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**A PUZZLE OF SOVEREIGNTY**

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Sovereignty either is or is not.  
—Stephen Leacock<sup>1</sup>

The subject of the sovereignty of the nation-state presents a puzzle. On the one hand, the notion of state sovereignty figures importantly in our descriptions of, and our prescriptions for, global political change. For example, a natural characterization of the political changes in Eastern Europe preceding and following the demise of the Soviet Union is that a number of political communities have vigorously and often successfully asserted claims to sovereignty. More generally, most of the events in the world political arena are naturally understood as the sovereign actions of states. In addition, many complain that sovereignty stands in the way of solutions to many of the world's most pressing problems and ought to be abandoned, thereby implying that it remains a reality. Thus, the notion of sovereignty continues to apply to the realities of international political life and retains its explanatory efficacy.

Against this is the claim that, as a result of the contemporary realities of global affairs, sovereignty has become irrelevant, an anachronistic notion. What is meant is not that sovereignty ought to be abandoned, that it is, as it were, normatively irrelevant (though this claim is often made as well), but rather that it has already ceased to exist. On this view, there are factors that have drained states of their sovereignty by depriving them of the ability to protect themselves and their citizens from the negative effects of the actions of other states or outside groups. The most important of these factors is the

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1. GUY C. FIELD, *POLITICAL THEORY* 60 (1956).

accelerating pace of global economic integration. Economic actions taken in other parts of the world, over which a state has no control, can result in great harm to its citizens. Often the actions with the harmful effects are not under the control of any state, their agents being multi-national corporations or large numbers of private individuals acting independently, such as currency traders. Another major factor is the increasingly wide-spread and detrimental human impact on the environment, an impact which, with effects such as greenhouse-gas warming and ozone depletion, is now global. The result of such factors is that states have lost the ability to insure their citizens' security, especially their economic and environmental security.<sup>2</sup> The interconnections among states have deprived each of the self-sufficiency necessary to achieve this security. Thus, states have lost their sovereignty. As F. H. Hinsley puts it: "Since the body-politic is no longer self-sufficient, but is denied freedom of action by the greater complexity of the international context, it is no longer possible to credit it with the exercise of sovereign power."<sup>3</sup>

The puzzle thus presented, which is my purpose to attempt to solve, is that the notion of sovereignty seems both continually important and increasingly irrelevant to an understanding of world affairs. From one perspective, sovereignty seems an enduring force in international relations, while from another, its force seems spent. Sovereignty, it seems, both is and is not. Another way to put the puzzle is to observe that the very factors creating the international problems of which sovereignty is said to impede the solution, such as global environmental damage, seem by their own workings to have deprived states of sovereignty. Consideration of these factors suggests both the presence and the absence of sovereignty.

The puzzle depends on understanding sovereignty in the way it has been traditionally understood, that is, as absolute, such that it cannot both be and not be. It cannot be partial. On the traditional view, "sovereign," like "unique," cannot take certain qualifying adverbs, such as "partially." One easy way to dissolve the puzzle is to claim that state sovereignty is not like that. On this view, sovereignty can be partial, it can be partly lost and partly retained, so that it can both be and not be. On this view, the traditional notion of sovereignty is indeed irrelevant, and any talk of states as sovereign in this sense is mistaken, a holdover of outmoded linguistic forms or a nostalgic effort to recreate a state of affairs that can no longer be and perhaps never was. The view that sovereignty is partial seems now to have wide currency. For example, former United Nations Secretary-General Boutros-

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2. Even though the factors here cited as undermining sovereignty are of comparatively recent appearance, one should not think that sovereignty was not similarly problematic in earlier times. For example, difficulties with communications and the collection of information at earlier points in the modern age may also have seriously undermined sovereignty. I owe this point to Thomas Pogge.

3. FRANCIS H. HINSLEY, SOVEREIGNTY 218 (2d ed. 1986). Hinsley goes on to criticize this argument. *Id.*

Ghali asserted: "It is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands, and was in fact never so absolute as it was conceived to be in theory."<sup>4</sup> But I want to explore the idea that the puzzle runs deeper than this easy dissolution suggests. I want to explore the idea that it is possible to regard contemporary states as sovereign in the traditional sense without denying facts of the sort that naturally lead one to deny that states are sovereign in this sense.

My concern is the descriptive adequacy of the traditional notion of sovereignty, not the prescriptive issue of whether or not sovereignty in this sense is a good thing. The descriptive question is an important preliminary to the prescriptive one. Given the frequent appeal to the notion of sovereignty in our description and explanation of world affairs, the future of international relations will inevitably be understood by us in terms of this notion, whether it is a future of sovereignty retained or of sovereignty lost. In this sense, the future of world affairs is the future of sovereignty, and by better understanding the notion of sovereignty we will be better able to appreciate the nature of that future and to work to form it. I begin in the first section with some general discussion of the nature of sovereignty, continue in the second section with a proposed solution to the puzzle, and conclude in the third section with a brief application of the analysis to our current situation.

## I.

Consider a classic definition of the traditional notion of sovereignty, offered by John Austin: "The generality of the given society must be in the habit of obedience to a determinate and common superior; whilst that determinate person, or determinate body of persons must not be habitually obedient to a determinate person or body."<sup>5</sup> When these conditions are satisfied, when there is a group that others habitually obey, but that does not itself habitually obey others, the society is sovereign and the determinate group satisfying the conditions is the sovereign of that society, its "uncommanded commander." When a society is sovereign, it is an "independent political society," that is, a state. But sovereignty is generally taken to be necessary as well as sufficient for statehood. Thus, strictly speaking, the claim that a state is sovereign is a tautology and the expression "sovereign state" is a pleonasm.<sup>6</sup>

According to the traditional notion, sovereignty is absolute. This has

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4. LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 18 (3rd ed. 1993).

5. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 195 (London, Weidenfeld and Nicolson 1955) (1832) (emphasis omitted). Though Austin speaks of the sovereign as an individual person or a group of persons, I will henceforth speak of the sovereign as a group, ignoring the possibility of an individual sovereign, which is certainly an anachronistic notion.

6. Bernard Crick, *Sovereignty*, *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES*, vol. 15, at 77 (1968).

often been understood to mean that the power of the sovereign is unlimited.<sup>7</sup> Why is it thought that a state must be sovereign in this sense? The problem in political theory out of which this notion of sovereignty arose, the problem central for Hobbes, is how social order is to be maintained in the face of the tendency to disorder, the tendency toward the "state of nature." The problem was seen as soluble only if there is in society an authority that is unchallenged, in the sense that its power is not limited by other groups in society. In the absence of such an authority, it was argued, there could be no lasting social order. Thomas Pogge rehearses the argument:

A juridical state (as distinct from a lawless state of nature) presupposes an absolute sovereign. . . . A juridical state, by definition, involves a recognized decision mechanism that uniquely resolves any dispute. This mechanism requires some agency because a mere written or unwritten code . . . cannot settle disputes about its own interpretation.<sup>8</sup>

If sovereignty is to play the role of guaranteeing social order, the sovereign's power must be unlimited in relation to other human agency within the society, because, if it were not, the sovereign could not resolve all disputes. Social order would not be possible in the absence of such an authority.

The argument that sovereignty must be absolute in this sense can be criticized on both theoretical and practical grounds. Pogge argues that it is theoretically flawed on the grounds that no possible decision mechanism, even one involving a monarchical sovereign, could guarantee a resolution of all disputes, so that "if that were what it takes, then in principle we could not transcend the state of nature."<sup>9</sup> This shows that even if the power of the sovereign were unlimited, it could not do what proponents of absolute sovereignty believe must be done to preserve social order. The theoretical criticism dovetails with the practical criticism, which calls attention to the fact that states exist and function quite well without their ruling groups having unlimited power. Despite the fears of those who believe that sovereignty requires unlimited power, we know from experience that limited government works.<sup>10</sup> Even in Austin, one finds criticism of the claim that

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7. The power of the sovereign is sometimes characterized as being not only ultimate and unlimited, but also undivided. I have left out this characteristic, because it seems inconsistent with the idea that the sovereign can be a group. To say that the sovereign's powers are undivided cannot mean that they are not divided within the sovereign group, and if it does not mean this, it is not clear what it means. One thing it might mean is that sovereign power cannot be divided among levels of government, that it cannot be divided vertically, a crucial point for later discussion.

8. Thomas Pogge, *Cosmopolitanism and Sovereignty*, 103 *ETHICS* 59 (1992).

9. Thomas Pogge, *Moral Progress*, in *PROBLEMS OF INTERNATIONAL JUSTICE* 302 n.2 (Stephen Luper-Foy ed. 1988).

10. In addition, given that states that do not have ruling groups with unlimited power not only exist, but prosper, it is implausible for defenders of this notion of sovereignty to respond that their notion is meant to be prescriptive, rather than descriptive or analytic. Crick mentions the distinction among descriptive, analytic, and prescriptive understandings of sovereignty, though he suggests that a prescriptive understanding is not implausible. Crick, *supra* note 6,

sovereignty requires unlimited power. Indeed, such criticism is implicit in his definition, for the phrases “generality” and “habit of obedience” allow some slippage in the effectiveness of the exercise of the power and such slippage seems inconsistent with the idea that the power is unlimited. Austin confirms this implication when he criticizes the view of Grotius that sovereign power “is perfectly or completely independent of other human power.” Citing various ways in which the power of the sovereign is limited, Austin asserts that if such independence is essential to sovereign power, “there is not in fact the human power to which the epithet *sovereign* will apply with propriety.”<sup>11</sup>

Such criticisms of the idea that the ruling groups of states must have unlimited power have led many to substitute for the notion of absolute sovereignty the notion of partial sovereignty. But we should not be so quick to accept the contemporary view that sovereignty can be partial. For the claim that sovereignty is absolute need not be understood as implying that the sovereign possesses unlimited power. Rather, it may simply be entailed by the fact that sovereignty is a threshold concept. Threshold concepts are concepts that apply in an all-or-nothing fashion when certain variable background conditions are satisfied, when those conditions have reached a certain threshold of intensity. Legal concepts often are like this. For example, “adult” is a legal concept that applies in an all-or-nothing fashion once a person has reached a certain threshold age, such as eighteen. “Autonomy,” in one of the several ways in which it applies to individuals, functions as a threshold concept as well. In this sense, young children are not autonomous, while most adults are. The relevant difference between young children and most adults is that the actions of most adults are substantially voluntary, whereas the actions of young children are not. “Autonomy,” in this sense, signals the achievement of a threshold level of maturity wherein one’s actions are substantially voluntary. It is an all-or-nothing concept. If one’s actions are less than substantially voluntary, it is not the case that one is partially autonomous, rather one is not yet autonomous. “Autonomy” can be used in ways in which it does not function as a threshold concept, ways in which the phrase “partial autonomy” makes sense. But it has an important use as a threshold concept, to signal a significant quality possessed by most adults, and we have other concepts, such as voluntariness, with which to talk about the ways in which maturation is a matter of degree.

While “sovereignty” too can be used in other ways, I believe that its primary use, as applied to states, is, like “autonomy,” as a threshold concept.<sup>12</sup> The background variable in the case of sovereignty is power.

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at 77.

11. AUSTIN, *supra* note 5, at 214.

12. For a discussion of the analogy between the notions of autonomy and sovereignty, see JOEL FEINBERG, HARM TO SELF 27-51 (1986).

Perhaps the most important feature of a state is that it has a ruling group which is significantly more powerful than other groups within that society. "Sovereignty" is the term we use to designate the presence of this feature. Thus, we may say that sovereign states require political organizations that possess a substantial preponderance of power relative to other domestic groups and social organizations.<sup>13</sup> As a threshold concept, sovereignty is all-or-nothing: a state either has a ruling group possessing a substantial preponderance of power or it does not. (If it does not, we may not even call it a state.) Whether a state is sovereign depends on the degree of relative power its ruling group possesses, but the state's sovereignty is not a linear function of this relative power. While the power may be partial, the sovereignty is not. Of course, the threshold is a vague one. Austin refers to the standard of sovereignty as a "fallible test," comparing it to such legal notions as "reasonable diligence." Given some intermediate case, whether it be an instance of a sovereign state may be "impossible to answer with certainty, although the facts of the case were precisely known."<sup>14</sup> But one should not confuse vagueness of standard with variability of standard. It may be hard, even impossible, to determine if sovereignty is present in some case, given the vagueness of the standard, but this does not entail that the case is one of partial sovereignty.

On this understanding of sovereignty, the role of the concept is to mark an important and distinctive feature about states, namely, that they have ruling groups which possess a substantial preponderance of power, just as autonomy, in the sense discussed, marks an important and distinctive feature of adults, namely, that their actions are substantially voluntary. In each case, it is important to have a concept to play this role and what is needed is a threshold concept, one that applies in an all-or-nothing fashion. There are other concepts (power and voluntariness) available if we wish to speak of the variable and partial character of the phenomena underlying these features. Thus, the traditional idea that sovereignty is an absolute is correct, but not in the way that this is often understood. Sovereignty is not absolute in the sense that the power it represents is unlimited, but rather in the sense that the concept applies in an all-or-nothing fashion. Sovereignty does not represent unlimited power because the threshold for its application is merely the substantial preponderance of power. But because "sovereignty" is a threshold concept, any amount of power short of that does not imply partial sovereignty. Two conflicting conclusions have been drawn from the view that sovereignty represents unlimited power. The first, drawn by proponents of absolute sovereignty, is the claim that a state cannot be sovereign unless the power of its ruling group is unlimited. The second, drawn by those who have abandoned the idea of absolute sovereignty, is the claim that if a state

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13. For a discussion of the relationship between the concepts of sovereignty and political power, see HINSLEY, *supra* note 3, at 1.

14. AUSTIN, *supra* note 5, at 204, 205, 207.

does not have a ruling group with unlimited power, its sovereignty is partial. Each of these conclusions is mistaken.

But this observation about the concept of sovereignty does not by itself yield a solution to the puzzle of sovereignty. For, while a ruling group need not possess unlimited power for its state to be sovereign, it must possess a substantial preponderance of power. The factors cited in the statement of the puzzle, however, suggest that the power of the state has fallen below this threshold, in so far as the state lacks the ability effectively to assert its independence in the face of a variety of forces impinging on it from the outside. It does not seem that a state's power can be substantially preponderant, however vague this standard might be, if it does not have the ability to keep these forces more effectively at bay. So, the puzzle remains, and the search for a solution must continue.

Let us return to Austin's definition. As he notes, it has both a positive and a negative aspect: the sovereign *is* habitually obeyed by others and does *not* habitually obey others. The sovereign commands and is uncommanded. This represents a fundamental divide in the theory of sovereignty. There is sovereignty *in* the state and sovereignty *of* the state.<sup>15</sup> Sovereignty concerns a certain type of relation within the state (the positive part) as well as a certain type of relation (or lack of relation) between the state and outside parties (the negative part). The power of the sovereign makes it internally supreme, where it commands, and makes the state externally independent, where it is uncommanded. These two aspects, supremacy and independence, are referred to as *internal sovereignty* and *external sovereignty*. But these terms refer not to different sovereignties, but rather to different perspectives on sovereignty. Sovereignty can be viewed either internally or externally.

The puzzle of sovereignty sketched at the beginning is a puzzle of external sovereignty. But a parallel puzzle might be generated in regard to internal sovereignty. It could be argued that the power of various groups within the society is sufficient to deny to the ruling group the supremacy necessary for sovereignty. For example, in some states, the government may be largely under the control of domestic business interests. To the extent that this puzzle holds, it should be similar in some respects to the puzzle of external sovereignty. This suggests that finding a solution to one puzzle would be helpful in finding a solution to the other. Writers on sovereignty have made a number of points that either were intended as, or would be useful in constructing, a solution to the puzzle of internal sovereignty, so it is worthwhile to consider these points in the hope that they may help in finding a solution to the puzzle of external sovereignty.

The puzzle of internal sovereignty is that the apparent reality of internal sovereignty flies in the face of the ability of various domestic forces seriously to challenge the power of the ruling group of the state. A solution to this

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15. FEINBERG, *supra* note 12, at 48. See also GERALD MACCALLUM, *POLITICAL PHILOSOPHY* 137 (1987).

puzzle may be found by exploring the idea that “sovereignty” is an ambiguous term. For example, S. I. Benn and R. S. Peters note that it may denote either supreme legal authority or supreme ability to induce others’ compliance through coercion. In other words, sovereignty may be a measure of either legal power (or competence) or coercive power. To avoid the ambiguity, one can draw a distinction between the two types of power and hence two types of sovereignty. Benn and Peters refer to the first as *de jure* sovereignty, the right to command, and the second as *de facto* sovereignty, the ability to command. The first may also be called *legal sovereignty* and the second *coercive sovereignty*. “Legislators usually do determine other people’s behaviour in ways they intend. But there is no warrant for inferring that the *de facto* authority or power arising from supreme competence will also be supreme.”<sup>16</sup> *De facto* authority may, for a short time at least, be separated from legal competence. In situations where the military has escaped effective civilian control, for example, legal and coercive sovereignty may temporarily lie with different bodies. While there is a strong link between legal and coercive power, due to the fact that legal power cannot survive long estranged from coercive power, it was Austin’s mistake not to appreciate the distinction between the two. They are different types of power, sources of different types of sovereignty, which, though linked, may occasionally and temporarily be located in different groups in society.

To pursue this strategy further, consider A. V. Dicey’s remark that the sovereign power of Parliament is not unlimited because, “there are many enactments . . . which Parliament never would and (to speak plainly) never could pass.” These are laws that the citizens would simply not tolerate, such as a legislative attempt to outlaw a popular religion. Dicey refers to the “possibility or certainty that his subjects . . . will disobey or resist his laws,” as an “external limit” on the sovereign.<sup>17</sup> Benn and Peters note this as well, and, like Dicey, cite in this regard Hume’s observation that power ultimately rests on the opinion of others.<sup>18</sup> But instead of understanding this common-sense point about the limits of political power as revealing a limitation on sovereignty, one could instead see it as calling for a further distinction. Harold Laski moves in this direction: “The power Parliament exerts is situate in it not by law, but by consent, and that consent is, as certain famous instances have shown, liable to suspension.” Laski suggests that this shows the need for a different understanding of sovereignty, concluding that we must “find the true meaning of sovereignty not in the coercive power possessed by its instrument, but in the fused good-will for which it stands.”<sup>19</sup> But instead of saying that this is *the* meaning of

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16. STANLEY I. BENN AND RICHARD S. PETERS, *THE PRINCIPLES OF POLITICAL THOUGHT* 301-02, 303 (1959).

17. ALBERT V. DICEY, *THE LAW OF THE CONSTITUTION* 26, 30 (1982, reprint of 8<sup>th</sup> ed. 1915).

18. BENN AND PETERS, *supra* note 16, at 305-07; DICEY, *supra* note 17, at 30-31.

19. HAROLD LASKI, *STUDIED IN THE PROBLEM OF SOVEREIGNTY* 12, 15 (1968).



sovereignty, one could simply say that it is *a* meaning. Dicey suggests this when he notes that “the word ‘sovereignty’ is sometimes employed in a political rather than in a strictly legal sense.” He distinguishes between legal and political sovereignty. “That body is ‘politically’ sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state.” He goes on to identify this body as the electorate.<sup>20</sup>

This is popular sovereignty, the familiar idea that ultimate political power lies with the people. But there is an important difference between the ideas of popular sovereignty that Laski and Dicey have in mind. Dicey is speaking of the power of a democratic electorate to make and unmake governments, while Laski seems to be referring to the power of the people to deprive officials of their power by refusing to comply with their directives or, ultimately, by eliminating them through revolution. The former is a legally sanctioned exercise of power and the latter is not, the contrast between the *de jure* ballot and (at the extreme) the *de facto* bullet. The former exists only under a democratic form of government, but the latter exists under any form of government. To mark the contrast, I will refer to Dicey’s political sovereignty as *electoral sovereignty* and to Laski’s notion of sovereignty as *civil sovereignty*. Again, each form of sovereignty represents a different kind of power, electoral and civil power, we may call them. The idea of civil sovereignty is that the populace, comprising civil society in distinction from the state, holds civil power through its aggregate ability, whether exercised actively or passively, to comply or to refuse to comply with the directives of state officials, thereby rendering the directives and their issuers effective or ineffective.

But civil power (and civil sovereignty) may be understood more broadly. The extreme assertion of this power is the deliberate efforts of a large mass of the population to overthrow the state. But it also encompasses the effect of public opinion on officials and the activities of political parties, which seek not to overthrow the state, but to determine those who run it. (The civil power of political parties is separate from, though it seeks to work through, the electoral power of the members of the franchise.) More generally, the exercise of civil power may depart from the revolutionary model in three important respects. First, civil power may involve the activities of relatively small groups rather than large masses.<sup>21</sup> Second, the effect of the activities may be not to deprive officials or their directives of effect, but rather to influence what directives officials will issue or enforce. Third, groups exercise civil power when their activities have such effects on the state, whether or not members of the group directly intend these effects. The first

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20. DICEY, *supra* note 17, at 27. See also Crick, *supra* note 6, at 81.

21. This distinction between the exercise of civil power by large and small groups is noticed by Austin, who observes: “In every monarchy, the monarch renders habitual deference to the opinions and sentiments held by his subjects. But in almost every monarchy, he defers especially to the opinions and sentiments . . . of some especially influential though narrow portion of the community.” AUSTIN, *supra* note 5, at 218 n.17.

two qualifications are designed to capture the activities of special interest groups, which may be composed of a relatively small number of individuals and which generally seek not to overthrow the state, but simply to make its directives more compatible with their interests. The third qualification is meant to recognize the ways in which state directives are influenced by the aggregate effects of many individuals acting independently, as, for example, in the activities of bond traders, whose aggregate buying and selling may cause the government to modify its economic policy. Civil power includes all of the nonelectoral ways in which nonofficials can determine who the state officials are, the effectiveness of their authority, or the content of their directives.

It seems, then, that there are four types of power which can serve as the basis for distinguishing among different types of sovereignty. They may be arrayed as follows:

MODE OF POWER (OR SOVEREIGNTY)

		<u>de jure</u>	<u>de facto</u>
	officials	legal power (sovereignty)	coercive power (sovereignty)
locus of power (or sovereignty)	populace	electoral power (sovereignty)	civil power (sovereignty)

Both legal and coercive power lie with government officials, although, as noted earlier, they may temporarily lie with different groups of officials, neither subordinate to the other in terms of its own form of power, as when the military escapes civilian control. Legal power is *de jure*, in that it is a matter of competence or right, while coercive power is *de facto*, in that it is a matter of the ability to wield force, a matter of guns. Here we keep apart what Austin tried to meld when he sought to reduce law to coercive power. In contrast, both electoral power and civil power are in the society but not of the state, since they lie with the populace. Civil power lies with both small and large groups, while the portion of the populace with which electoral power lies depends on the extent of the democratic franchise. Electoral power is *de jure*, because the power of the electorate is a result of its legal status, present in a democracy and otherwise absent. Civil power, on the other hand, is *de facto* because it lies in the capacity of the populace to act in civil society, independent of legal constitution.

Political power is, thus, not a univocal notion, but comes in a variety of types. Different groups in society hold different amounts of different types of power. A claim about sovereignty is a claim about the supremacy of

some group in regard to a particular type of power. Generally, the claim that the state is sovereign is a claim that the ruling group in that society is legally and also coercively sovereign, hence it is a claim about that group's legal and coercive supremacy. Other groups in society will have supremacy in regard to elective and civil power, so it may make sense to speak of them as holding elective or civil sovereignty. This is how the notion of popular sovereignty, sovereignty of the people rather than the state, may be understood. Whether or not the notion of popular sovereignty makes sense, however, what is crucial for the argument is that the type of sovereignty attributed to the state concerns specifically legal and coercive power. If the ruling group of a state is judged in terms of its legal and coercive power, then the state may be sovereign despite the fact that other groups in society have supremacy over the ruling group in terms of other types of power. Thus, the solution of the puzzle of internal sovereignty is that, while the ruling group of a state may be subject to the power of other groups in society, if the ruling group has legal and coercive supremacy, the state will be sovereign.<sup>22</sup> If one claims that sovereignty is absent because the ruling group of a state can be voted out of office or overthrown by a popular revolt or bought off by business interests, the response is that state sovereignty remains, because none of this shows that the ruling group does not have legal and coercive supremacy.

In addressing the puzzle of internal sovereignty, it is important that the argument just rehearsed, namely, that claims of sovereignty concern specific types of power, be joined with the earlier observation that "sovereignty" functions as a threshold concept. For in many states, if not in most or all of them, neither the legal power nor the coercive power of the ruling group is unlimited. Legally, many states are organized on principles of federalism, are based on doctrines of common law, or have written constitutions, all of which place legal limitations on the ruling group. So, if sovereignty were a function of unlimited power, not even making sovereignty specific to legal power would be sufficient to preserve it. But, given the threshold nature of the concept, the state is sovereign so long as legal and coercive power of its ruling group is substantially preponderant.<sup>23</sup> This is what the legal and

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22. One other solution to the puzzle of internal sovereignty deserves mention. Bernard Crick distinguishes between "the time of sovereignty and the time of politics." The notion of sovereignty does not apply to "normal political conditions in which it is recognized—and acted upon—that power is divided and that the business of government is creative conciliation." Rather, it applies to "conditions of emergency in which normal constitutional rules have to be set aside if the state is to survive." Crick, *supra* note 6, at 81. In states of emergency, someone or some group may assume something like the absolute power envisioned by Hobbes and others, and it is only for describing such a time that the notion of sovereignty is useful. In the words of Carl Schmitt: "Sovereign is he who decides on the exception." CARL SCHMITT, *POLITICAL THEOLOGY* 5 (Cambridge, MIT 1985).

23. Even though Austin implicitly acknowledges that the coercive power of the state is not unlimited, by his use of "generality" and "habitually" is his definition, he nonetheless claims that the legal power of the state is unlimited, apparently under the sway of the Hobbesian argument discussed earlier. AUSTIN, *supra* note 5, at 254.

coercive supremacy of internal sovereignty requires. For example, the United States is sovereign because it holds preponderant, though not unlimited, legal power vis-a-vis the individual states of the federal union, but the states are not sovereign, because, though they hold some legal power vis-a-vis the federal government, their legal power is not preponderant. Now that a solution of the puzzle of internal sovereignty has been sketched, we should turn our attention again to the puzzle of external sovereignty.

## II.

As internal sovereignty is a matter of supremacy, external sovereignty is a matter of independence. External sovereignty represents "the principle that internationally, over and above the collection of communities, no supreme authority exists."<sup>24</sup> A sovereign state is independent in the sense that there is no supreme authority above it that can interfere with its freedom of action within its realm. It is, in Austin's language, an "independent political society." The notion of sovereignty also includes the idea of "sovereign immunity," that is, the right of states "to have other states recognize their sovereign acts."<sup>25</sup> Thus, external sovereignty is freedom from interference not only on the part of a would-be supranational authority, but also on the part of other states. As independence or freedom from outside interference, external sovereignty is self-governance. Internal sovereignty is freedom-to, while external sovereignty is freedom-from.

Consider the following language, drawn from a United Nations' resolution:

No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. . . . No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights, or to secure from it advantages of any kind.<sup>26</sup>

This language, in effect, prescribes the complete independence of states. It is clear that this prescription not only has not been fulfilled, but that it could not be fulfilled. Werner Levi observes that the realization of this prescription "would eliminate all international politics because by their nature they always involve a measure of pressure or influence." He continues: "This is a vain attempt to dissolve a dilemma by denying the social facts of interna-

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24. HINSLEY, *supra* note 3, at 158.

25. WERNER LEVI, *CONTEMPORARY INTERNATIONAL LAW* 89 (2d ed. 1991).

26. *Id.* at 85.

tional life—or all life, for that matter.”<sup>27</sup> The facts of international life are that there are many actions taking place outside of a state that result in significant harm to or interference with individuals or institutions of that state. These actions of outside interference, as I will call them, are often actions of other states, but they may also be actions of external nonstate groups or actions of individuals with aggregate effects. It is through the growing frequency and efficacy of such actions that the independence of states is in our time being severely compromised.<sup>28</sup>

The puzzle of external sovereignty is how sovereignty can continue to be a reality given the prevalence of actions of outside interference. As in our discussion of internal sovereignty, part of the solution lies in recognizing the implications of sovereignty understood as a threshold concept. The idea of external sovereignty as complete independence, typified by the above United Nations’ language, is part of the interpretation of absolute sovereignty as unlimited power. If this were the only interpretation of the traditional notion of absolute external sovereignty, one would be driven here as well to adopt a notion of partial sovereignty. But the all-or-nothing character of external sovereignty is tied to the status of sovereignty as a threshold concept, not to its representing complete independence. External sovereignty can hold even though the state’s independence is less than complete. Austin acknowledges this when he claims that a “feeble state,” despite its occasional obedience of the commands of outsiders, is nonetheless “sovereign or independent.”<sup>29</sup> At what point on the scale from complete dependence to complete independence is the threshold for applying the concept of sovereignty? As we think it distinctive of a state that it hold a substantial preponderance of power over domestic rivals, we think distinctive of a state that it have substantial independence from outside forces. So, a state is externally sovereign when it is substantially independent.

But the puzzle still remains, for actions of outside interference seem to undermine state’s independence to such an extent that it is no longer substantial. The remainder of the solution lies in making distinctions among types of independence, parallel to the distinctions among types of domestic power, and understanding that external sovereignty is a function of a specific type of independence. So, a state may be externally sovereign if its independence, in one sense, is substantial, even though its independence, in another sense, is less than substantial. To legal power, there corresponds legal independence, and to coercive power, there corresponds military

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27. *Id.* The dilemma to which Levi refers is presumably something like the puzzle of external sovereignty. Levi goes on to assert that “the concept of intervention has lost legal usefulness in most instances,” presumably because, in the contemporary world, almost any action a state can take can have effects on other states, so that intervention cannot be clearly distinguished from nonintervention. *Id.* at 86.

28. It is not only through actions of outside interference that independence can be compromised. This can occur also through intervention on the state’s territory by military forces or clandestine agents.

29. AUSTIN, *supra* note 5, at 197.

independence. The ability of a state to retain its legal independence is closely tied to its ability to retain its military independence, as legal power in the state is strongly tied to domestic coercive power. Thus, one may say that a state is externally sovereign when it has substantial legal and military independence, even if it lacks substantial independence in other respects. So, the puzzle will have been solved, if it can be shown that, despite the actions of outside interference, such as those leading to the economic and environmental effects cited earlier, states, in general, still retain substantial legal and military independence.

Consider military independence. It may seem at first glance that no nation enjoys substantial military independence. With the advent of nuclear weapons, and the capacity for assured destruction they create, no nation is now able, by its own military resources, adequately to protect itself against an attack by a foe armed with such weapons. Indeed, it has been argued that nuclear weapons is one of the major factors undermining sovereignty in our time. But even in the pre-nuclear age, it was often true that not even the strongest nation could adequately protect itself militarily if a number of other nations combined to attack it. Military independence does not, however, require the ability to thwart all potential military attacks. As Austin notes: "If power to maintain its independence by its own intrinsic strength be a character . . . of an independent political society, the name will scarcely apply to any existing society." Rather, all that is required for independence is that the state "be not dependent in fact or practice."<sup>30</sup> If a state has avoided undue military influence, including military conquest, even though it lacks the capacity to avoid it were there to be a concerted effort on the part of its military opponents, it is militarily independent. This pre-nuclear wisdom seems to apply in the nuclear age as well. Though there is no defense against nuclear weapons, dreams of ballistic missile defenses not to the contrary, the doctrine of nuclear deterrence based on the mutual capacity for assured destruction appears to have served well in allowing the superpowers during the Cold War to maintain substantial military independence.<sup>31</sup>

What about legal independence? It is true that the legal behavior of states is frequently influenced by actions of outside interference. For example, state A may seek to get state B to open its markets by bringing economic pressure to bear, and such pressure may succeed in getting B to lower its tariffs. But it would be a mistake to argue that this shows that B lacks substantial legal independence. A's influence in such a case, to use a domestic analogy, is like the influence of business interests on governmental

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30. *Id.* at 213.

31. Caution is necessary in regard to this claim. The fact that a war between the superpowers was avoided may not show that nuclear deterrence has been an effective policy, though many assume this to be the case. The absence of war may have been due to other factors in the geo-political balance, with nuclear weapons playing a neutral or even a negative role. Nuclear weapons may be the threat to military sovereignty that many in the 1940s thought they would be.

decisions, an influence which does not, as we have seen, destroy internal sovereignty, because it is an exercise of civil power rather than of legal power. Roughly corresponding to civil power on the domestic level is what I will call interest independence on the international level. States have interest independence if they are able to protect their domestic interests from outside (nonmilitary) interference. The prevalence of actions of outside interference shows that states lack substantial interest independence. But interest independence is distinct from legal independence. Lack of interest independence does not entail lack of legal independence, hence does not entail the absence of external sovereignty, which is tied to legal and military independence. Economic interdependence and global environmental degradation undermine the interest independence of all states, but states' responses to these factors are, in general, exercises of, hence a demonstration of, legal sovereignty.

But what if the outside pressure is severe? States that are economically weak often suffer grievously from outside economic forces. When the interest independence of a state is severely compromised, can its legal sovereignty remain intact? Pogge says not, referring to the legal sovereignty of third-world states as "fictional."<sup>32</sup> Levi makes the same point:

In the face of enormous political and economic inequalities among states, sovereign or formal legal independence is a sham because the economic dependence of the newer states on developed states in fact cancels their right to exercise their judgment freely to decide on matters involving the government of their territories.<sup>33</sup>

Indeed, if outside economic pressure is too great, legal independence can be lost, because a state's legal actions may then effectively be coerced.<sup>34</sup> As individual autonomy can be lost if outside pressure is too great (like in the gunman's "your money or your life"), legal independence can be lost if actions of outside interference are overwhelming. But external legal sovereignty, like individual autonomy, survives so long as outside pressures are not sufficient to constitute coercion. The point at which the legal actions of states become effectively coerced by outside forces is difficult to determine, but this is no reason to hold that any level of outside interference negates legal sovereignty. The fact that outside nonmilitary interference can negate legal sovereignty shows that there is some link between legal and interest independence, but this link is much weaker than the link between legal and military independence. While substantial legal independence cannot long survive loss of substantial military independence, it will survive all but

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32. Pogge, *supra* note 8, at 66.

33. LEVI, *supra* note 25, at 82.

34. This implies is that the first-world's commitment to the abstract principle of the equality of legal sovereignty should lead it to a commitment to strengthen the economic conditions of poor states to the extent that outside economic influence would no longer be coercive. Levi points out that this is an argument that many underdeveloped states have made. *Id.* at 83.

the most extreme loss of interest independence, the reason being that, in general, coercion is achieved much more easily by military than by nonmilitary means. Thus, the prevalence of actions of outside interference does not entail, at this point in time, that states have, in general, lost their legal sovereignty, even though this may have happened for some poorer states.

But there is another challenge to the claim that states possess external legal sovereignty. It arises from the way in which states have responded to actions of outside interference. In an effort to negate the effect of such actions and to stanch the loss of interest independence that they involve, states have with increasing frequency been entering into mutual agreements to mitigate or control these outside pressures. These mutual agreements have become the substance of international law. Thus, the contemporary growth in international law is coincident with increasing economic interdependence, growing environmental impacts, and other factors that have robbed states of their interest independence. It is, in part, a solution to a coordination problem. A state, by agreeing to provisions of international law, chooses to create constraints on its own behavior in order to get other states to constrain their behavior, thereby achieving some control over the actions of outside interference to which it is subject, on the calculation that the chosen constraints are less onerous than the unrestrained actions of outside interference. But these constraints are legal constraints, and thus seem to undermine the state's legal independence. The existence of international law seems to entail the loss of the state's legal sovereignty.

If, however, international law is understood in this way, as based on treaties or conventions, as "agreement law," its existence is compatible with the existence of state legal sovereignty. This idea of international law is expressed by Louis Henkin in this way:

By their ability to consent, to have relations and conclude agreements, states have in effect created the international political system, by a kind of "social contract." By their ability to consent to external authority and to conclude agreements, they have created norms and institutions to govern these relations, the international law of the system.<sup>35</sup>

In contrast, in the case of domestic law, those bound are bound independent of their actual agreement. The social contract theory of domestic law must resort to hypothetical consent, but the social contract theory of international law may appeal to actual consent. In view of this difference, international law is not a denial of a state's legal sovereignty. As based on agreement,

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35. HENKIN, *supra* note 4, at 16 (quoting Louis Henkin from *International Law: Politics, Values and Functions*).



international law is an exercise of that sovereignty.<sup>36</sup> When states make agreements, the resulting international laws are “expressions of, rather than infringements on, their sovereignty.”<sup>37</sup> The agreements are treated not as “formal abridgments” of their sovereignty, “but as voluntary restraints on their *exercise* of that sovereignty.”<sup>38</sup> Indeed, Levi notes, “international courts have consistently held that the conclusion of treaties is the exercise of an attribute of sovereignty, not a limitation of it.”<sup>39</sup> The ruling group of a state can by treaty-making bind itself and its successor regimes, but the state’s being under such obligations does not infringe its legal sovereignty, because the obligations are a direct product of its legal power.

One way to test this conclusion, drawn from the idea that international law is agreement law, would be to compare international law with the law of a group of states whose relations are also based on agreement, namely, the European Community (EC). The force of the comparison is based on the assumption that “no other international organization enjoys such reliably effective supremacy of its law over the laws of member governments” than does the EC,<sup>40</sup> and the resulting implication that if there is a strong case that state legal sovereignty has not been lost in the EC, all the more so would this hold in regard to states under international law.<sup>41</sup> The main question is whether the EC is an international or a supranational organization.<sup>42</sup> If it is a supranational organization, member-state sovereignty would be lost, but not if it is merely an international organization. There are, indeed, some organs of the EC, such as the Commission and the European Parliament, that are independent of direct state control, and thus seem to constitute the EC as a supranational organization. Real power, however, lies not with these, but with the Council of Ministers, composed of direct representatives of the member states, and the European Council, composed of the members’ heads of government, both of which conduct their business, especially regarding important matters, under a rule of unanimity. This indicates that the EC is an international organization in which the members have an effective veto over policy and thus retain their legal sovereignty.

Commentators describe the EC as involving “the pooling and sharing of

36. Among international agreements, a distinction is drawn between “law-making treaties,” which form the substance of international law, and “contract treaties.” Law-making treaties, as opposed to contract treaties, involve a large number of signatories, apply to all of them equally, and are in effect for an extended period of time. See MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 24 (4<sup>th</sup> ed. 1982).

37. MACCALLUM, *supra* note 15, at 137.

38. Stephen Toulmin, *Limits of Allegiance in a Nuclear Age*, in *NUCLEAR WEAPONS AND THE FUTURE OF HUMANITY* 364 (Avner Cohen and Steven Lee eds. 1986).

39. LEVI, *supra* note 25, at 82.

40. Robert Keohane and Stanley Hoffman, *Institutional Change in Europe in the 1980s*, in *THE NEW EUROPEAN COMMUNITY* 11 (Keohane and Hoffman eds. 1991).

41. For my discussion of the EC, I draw upon the essays in two collections: *THE NEW EUROPEAN COMMUNITY*, *supra* note 40; and *EURO-POLITICS* (Alberta Sbragia ed. 1992).

42. See, e.g., David Cameron, *The 1992 Initiative: Causes and Consequences*, in *EURO-POLITICS*, *supra* note 40, at 28.

sovereignty rather than the transfer of sovereignty to a higher level.”<sup>43</sup> The notion of pooling, as opposed to transfer, captures the sense in which EC law is constituted by member-state agreements.<sup>44</sup> The central role of the Council of Ministers and the European Council makes clear that EC law, at least in its major provisions, is agreement law, and that the legal sovereignty of its members is preserved. There is no guarantee that the EC will continue to have such a structure. If, for example, the European Parliament were to assume the power currently held by the Council of Ministers and the European Council, or if the latter organizations were to adopt a majority rather than a unanimity rule for major decisions (a direction in which the EC may be moving), then the EC would become a supranational organization and the legal sovereignty of its members would be lost. Such a development might occur in the case of international law as well. But for now, it is agreements rather than legislation that are the source of international law. As Hinsley notes:

States are not only not moving toward the centralization of the functions involved in applying international law, which would be incompatible with their sovereignty, but are advancing, however slowly, in a different direction—one in which they are exercising their sovereignty to bring about an agreed re-definition of their rights and duties within the international system.<sup>45</sup>

So, at present, EC law, and all the more so international law, is not inconsistent with state sovereignty.

There are two objections that could be offered to this conclusion, one logical and one empirical.<sup>46</sup> The logical objection is represented by the question: How is it that states by their agreement are able to bind themselves? What is the source of the resulting legal obligation? How can agreement create law in the absence of an existing legal structure? Skepticism on this point is expressed by J. L. Brierly: “For consent cannot of itself create an obligation; it can do so only within a system of law which declares that consent duly given, as in a treaty or a contract, shall be binding on the party consenting.”<sup>47</sup> States are not bound by what they agree to in the absence of a background norm of promise-keeping. Without such a norm, a state’s agreement to a treaty would be, at most, a statement of intention, creating no obligation. This promise-keeping norm, formulated as *pacta sunt servanda*, must itself be an aspect of international law not based

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43. Keohane and Hoffman, *supra* note 40, at 13.

44. This notion of pooling sovereignty, rather than that of transferring sovereignty, also characterizes the state of affairs in regard to military sovereignty. When states form military alliances to better protect themselves, they are, in general, preserving rather than sacrificing their military sovereignty.

45. HINSLEY, *supra* note 3, at 229.

46. See, e.g., HERBERT L.A. HART, *THE CONCEPT OF LAW* 219-21 (1961).

47. JAMES L. BRIERLY, *THE LAW OF NATIONS* 53 (6<sup>th</sup> ed. 1963).

on agreement.<sup>48</sup> The response to this objection is that this promise-keeping norm is what Hart refers to as a power-conferring rule, rather than a duty-imposing rule.<sup>49</sup> The norm does not impose a duty on states. Instead, it provides states with the legal power to make agreements, to create obligations in themselves and other states in pursuit of their interests. The pre-existence of this legal norm necessary for agreements to generate obligations, because it does not itself impose duties on states, does not infringe on their legal independence. Thus, legal independence is not diminished by such a rule, and legal sovereignty remains.

The empirical objection is that the paradigm of an agreement among states is not the only way in which states come under obligations of international law. There is, in fact, a strong point of disanalogy between international law and the law of the European Community: A member-state of the EC can leave that organization, but a state cannot leave the world.<sup>50</sup> Simply by being in the world, a state is subject to legal obligations independent of the agreements it has made. Agreement law is not the only basis for international law. In addition to treaties, the sources of international law include custom and judicial decisions.<sup>51</sup> Each of these sources can create legal obligations for states independent of that to which they have agreed. International customary law, like domestic common law, makes obligatory certain settled patterns of behavior and expectations. One of the ways in which customary law goes beyond agreement law, for example, is that states which have not ratified an agreement may become obligated by it, if so many states have ratified it that its terms become customary.<sup>52</sup> Defenders of the traditional notion of external sovereignty, wishing to show that all international law is based on agreement, have argued that states have given their tacit consent to customary rules. But the notion of tacit consent is no more adequate here than is the analogous notion of tacit command used by Austin to attempt to explain the common law in terms of his notion of sovereignty.<sup>53</sup>

It is, however, an important fact that both custom and judicial decision play a less important role than agreement in the constitution of international law. The International Court of Justice plays a modest role in the development of international law because it hears only those disputes submitted to it by states and because it has tended to behave in a cautious manner.<sup>54</sup> In

48. HENKIN, *supra* note 4, at 20-21 (excerpting HANS KELSEN'S PURE THEORY OF LAW).

49. HART, *supra* note 46, at 27-41.

50. I owe this point and my recognition of the need for the following discussion to an anonymous reviewer.

51. WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 120 (1964).

52. LEVI, *supra* note 25, at 20.

53. BRIERLY, *supra* note 47, at 51-52. On the criticism of Austin's notion of tacit command, see HART, *supra* note 46, at 44-48.

54. FRIEDMANN, *supra* note 51, at 141-42; LEVI, *supra* note 25, at 12.

addition, the court is formally instructed not to operate under the doctrine of precedent or *stare decisis*, thus limiting the legal effect of its decisions.<sup>55</sup> Given the explosive growth of international intercourse, treaty law, "as the nearest substitute to international legislation," has superseded customary law as the primary source of international law.<sup>56</sup> Indeed, large portions of customary law have been directly superseded by being codified under treaty.<sup>57</sup> The lesser importance of customary law and judicial decisions places them in the same category as domestic factors such as federalism and the common law in regard to the challenge they pose to claims about the existence of sovereignty. As the latter factors show that the domestic legal supremacy of the state is not unlimited, the former show that international legal independence of the state is not unlimited. But in neither case do the factors show that sovereignty is absent, and the reason is the same. Because "sovereignty" is a threshold concept, unlimited supremacy or independence is not necessary for it to apply. What is necessary is that the legal supremacy or the legal independence of the state be substantial. The minor role played by factors other than agreement in the constitution of international law shows that, despite these factors, state legal independence is substantial, and external legal sovereignty holds. The relationship between a state and the international order is precisely the reverse of the relationship between a political unit and the federal state of which it is a part. The federal state is legally sovereign because its legal power is preponderant, despite the legal obligations imposed on it by the inferior legal power of its parts, while the parts of the international order, the states, are sovereign because they enjoy substantial legal independence, despite the legal obligations imposed on them by their membership in the international order.

The puzzle of external sovereignty is how states can be seen to have retained their sovereignty in the face of economic, environmental, and other outside pressures which appear to have robbed them of that sovereignty. The solution is that sovereignty can be identified with legal independence, which has largely been retained, despite the growth in international law, even as other forms of independence have declined. A state can retain substantial legal independence, sufficient for the attribution of sovereignty, as other forms of independence decline, so long as the decline does not result in the state's legal actions being coerced. Such coercion would occur should military independence become less than substantial, as in the case of satellite states of superpowers, but it would not occur in regard to interest independence unless the loss of that independence becomes severe. Outside economic, environmental, and other pressures have led to a serious loss of interest independence, but this loss has not to this point in time been sufficient to result in states' legal actions being coerced, except perhaps in

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55. LEVI, *supra* note 25, at 50.

56. FRIEDMANN, *supra* note 51, at 123-24.

57. LEVI, *supra* note 25, at 38.

the case of some poor states. The other way in which states can lose external legal sovereignty is if they were to lose substantial legal independence as a result of the displacement of agreement law as the main source of international law, as through the creation of an effective majoritarian international legislative organ. In the future, this may happen to the European Community and it may happen to the world. States may act so as to bring about, deliberately or unintentionally, an effective supranational organization, thereby alienating their own legal sovereignty. International law would then become world law. But this has yet to happen. There is no necessity or inevitability about state sovereignty, but, as the world is now, most states have it.

The solution to the puzzle of sovereignty shows that it is still meaningful to speak of sovereignty in the traditional sense, as an absolute, as an all-or-nothing matter, rather than as a matter of degree. Many have been led by the prevalence of actions of outside interference to abandon the traditional notion and to speak of partial sovereignty. But the solution to the puzzle, involving understanding sovereignty both as peculiar to legal power and independence and as a threshold concept, shows that the switch to talk of partial sovereignty is not forced by the facts. Of course, there may be other reasons to hold that it is desirable or even necessary to abandon the traditional notion of sovereignty and to adopt a notion of partial sovereignty. This would presumably involve identifying sovereignty with, rather than treating it as a threshold function of, state power and independence, so that when power and independence are partially present, sovereignty would be as well. But I wish to conclude with an argument to show how understanding sovereignty in the way I have proposed will help us better to understand how states have and will respond to our global crisis.

### III.

Our global situation is one in which states are losing power at an accelerating rate to forces outside of their borders. This has implications for state sovereignty, as we have seen, and I would like now to show that my view of these implications provides a better explanation of how the global situation is developing. The traditional view is that sovereignty is absolute, in the sense that it requires unlimited power, while the contemporary view, recognizing that power is nowhere unlimited, is rather that sovereignty can be partial. Consider now a dilemma that arises if we regard these two views as the only options:

- (1) If we accept the view that sovereignty requires unlimited power, hence complete independence, then once it is recognized that the state does not now enjoy complete independence, it is no longer regarded as sovereign, and thus may not be seen as retaining the control necessary effectively to stanch the further loss of its independence or to determine the form that loss takes.
- (2) If we accept the view that sovereignty can be partial, then states are

regarded as sovereign despite their lack of complete independence. But the result may be the same, for then sovereignty, representing only limited independence, may not be seen as providing the degree of control necessary for the state to stem a further drain of independence or to determine the form it takes.

Both views of sovereignty yield the same unfortunate consequence.

The problem is that both views see "sovereignty" as a univocal term, in the sense that they understand it as representing the holding of a generic form of power. If the term is seen as univocal, the continuing erosion in the independence of states would be viewed as occurring in the single dimension of that generic form of power. The implication of such a one-dimensional model, as the dilemma indicates, is that states, having lost some independence, may not be in a position to exercise effective control over the erosion of their remaining independence. As states become more feeble, they lose the ability to avoid further enfeeblement. On the one-dimensional model, state independence erodes as state power leaks to a variety of external power centers, some governmental, some private. The erosion is unorganized because no one has control over the process, and would lead on its own to chaos rather than to order. Thus, the one-dimensional model has some difficulty explaining how we are to avoid the facile pessimistic scenario under which the world will face increasing levels of international chaos.

The view developed here that "sovereignty" is equivocal, in the sense that it is defined in terms of specific types of power, avoids the dilemma because it allows the erosion of state independence to be understood in terms of a two-dimensional analysis. To see how this works, consider the "enforcement mechanism" of international law. Instead of facing the formal sanctions of a coercive sovereign, those in violation of international law face, at most, reprisals on the part of other states seeking to "punish" the violator.<sup>58</sup> The reprisals are actions of outside interference taken in response to the violation. Thus, in creating new international law through agreements, states create new ways in which other states may seek to influence them through actions of outside interference. States create the possibility of these new actions of outside interference because their treaty-making gives rise to expectations on the part of others that they will behave in obedience to the law to which they have consented. If states thwart these expectations by violating the law, this would give rise to (as well as justify) the new actions of outside interference. The state chooses to create the possibility of these new actions of outside interference in order to avoid other actions of outside interference that it believes impose a more weighty burden on its independence. For example, it accepts the constraints on its toxin-dumping behavior resulting from its desire to avoid new actions of outside interference that would occur should it continue its toxin-dumping (in violation of its agreement not to do so) in order to avoid the actions of outside interference

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58. BENN AND PETERS, *supra* note 16, at 433-34.

represented by other states' pre-agreement toxin-dumping activity. Through the exercise of its legal independence, the state shifts the ways in which and the extent to which its interest independence is interfered with. The reason the state agrees to the shift is that the new constraints it chooses to impose on its interest independence are less harmful than the unchosen limitations on its interest independence that the agreement seeks to avoid. The reason that the shift leads to a less harmful loss of independence is that the power that is lost from the states, instead of seeping away to a variety of outside sources, is reconstituted into a regime of international law, which promotes the security of states.

Thus, the view of sovereignty presented here better explains the growth of the international treaty regime. By making legal sovereignty a separate dimension, a dimension in which the state's independence may remain substantial and efficacious as independence in other areas declines, the model makes clear how states retain the power to constitute that regime despite that decline. It explains their ability to structure that decline in ways that enhance their security. Speaking of international law, Levi remarks: "Many new legal norms . . . decrease the content of sovereignty but not its influence upon the integration of the innovations into the existing fundamental system."<sup>59</sup> But the only way this decreasing content can be reconciled with the continuing influence of which Levi speaks is on a two-dimensional analysis. There has been a loss of power by states, but to describe this simply as a loss of sovereignty, or of the content of sovereignty, is to be unable to explain how the result of this loss has been the growth of international law, for this result can be explained only through the continuing efficacy of sovereignty. World order is a matter of reconstituting the power lost to states into an arrangement that enhances the security that states' interest independence was traditionally able to provide for them. This reconstituting activity is possible because substantial legal independence is retained as other forms of independence are lost. Eroding state independence will likely continue to be orchestrated by the states themselves, in virtue of their retention of legal sovereignty, in such a way as to foster the growth of world order through an expanding international treaty regime.<sup>60</sup> The model that better explains the growth of international law to date entitles us to be sanguine about the prospects for the future growth of world order.

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59. LEVI, *supra* note 25, at 325.

60. I would argue neither that our only option for avoiding international chaos is the eventual emergence of an international legal regime with power concentrated at the top nor that such a top-heavy regime would be the most desirable of these options. In many ways more appealing is a model where governmental authority would not be concentrated at any one level, state or world, but would be dispersed among political units at many levels from local to global. Such a model is proposed by Thomas Pogge in "Cosmopolitanism and Sovereignty," and is sometimes advocated as a principle of organization for the European Community under the notion of subsidiarity. But what I would argue is that the only way we can understand the emergence of any order that manages to avoid international chaos is through states retaining legal sovereignty for a length of time sufficient for them to choose to bring such an order into existence. It will not come to be in any other way.

