea of social differentiation.[233] The solution was a system of checks and balances which would prevent any one branch of government from becoming dominant. In order for this solution to work, the Federalists had to espouse an idea of sovereignty as divisible, in part because they recognized that the vast size of America made Rousseauian sovereignty impossible. We can thus clearly see how the Federalists reinterpreted the idea of sovereignty left to them by their intellectual heritage so that it was more in line with their interests and geopolitical needs. Each of these thinkers has made

[232] Rousseau, *supra* note 47.
[233] It should be noted that the Anti-Federalists were more opposed to the idea of social differentiation than the Federalists, who actively supported elitism and argued for the centralization of power: a profoundly undemocratic move.

similar kinds of concessions and engaged in similar kinds of intellectual remodeling—in order to produce an idea of sovereignty which reflected their intellectual heritage, their own personal convictions and interests, and the geopolitical circumstances in which they found themselves. And states are no different.

In the second main thread of our argument we claim that *existing interpretations of sovereignty tend to reflect the standard idea of what sovereignty is in America and Europe*. For America, we see two ideas of sovereignty: First, a statist idea, often referred to as the classical or traditional idea of sovereignty, which privileges territorial integrity and political independence. Second, there is the powerful role that the idea of popular sovereignty plays: emphasizing the rights and needs of people over governments and promoting concern for human rights and democracy. We argue however, that both these elements make up a single, uniquely American conception of sovereignty which applies the statist idea of sovereignty to itself and the popular idea of sovereignty to everyone else. This means that the ability of America to intervene is maximized while the ability of other states, both to defend themselves against intervention or to intervene in other states, is minimized. And this is our third and final argument: that *powerful states use ideas of sovereignty to empower themselves*.

For (and in) Europe, the idea that sovereignty is pooled is so powerful that few viable alternatives are offered. The idea of statist sovereignty is clearly inapplicable to the EU and the idea of post-statist, post-sovereignty is unconvincing. The dominance of the idea of pooled sovereignty is enhanced by the self-consciously technical nature of the literature on European integration. Such complexity, we argue, serves to elide the operation of power and power hierarchies both within the EU and in relations between the EU and other states. Turkish accession provides a case in point. Member states' concerns for their own sovereignty have led them to impose extensive restrictions on Turkish accession, undermining Turkish

sovereignty to an unprecedented degree. Historically, intellectually and empirically it is clear that sovereignty has been reinterpreted over time to meet geopolitical needs and interests within the frame of existing philosophical orthodoxy.

This matters for several reasons, the first of which concerns our own intellectual endeavors to understand and theorize about sovereignty and sovereign actors within the international system. If there is one defining feature of the academic literature on sovereignty it must surely be confusion: so much writing on sovereignty starts with the idea that sovereignty is a confusing notion, so much so that many authors argue that the concept should be abandoned. Much of this confusion is the result of the unconscious acceptance that there is one idea of sovereignty and that we must simply discover what it is, and that the existence of differing, often contradictory ideas of sovereignty fatally undermines the concept. This is what happens when scholars assert the Bodinian idea of sovereignty as absolute, unitary and supreme, without seeing it simply as one interpretation of sovereignty reflecting a particular historical epoch and political agenda, and then running into trouble when popular ideas of sovereignty inevitably crop up. We believe that much of the confusion can be removed by identifying what the different ideas of sovereignty are, and how they have evolved over time. Moreover, the different ideas of sovereignty manifested by states are not simply the result of historical mishap or quirk, but reflect their interests, assessments of prevailing geopolitical circumstances, and particular intellectual heritage. Sovereignty did not fall, unbidden, from the sky. It was created in a particular time and place and has been re-created ever since.

Understanding this politicisation of the concept of sovereignty opens the way for a better understanding of international law and international relations generally. Throughout this article we have shown how the United States and Europe, the two most powerful actors on the world stage, have used interpretations of sovereignty to further their own interests. This has

serious implications for relations both between the United States and Europe, and for relations between these powerful entities and weaker actors. A strong but underlying theme of this article has been the extent to which America and Europe, despite their supposed differences, are much more alike than is commonly perceived. In short, the elision of self-interest and power in the EU and by the EU is supported by widespread acceptance of the idea of pooled sovereignty—and yet the pooling of sovereignty does not mean the end of self-interest. Sovereignty and power are intimately connected, and American and European conceptions of sovereignty are but two sides of the same coin.