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April 2008

Integrated Sovereignty

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Integrated Sovereignty

Philip M. Nichols*

Abstract

Sovereignty confounds legal scholarship. The doctrinal definition of sovereignty does not describe the real world, yet that definition dominates both the application of law and scholarly debate. Robert Dahl's empirical methodology, never before applied to sovereignty, yields at least two insights. First, sovereignty does not consist of absolute control of everything, instead sovereignty is the final control of some things. Second, many different entities possess sovereignty; thus the sovereignty described in doctrinal international law is actually integrated. Accepting the notion of integrated sovereignty allows international law to better describe the empirical world, and positions international law to accommodate the needs of a changing world.

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Conclusion

Defining sovereignty presents legal scholars with many puzzles. Not least among the puzzles is the fact that none of the current theories of sovereignty seems viable. Robert Dahl faced a similar puzzle with the definition of "democracy"; traditional theories such as

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Madisonian or populist theories did little to explain or predict how democracy functions in the real world. In his seminal *A Preface to Democratic Theory* Dahl introduced an empirical approach to defining democracy: an analysis of the group of institutions referred to as democratic in everyday speech for the purpose of finding common characteristics.¹ Using this approach, which he termed the descriptive method, Dahl developed a theory of polyarchical democracy.² Dahl's theory, based on his empirical observations, "rank[s] among the most formidable, influential, and enlightening versions of contemporary 'revisionist' democratic theory."³

Dahl's methodology has been recognized by legal scholars: Bruce Ackerman notes that Dahl "has contributed more to our empirical understanding of democratic institutions than any political scientist of the twentieth century."⁴ Nonetheless, while Dahl's methodology earns praise from legal scholars⁵ it is not emulated, and certainly has not been used to navigate the puzzling terrain of sovereignty.

Doctrinal international law⁶ depicts sovereignty as absolute control over every issue and object within a sovereign's jurisdiction. While this notion of sovereignty has provoked criticism,

¹ ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 63 (1956).

² *Id.* at 74; *see id.* at 75-81 (explaining polyarchical democracy). Dahl also used what he termed the method of maximization, which prescribes a goal to be obtained and the political conditions necessary to achieve that goal. *Id.* at 63; *see id.* at 2 (explaining methods and how they relate to one another).

³ Richard W. Krouse, *Polyarchy and Participation: The Changing Democratic Theory of Robert Dahl*, 14 *POLITY* 441, 441 (1982).

⁴ Bruce Ackerman, *The New Separation of Powers*, 113 *HARV. L. REV.* 633, 646 n.21 (2000).

⁵ *See, e.g.*, Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 *COLUM. L. REV.* 1, 32 n.73 (1998) ("Pluralism's main contributors included Robert Dahl, who provided empirical support for pluralism's descriptive claims . . ."); Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 *U. PA. J. CONST. L.* 903, 993 n.359 (2005) (discussing Dahl's empirical analyses); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 *U. PA. L. REV.* 1513, 1594 (2005) (referring to Dahl's empirical work as support for Neil Komesar's two-force model of politics).

⁶ This paper specifically addresses sovereignty as a legal construct. A polity acting outside of the rules of law could possibly impose itself on others while ignoring the entreaties of the international community; such behaviors are better analyzed through the lens of international relations or political science. Realist schools of international relations have a surprisingly complex relationship with international law, as does the study of power. *See* Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 *AM. J. INT'L L.* 64, 70-86 (2006) (describing those relationships). Nonetheless, the study of international law remains just as interesting and provides fruitful insights.

it retains vitality in international use, and remains the cornerstone of international law. This paper discusses that vitality,⁷ but also demonstrates that sovereignty is a human artifact rather than a natural condition, and that historical conditions rather than inevitable forces created the iteration of sovereignty that dominates international law.⁸

This paper applies Dahl's empirical methodology to that traditional concept of sovereignty. Specifically, the paper examines the sovereignty of the United States, which is commonly and correctly considered to possess sovereignty.⁹ An analysis reveals that, in fact, the United States does not conform to traditional notions of sovereignty. The lapses found, however, are not those described in contemporary criticisms of sovereignty; those criticisms spring from the control exerted over sovereigns by the international regime. An empirical analysis, however, reveals that as a structural, legal matter the United States has never possessed absolute control, and in fact shares control with a number of other polities. Further empirical examination finds that this is true of many polities considered sovereign both in the vernacular and as a legal matter.¹⁰ From this, at least two insights emerge. First, sovereignty does not consist of absolute control over everything but rather final control over something. Second, the absolute control described in traditional international law does not reside in one polity, but instead can be found in the integration of several entities.

Integrated sovereignty allows for a much better description of the world and of the legal constructs that exist within that world.¹¹ Integrated sovereignty also describes relationships that confound doctrinal international law.¹² Integrated sovereignty, therefore, rescues sovereignty from those who would see it banished from legal thought, and provides a coherent means through which international law can retain its relevance in a changing world.

1. *The Theory of Sovereignty*

⁷ See *infra* notes 14-46 and accompanying text.

⁸ See *infra* notes 47-71 and accompanying text.

⁹ See *infra* notes 77-111 and accompanying text.

¹⁰ See *infra* notes 112-123 and accompanying text.

¹¹ See *infra* notes 162-168 and accompanying text.

¹² See *infra* notes 174-209 and accompanying text.

Sovereignty has long been conceived of as absolute control over everything that occurs within the jurisdiction of the sovereign, brooking no outside interference.¹³ *Black's Law Dictionary* describes sovereignty as

supreme, absolute, and uncontrollable power . . . , supreme political authority; the supreme will; . . . the self-sufficient source of political power from which all specific political powers are derived; . . . the power of regulating . . . internal affairs without foreign dictation . . .¹⁴

The very words in this definition – *supreme, absolute, uncontrollable, all specific political powers*, and so forth – reflect starkly absolutist attitudes toward sovereignty. Indeed, doctrinal international law is built upon an absolutist concept of sovereignty.¹⁵ The absolutist definition of sovereignty has become a favored punching bag of legal scholars and political scientists.¹⁶ Nonetheless, it retains vitality as the definition used in both local and international tribunals. Moreover, even whilst decrying it, scholars reinforce the concept.

The absolutist concept has a long and hoary history in tribunals constituted under international law. In the *Island of Palmas* case, the tribunal made repeated reference to sovereignty and posited that “[t]he development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.”¹⁷ This principle retains its vitality in international tribunals to this day.¹⁸

¹³ FRANCIS HARRY HINSLEY, SOVEREIGNTY 26 (1966).

¹⁴ BLACK'S LAW DICTIONARY 1430 (8th ed. 2004).

¹⁵ See Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 458 (2000) (referring to absolute sovereignty as “the most sacred of international law principles”).

¹⁶ See RICHARD N. HAASS, *THE OPPORTUNITY: AMERICA'S MOMENT TO ALTER HISTORY'S COURSE* 41 (2005) (suggesting that absolute sovereignty does not exist and suggesting that a contractual approach “that recognizes the obligations and responsibilities” as well as privileges of statehood); STEPHEN KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 3 (1999) (stating that as a functional matter sovereignty has never existed).

¹⁷ *Island of Palmas* (U.S. v. Neth.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928).

¹⁸ Steven R. Ratner, *Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber*, 100 AM. J. INT'L L. 808, 810 (2006) (“the guiding principle remains that set nearly eighty years ago in the *Island of Palmas* case”).

United States courts also have long used the concept as memorialized in *Black's Law Dictionary*. Although it did not make reference to *Black's*, the opinion in *The Schooner Exchange versus M'Fadden* bulges with references to the "perfect equality and absolute independence of sovereigns" and the "full and absolute territorial jurisdiction . . . of every sovereign."¹⁹ *The Schooner Exchange* continues to resonate in discussions of sovereignty in this country.²⁰

Perhaps the most well known local use of the doctrinal use of the absolutist definition in recent time occurred in the cases testing the powers of and constraints on the United States federal government in the Guantanamo Naval Station on the island of Cuba. In its consideration of whether the United States exercises sovereignty over the base, the court of first impression immediately turned to *Black's Law Dictionary* and its absolutist definition.²¹ The *Guantanamo* courts took a convoluted journey over and around the concept of sovereignty, but the starting point of their journey was the absolutist definition.²²

In the less-publicized but equally convoluted – and troubling – *Lara* case,²³ the United States Supreme Court wrestled as it so often has with the issue of Indian sovereignty.²⁴ In his

¹⁹ *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812). The Court forcefully states:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

Id.

²⁰ See Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 86-87 (2003).

²¹ *Gherebi v. Bush*, 352 F.3d 1278, 1296 n.21 (9th Cir. 2003).

²² See Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2535-2543 (2005) (discussing the sovereignty of the Guantanamo Naval Station in context of the *Gherebi* case); *The Supreme Court, 2004 Term – Leading Cases*, 118 HARV. L. REV. 396 (2004) (discussing the *Guantanamo* cases).

²³ *United States v. Lara*, 541 U.S. 193 (2004).

²⁴ See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005) (discussing *Lara* and tribal sovereignty); Eric Wolpin, *Answering Lara's Call: May Congress Place Nonmember Indians Within Tribal Jurisdiction Without Running Afoul of Equal Protection or Due Process?*, 8 U. PA. J. CONST. L. 1071 (2006) (discussing the case and the questions of tribal sovereignty raised therein).

concurrence to the majority opinion, Justice Stevens turned immediately to the absolutist definition found in *Black's Law Dictionary*.²⁵ While the journey taken by the Court through the question of sovereignty is again convoluted, the absolutist definition again continued to demonstrate its vitality.

State courts too have turned to the stark definition found in *Black's Law Dictionary* when dealing with the question of the relationship between Indian sovereignty and that of the United States. The Supreme Courts of both Montana²⁶ and Wisconsin²⁷ made direct and immediate use of *Black's* absolutist definition of sovereignty. Similarly, the Supreme Court of Ohio has turned to the same absolutist definition, on more than one instance, in determining whether domestic political subdivisions are sovereign or are entitled to sovereign immunity.²⁸

It cannot be argued that the absolutist concept of sovereignty was used only by pre-modern courts.²⁹ Most of the cases used as illustrations of its use were decided in the last decade. Courts continue to use the absolutist definition found in *Black's*: the Eastern District of New York, dealing with a novel argument that for tax purposes the federal government does not possess sovereignty over the territory of the fifty states, made immediate and definitive reference to *Black's Law Dictionary* for purposes of establishing the definition of sovereignty.³⁰ Clearly, in the actual application of laws and rendering of decisions, the concept of sovereignty memorialized in *Black's* retains a great deal of vitality within the United States.

The United States is not alone. Local courts throughout the world use the definition found in *Black's*, or a similar absolutist definitions. The Supreme Court of South Wales, for example, relied on a definition of sovereignty as a government “not itself subject to any

²⁵ Lara, 541 U.S. at 218 (Stevens, J., concurring).

²⁶ Confederated Salish & Kootenai Tribes v. Clinch, 336 Mont. 302, 310 (2007).

²⁷ Sturdevant v. State, 76 Wisc. 247, 253 (1977).

²⁸ Butler v. Jordan, 92 Ohio St.3d 354, 372 (Ohio 2001); Gladon v. Greater Cleveland Regional Transit Auth., 75 Ohio St.3d 312, 333 (Ohio 1996).

²⁹ Obviously, of course, courts of old *did* use the absolutist definitions found in dictionaries. See, e.g., The Lucy H, 235 F. 610, 614 (N.D. Fla. 1916) (using “standard dictionaries” to find that a sovereign is the “supreme power”).

³⁰ United States v. Webb, 100 A.F.T.R.2d (RIA) 6290, *8 n.3 (E.D. NY 2007).

government.”³¹ Similarly, The High Court of Canada, in the ongoing prosecution of Lawrence Hape, has repeatedly used an absolutist definition.³²

Ironically, the definition found in *Black’s* retains great vitality in the debate among legal scholars.³³ A vibrant debate exists among legal (and political science) scholars as to whether sovereignty continues to exist or have relevance in the twenty-first century. Richard Steinberg summarizes the manners in which the traditional, absolutist concept of sovereignty expresses itself jurisprudentially:

Legal sovereignty implies that each state has the legal competence to, inter alia, participate in the international system on an equal footing with other states, conclude treaties on the basis of consent, exclude other states from interfering in its internal affairs, govern the affairs of its domestic territory, and control its borders. The state so conceived is seen as the central global actor by lawyers in most international organizations and ministries of foreign affairs, defense, and trade.³⁴

In other words, the state is the sole international actor and as such is inviolate by other international actors. Kalypso Nicolaidis and Joyce Tong just as succinctly summarize the contestation of the traditional notion:

³¹ *Tse Chu-Fai v. Governor of the Metropolitan Reception Centre*, 150 A.L.R. 566 (S. Ct New S. Wales 1997).

³² *Regina v. Hape*, [2007] S.C.J. No. 26, slip op. at 54.

³³ See, e.g., M. Benjamin Cowan, *Venue for Offshore Environmental Crimes: The Seaward Limits of the Federal Judicial Districts*, 49 VAND. L. REV. 825, 833 n.31 (1996) (using *Black’s* to distinguish sovereignty from jurisdiction); Anna Gelpern, *The View from the Academy: Building a Better Seating Chart for Sovereign Restructurings*, 53 EMORY L.J. 1115, 1124 (2004) (using *Black’s* to define sovereignty but noting that sovereign immunity is no longer absolute); Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT’L L. 697, 730 & n.131 (1999) (using *Black’s* to provide the “classic definition” of sovereignty in a discussion of issues raised when a sovereign joins an international organization); Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT’L L.J. 373, 404 & n.111 (1995) (using *Black’s* to demonstrate that sovereignty “denotes supreme and absolute political power”); Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai’i*, 20 HAWAII L. REV. 99, 150 (1998) (using *Black’s* to demonstrate a “fairly well-established concept”); Dagmar Thorpe, *Sovereignty, A State of Mind: A Thakiva Citizen’s Viewpoint*, 23 AM. INDIAN L. REV. 481, 481 (1999) (using *Black’s* and noting that “[s]overeignty is an Anglo-European definition which is now applied to Native American tribes”).

³⁴ Richard H. Steinberg, *Who Is Sovereign?*, 40 STAN. J. INT’L L. 329, 329 (2004).

Powerful states have never had a “hands-off” approach to other states’ actions within the confines of their territorial borders. International organizations have long been in the business of managing such conditionality in every domain. What is new, however, is not the very partial and asymmetric constraining of states by each other, but the emergence of new subjects of international law.³⁵

In other words, the traditional notion of an inviolate state is under pressure from above – that is, from other states and more recently from international organizations. This observation allows Jeffrey Walker to conclude that

the post-Westphalian idea is that: 1) what a sovereign does to his own people isn't necessarily his own business – and other states may rightfully intervene under certain conditions; 2) non-state entities such as international organizations, regional alliances, and non-governmental organizations have a place at the international table; and 3) there are some universally applicable ideas that no one gets to reject, such as the inherent right of persons to fundamental human rights, the right of peoples to self-determination, and perhaps the right of everyone to democratic governance and environmental protection.³⁶

This critique of sovereignty is interesting for two reasons. First, it opens the door to the possibility that sovereignty is divisible. Sovereignty has traditionally been thought of as indivisible: “the conception of a divisible sovereignty is contrary to logic and politically unfeasible.”³⁷ Breaking up states’ monopoly as international actors by giving international organizations international standing creates a puzzle: from whence came their sovereignty?³⁸

The accepted answer seems to be that nations have “sliced” off some portion of their sovereignty and conveyed it to those organizations or otherwise infused it into international order.³⁹ Perhaps

³⁵ Kalypso Nicolaidis & Joyce L. Tong, *Diversity or Cacaphony: The Continuing Debate Over New Sources of International Law*, 25 MICH. J. INT’L L. 1349, 1354 (2004)

³⁶ Jeffrey K. Walker, *The Demise of the Nation-State, the Dawn of New Paradigm Warfare, and a Future for the Profession of Arms*, 51 A.F. L. REV. 323, 325 (2001).

³⁷ HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 320 (5th ed. 1973); see Tayyab Mahmud, *Migration, Identity, & the Colonial Encounter*, 76 OR. L. REV. 633, 676 (1997) (“Modern political discourse dictated that while a state might be divided, sovereignty was indivisible.”). Morgenthau himself argued that in the modern political context the absolutist definition of sovereignty was obsolete and that sovereignty was nothing more than the effective representation and advocacy for a nation’s interests in the international arena. Paul L. Joffe, *The Dwindling Margin for Error: The Realist Perspective on Global Governance and Global Warming*, 5 RUTGERS J.L. & PUB. POL’Y 89, 104 (2007).

³⁸ MORGENTHAU, *supra* note 37, at 325 (“[W]hat experience shows to be irreconcilable under the conditions of modern civilization – national sovereignty and international order.”).

³⁹ B.S. Chimni, *A Just World Under Law: A View From the South*, 22 AM. U. INT’L L. REV. 199, 203 (2007) (“The slice of sovereignty that is parted with today finds a non-territorial home. The

the most prominent recent advocate of this school of thought is John Jackson, who agrees that sovereignty is control but suggests that in the modern world control is allocated between nations and international organizations.⁴⁰

The observation that nations may be constrained by their international obligations as embodied in international organizations and international norms leads to a second interesting reaction. Thomas Hobbes believed that “[e]ither a state is sovereign, in which case it cannot be bound by any law higher than its own, or it is bound by law, in which case it ceases to be sovereign.”⁴¹ Many modern scholars continue this all-or-nothing conceptualization of sovereignty; any breach punctures it like a balloon and it collapses.⁴² Thus, because (under certain circumstances) the law of the European Union trumps that of constituent nations, Ian Ward may confidently proclaim “the end of sovereignty.”⁴³

A cacophony of voices proclaims the end of sovereignty and the sovereign state.⁴⁴ David Jacobsen suggests that the “classical framework of state sovereignty, national self-determination

ideas of federation and a Global State are embodied in a collective of international institutions and formal and informal global social networks.”); Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT’L L. 375, 429 (2004) (“The implication is that sovereignty is divisible; some facets of sovereignty cannot trump the concept of international obligation and some preserve sovereign autonomy over matters essentially within the domestic jurisdiction of a state.”). Although Morgenthau adopts a more realist approach, he concedes that the notion of “divisibility of sovereignty makes it intellectually feasible to reconcile . . . what logic proves to be incompatible.” MORGENTHAU, *supra* note 37, at 325.

⁴⁰ John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT’L L. 782, 794 (2003); see Vaughan Lowe, Book Review, 101 AM. J. INT’L L. 234, 236 (2007) (criticizing Jackson’s arguments).

⁴¹ John P. Humphrey, *On the Foundations of International Law*, 39 AM. J. INT’L L. 231, 233 (1945).

⁴² See, e.g., NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH* vi (1999); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1208 (2007); Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT’L L. 875, 883 (2006).

⁴³ Ian Ward, *The End of Sovereignty and the New Humanism*, 55 STAN. L. REV. 2091, 2092 (2003); see also KRASNER, *supra* note 16, at 3 (stating that as a functional matter sovereignty has never existed).

⁴⁴ See, e.g., DAVID J. ELKINS, *BEYOND SOVEREIGNTY: TERRITORY AND POLITICAL ECONOMY IN THE TWENTY-FIRST CENTURY* (1995); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485, 523-530 (2005).

and the nation state is crumbling in the core of the world order.”⁴⁵ Stephen Krasner proclaims sovereignty nothing more than “organized hypocrisy.”⁴⁶ What is most remarkable about these observations is that even as they expound upon the irrelevance of sovereignty, they continue to define it in absolutist terms – indeed, their proclamations of the end of sovereignty depend on an absolutist definition of sovereignty. Four hundred years after Leibniz, the absolutist conception of sovereignty dominates scholarly discourse.

A different, and less obvious point missed in the criticism of sovereignty has little to do with the vitality of the traditional notion of sovereignty, but has a great deal of relevance to this paper. The critiques of the traditional notion of sovereignty revel in active infringements sovereignty, usually by stronger nations or by international organizations. They fail to realize that an examination of the *entire* structure of entities considered to be sovereign may yield greater insights into the nature of sovereignty. This paper attempts to address both of those failures. First, however, the paper examines the source of the traditional notion of sovereignty in order to demonstrate the arbitrary nature of the European emphasis on the monopoly of the State when considering sovereignty.

2. *The Source of the Traditional Notion of Sovereignty*

Sovereignty is a legal construct rather than an innate part of human nature. It is important to understand that, as an empirical matter, this concept of sovereignty is a historical accident rather than an inevitable structure; it does not describe the full range of possibilities, and – most importantly – it does not accurately describe the real world. The latter observation will be discussed in the next section; this section examines the roots of the traditional notion of sovereignty.

2.1. *Sovereignty is a Historical Accident*

⁴⁵ David Jacobson, *Conclusion to The Global Future, in OLD NATIONS, NEW WORLD: CONCEPTIONS OF WORLD ORDER* 212, 217 (David Jacobson ed., 1994).

⁴⁶ KRASNER, *supra* note 16, at 3.

The predominant contemporary theory of international law traces its philosophical roots to Aristotle, its primary assumptions regarding international actors to the Treaty of Westphalia, and its principle tenets to Grotius and Leibniz.⁴⁷ The complexity of any school of thought defies simple explanation;⁴⁸ nonetheless, put simply traditional international law positions itself as a set of rules through which sovereign nations interact with one another.⁴⁹ Nations hold a near monopoly on sovereignty, with – as mentioned previously – some recognition of international organizations created by those nations.⁵⁰ Thus, it could be said that “international law is the law of nations.”⁵¹

European international law’s preoccupation with sovereignty, however, is more a historical accident than a discovery of an immutable truth.⁵² Indeed, Grotius, who most credit with the first modern compilation of western international rules in *De Jure Belli ac Pacis Libri Tres*,⁵³ did not concern himself with the nature the international actor.⁵⁴ That task was

⁴⁷ See JOSEPH G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 7-14 (9th ed. 1984).

⁴⁸ Slaughter cautions against oversimplifying the corpus of traditional international law. Anne-Marie Slaughter, *Interdisciplinary Approaches to International Economic Law: Liberal International Relations Theory and International Economic Law*, 10 AM. U.J. INT’L L. & POL’Y 717, 727 (1995).

⁴⁹ See LOUIS OPPENHEIMER, INTERNATIONAL LAW 20 (4th ed. 1928) (stating that nations are the actors in international law).

⁵⁰ See Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT’L L. 401, 415 (2000) (stating that nations have ceded some place in international law to international organizations).

⁵¹ Egon Guttman, *The Concept of Neutrality Since the Adoption and Ratification of the Hague Neutrality Convention of 1907*, 14 AM. U. INT’L L. REV. 55, 58 (1998).

⁵² See PHILLIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD 249 (1990) (“The misconceiving of international society as a system of closed sovereignties, externalized state-systems, undemocratized and unsocialized, spread throughout the world.”).

⁵³ See Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 20 (1966).

⁵⁴ See Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT’L L. 1, 21-22 (1946) (“The significance of the law of nature in [Grotius’] treatise is that it is the ever-present source for supplementing the voluntary law of nations, for judging its adequacy in the light of ethics and reason, and for making the reader aware of the fact that the will of states cannot be the exclusive or even, in the last resort, the decisive source of the law of nations.”). Thomas Hobbes is also sometimes credited with contributing to the intellectual roots of modern European international law, even though he himself did not believe in international law. Precisely because he did not believe in international law he also did not concern himself with the nature of international actors: “[law] neither makes the sovereign, nor limits his authority; it is might that makes the sovereign, and law is merely what he commands. Moreover, since the power that is the strongest cannot be limited by anything outside itself, it follows that sovereignty must be absolute and illimitable.” THOMAS HOBBS, LEVIATHAN ch. xvii (1651),

undertaken by Grotius's intellectual descendant Gottfried Wilhelm Leibniz, a diplomat for and advisor to various rulers of German principalities;⁵⁵ Leibniz spent his life balancing the overarching rule of the Holy Roman Empire against the independence of his employers.⁵⁶ Of necessity Leibniz found his employers to be sovereigns and the polities they ruled to be legitimate international actors.⁵⁷ Samuel Pufendorf, who followed Leibniz, also wrestled with the need to legitimize independent states as they freed themselves from the weakened Holy Roman Empire.⁵⁸ He posited that independent states “and supreme sovereignty come from God as the author of natural law,”⁵⁹ thus providing a foundation upon which the independent states could place themselves on equal footing with the empire – an argument based on their divine right to international personhood. The concepts born of the exigencies of Leibniz and Pufendorf became dogma as generations of international legal scholars – from Wolff through Vattel and Kant to Kelsen – preoccupied themselves with this conception in international legal personhood

cited in J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 12 (Sir Humphrey Waldock ed., 6th ed. 1963); *see* Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 *COLUM. J. TRANSNAT'L L.* 377, 435 (2006) (noting Hobbes belief that there was no authority binding sovereigns).

⁵⁵ JANNE ELISAPETH NIJMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW* 29 (2004) (stating that Leibniz was the first writer to use the term “international legal person” and noting that he was an intellectual successor to Grotius and Hobbes).

⁵⁶ E.J. AITON, *LEIBNIZ: A BIOGRAPHY* (1985); *see* Carl Friedrich, *Philosophical Reflections of Leibniz on Law, Politics and the State*, in *LEIBNIZ: A COLLECTION OF CRITICAL ESSAYS*, 47, 47-51 (Harry Frankfurt ed., 1972) (discussing the historical and intellectual background of Leibniz's work). The same, of course, was true of Grotius. *See* B.S. Chimni, *A Just World Under Law: A View From the South*, 22 *AM. U. INT'L L. REV.* 199, 202 (2007) (noting that “Grotius was a genius, but also a product of his times”).

⁵⁷ *See* NIJMAN, *supra* note 55, at 36-38 (discussing the relationship between Leibniz's occupation and his writings on international law).

⁵⁸ Leibniz, Pufendorf and others also wrote in the shadow of the brutal Thirty Years War. *See* Sungjoon Cho, *The WTO's Gemeinschaft*, 56 *ALA. L. REV.* 483, 527 (2004) (“[J]us gentium earned its international appeal after the Thirty Years War devastated several centuries' brilliant civilizational achievements in Europe. After witnessing the misery of the war, pioneering philosophers and legal scholars strived to achieve a mutually supportive and peaceful human community. These innovators attempted to tame and regulate brutal and irrational human behaviors – often committed in the name of sovereignty – through jus gentium.”).

⁵⁹ SAMUEL PUFENDORF, *ON THE LAW OF NATURE AND NATIONS* Book VII.III 1 and 2, p.1000-1 (transl. & ed. Classics of International Law 1934).

and developed rules for interaction between those international persons.⁶⁰ Pufendorf's claim of absolute, divinely based sovereignty became the foundation for the absolute sovereignty of the nation state.

The concept of the European state and its concomitant sovereignty was crafted in Europe to resolve European issues. It spread, however, to the rest of the world during the European period of colonization and occupation. As Antony Anghie notes:

The universalization of international law was principally a consequence of the imperial expansion that took place towards the end of the "long nineteenth century." . . . By 1914, after numerous colonial wars, virtually all the territories of Asia, Africa, and the Pacific were controlled by the major European states, resulting in the assimilation of all these non-European peoples into a system of law that was fundamentally European in that it derived from European thought and experience.⁶¹

Other systems did, however, order the relationships among polities differently than did post-Westphalian Europe. Their existence refutes any belief that the current version of international law represents a universal human impulse.

2.2. *The Traditional Notion of Sovereignty has not Been the Only Iteration*

Although international law treats doctrinal sovereignty as the only method of ordering relationships among polities, other methods have existed in other places in other times. Law rooted in Vedic principles relies on Dharma rather than on consensus, thus forgoing the need for absolute equality among polities.⁶² Similarly, "Islamic law, and hence Islamic international law, simply holds a different conception of law than does Western law, and hence public international

⁶⁰ See NIJMAN, *supra* note 55, at 84-85 (discussing the influence of Leibniz and Pufendorf on succeeding generations of international law scholarship).

⁶¹ Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 1-2 (1999).

⁶² See Ved P. Nanda, *International Law in Ancient Hindu India*, in THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW 51 (Mark W. Janis ed., 1991); see also VED P. NANDA & SURYA PRAKASH SINHA, HINDU LAW AND LEGAL THEORY (1996) (discussing the relationship between Vedic law and dharma); S.N. Al Habsy & Kishor Uprety, *Cooperation for Nominal Development or Politics for Actual Survival? South Asia in the Making of International Law*, 12 J. TRANSNAT'L L. & POL'Y 19, 23-24 (2002) (discussing the role of South Asia on the formation of international law).

law. . . . Islamic law draws its legitimacy from God, not from agreement. Therefore Islam cannot adduce consent, as does public international law, as the justification for public order.”⁶³

Chinggis Khan and his successors, during the long period of *pax mongolica*, created an elaborate system for ordering relations among polities. Some of Chinggis’s innovations retain vitality to this day; for example, the principle of diplomatic immunity.⁶⁴ Absolute sovereignty, however, had no place in the Ikh Yasa – the great law spread throughout the area of Mongolian hegemony.⁶⁵ The autonomy and individuality of polities was respected, but polities were ordered hierarchically, with some superior to others and all respectful in some manner to Mongolia.⁶⁶

Hierarchical systems, sometimes called vassal systems, existed throughout Asia.⁶⁷ These systems differed a great deal from the system founded by Leibniz and Pufendorf.⁶⁸ While these systems generally respected the autonomy of discrete polities, a great variety of polities existed and were arranged in hierarchies.⁶⁹

Africa too was marked by variety. It is impossible to identify a dominant scheme for ordering relationships among polities; it can be noted that the various methods differed from the rules of international personhood and sovereignty that exist today.⁷⁰

⁶³ David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT’L L. 819, 870, 877-78 (1993) (footnotes omitted).

⁶⁴ See JACK WEATHERFORD, *GENGHIS KHAN AND THE MAKING OF THE MODERN WORLD* xix (2004).

⁶⁵ Saul Levmore describes the Ikh Yasa without focusing on the manner in which it organized relations between cultures. See Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235, 280-85 (1986); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879, 924-28 (1986).

⁶⁶ See WEATHERFORD, *supra* note 64, at xix (2004) (describing rules governing relations among different cultures in Mongolian Empire); Denise Aigle, *Le Grand Jasaq de Gengis-Khan, l’empire, la Culture Mongole et la Shari’a*, 47 J. ECON. & SOC. HIST. ORIENT 31, 31-60 (2004) (discussing content of the law and the distinction between written law and customary law).

⁶⁷ See David C. Kang, *Hierarchy, Balancing, and Empirical Puzzles in Asian International Relations*, 28 INT’L SECURITY 165 (2004) (describing systems in Asia).

⁶⁸ See Larisa V. Zabrovskaia, *The Traditional Foreign Policy of the Qing Empire: How the Chinese Reacted to the Efforts of Europeans to Bring the Chinese into the Western System of International Relations*, 6 J. HIST. SOC. 351 (1993).

⁶⁹ See Kang, *supra* note 67.

⁷⁰ See David N. Edwards, *Meroe and the Sudanic Kingdoms*, 39 J. AFR. HIST. 175, 176-90 (1998) (discussing the relationships between the Kushite States and Sudanic Kingdoms); Richard

None of these systems survive today. Each was ground to dust or overwhelmed during the European period of colonization and occupation. Christopher Blakesley states:

The international law of today does not show distinct linkages to ancient Oriental and African practices. Even the modern descendants of very old Oriental cultures accept international law as the product of Western evolution. Ignorance and neglect in the West of the history of law and related institutions in the East constitute the most likely explanation of this omission. Scholars in some of the modern States that have evolved from the Oriental historical matrix sometimes chide the West for this inattention and threaten (usually mildly) to set the matter aright sometime. New States in Africa sometimes are heard in similar vein.⁷¹

The past is not the only source of different conceptions; recent theories of international law based on other intellectual paradigms offer alternatives to the post-Westphalian European concept of sovereignty. These include ideas propounded by socialist systems⁷² or by critical legal studies.⁷³ As with differing views from the past, however, these conceptualizations have had nowhere near the influence of the dominant theory of international law.⁷⁴

This paper does not argue for the superiority of one system of ordering relationships over all others. Rather, the past is brought up to illustrate a point: the traditional notion of

Reid, *Mutesa and Mirambo: Thoughts on East African Warfare and Diplomacy in the Nineteenth Century*, 31 INT'L J. AFR. HIST. STUD. 73, 73-81 (1998) (discussing rules and relationships between the Bugando Kingdom and the Nyamwezi Empire in the second half of the nineteenth century).

⁷¹ CHRISTOPHER L. BLAKESLEY ET AL., *THE INTERNATIONAL LEGAL SYSTEM* 1432 (5th ed. 2001).

⁷² See THEODOR SCHWEISFURTH, *SOZIALISTISCHES VOLKERRECHT?* 272-85 (1979) (the "highest principles" of international law include close cooperation, mutual assistance, brotherly friendship, and unity and compactness); Francis A. Gabor, *A Socialist Approach to Codification of Private International Law in Hungary: Comments and Translation*, 55 TUL. L. REV. 63 (1980) (discussing socialist principles of transnational law).

⁷³ See Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81 (1991) (suggesting a theory of international law that rejects states as primary international actors, rejects the possibility of objective consensus, and rejects the idea of determinate international legal obligations and rules).

⁷⁴ See BLAKESLEY ET AL., *supra* note 71, at 1432 ("Classical, scholarly Marxists, and many who are non-Marxist, deprecate the system of customary international law because it seems to them unavoidably to state, as law, rules and principles fostering the interests of the power elites asserting them. The socialist States of the former Second World, however, came in practice to accept the system and many of its most conventional rules and principles, while selectively seeking to deny status as law to other rules and principles because they are contradictory to national ideological or other preferences.").

sovereignty does not reflect an innate human impulse but instead reflects the conditions and exigencies of the period and place of its birth.

3. *The Traditional Concept of Sovereignty Does Not Describe the Real World*

As mentioned, many social scientists decree that sovereignty does not exist because the perfect and exclusive autonomy described in the doctrinal definition of sovereignty is infringed in the real world by rules protecting other nations. In a sense, these criticisms are somewhat overblown – it should be no more perplexing that absolute sovereignty is bounded by the obligation not to infringe on the sovereignty of other sovereigns than it is that individuals’ liberties are bounded by the obligation not to infringe upon the liberties of other individuals.⁷⁵ The real shortcoming of such criticism, however, is that it only includes the failure of the traditional notion of sovereignty to account for constraints imposed on sovereigns by other international actors or norms. The criticism does not, therefore, address the underlying structure of sovereigns or the fundamental soundness of the definition found in *Black’s Law Dictionary*.

Robert Dahl’s descriptive method suggests that a more holistic examination of sovereignty could yield useful insights. The United States presents a fruitful subject for examination. The United States is useful not because it is superior to or more worthy of study than other sovereigns, but instead because its structure encompasses a variety of relationships and arrangements.⁷⁶

3.1. *The United States*

The United States as a nation claims sovereignty.⁷⁷ Indeed, sovereignty comprises an essential component of the United States’ identity. As Attorney General Homer Cummings argued before the United States Supreme Court, “That the United States of America is a

⁷⁵ See Franz Xaver Perrez, *The Relationship Between “Permanent Sovereignty” and the Obligation not to Cause Transboundary Environmental Damage*, 26 ENVTL. L. 1187, 1188 (1996) (inherent in the concept that sovereigns are independent and equal is the rule that sovereigns may not impose on one another’s sovereignty).

⁷⁶ And also because most of the source material describing those relationships is accessible.

⁷⁷ See Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1576 (2002) (“After independence, the United States as a whole was certainly a sovereign nation, and so it presumably enjoyed a sovereign’s exemption from command.”).

sovereign nation and possesses the essentials of sovereignty has been repeatedly declared by this Court. This of necessity must be so.”⁷⁸ The United States should therefore, under the notion of sovereignty memorialized in *Black’s* and celebrated/calumniated in scholarly debate, exercise absolute control as a legal matter over everything that occurs within its physical territory and should suffer no constraints from without.⁷⁹ At most, the United States should be bound only by international norms and by obligations attached to pertinent international organizations. Scrutiny of the structure of the United States, however, indicates that this is not true. Control and authority exhibit far more complex structures.

As a physical entity, the United States consists of the forty-eight contiguous states as well as the states of Alaska and Hawaii, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, the Territories of American Samoa, Guam, and the U.S. Virgin Islands, and the insular possessions of Baker Island, Howland Island, Jarvis Island, Palmyra Atoll, Johnston Island, Kingman Reef, Midway Islands, Wake Island, and Navassa Island.⁸⁰ Within this sovereign territory of the United States, the United States possesses varying degrees of control and occasionally suffers outside dominion not at all in keeping with the definition of sovereignty.

Perhaps the most bewildering overlapping sovereignty is that of the five hundred and sixty-one⁸¹ Indian⁸² tribal governments that claim and are recognized to have sovereignty.⁸³ The Commerce Clause of the Constitution of the United States recognizes the unusual status of the

⁷⁸ *Norman v. Baltimore & O. R. Co.*, 294 U.S. 240 (1935).

⁷⁹ Other than, of course, the constraint that it respect the sovereignty of others. *See supra* note 75 and accompanying text.

⁸⁰ United States Geological Service, What are the Territories of the United States, http://www.usgs.gov/faq/list_faq_by_category/get_answer.asp?id=796.

⁸¹ *See* Bureau of Indian Affairs, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 72 Fed. Reg. 13,648 (Mar. 22, 2007).

⁸² The appellations “Indian,” “Native American,” and “Indigenous Persons” each carry problematic social baggage. On the advice of Professor Gavin Clarkson, a specialist in Indian law and a consultant to his own and several other tribes, this article uses the term “Indian,” which is the term of art used to describe the body of law.

⁸³ Hurst Hannum, *Sovereignty and Its Relevance to Native Americans in the Twenty-First Century*, 23 AM. INDIAN L. REV. 487 (1999); Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311 (1993); W. Wilma Mankiller, “*Tribal Sovereignty is a Sacred Trust*”: *An Open Letter to the Conference*, 23 AM. INDIAN L. REV. 479 (1999); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

Tribes, describing them as something different than foreign nations but also different than constituent states.⁸⁴ The relationship between the United States and the Indian Tribes has undergone constant and varying change. Chief Justice Marshall described Indian Tribes as “dependent domestic nations” subject to a great deal of control by the federal government.⁸⁵ Only a year later, the Chief Justice and the Court recognized that the Indian Tribes were independent nations prior to conquest by the United States, and that they retained rights independent of the sovereignty of the United States.⁸⁶ Indeed, throughout the convoluted history of jurisprudence regarding the Indian Tribes, courts have consistently recognized that as a legal matter the Tribes retain some degree of control independent of and unassailable by the United States.⁸⁷ Although poorly defined, the legal relationship between the United States and the Indian Tribes clearly does not fit within the legal definition of sovereignty. This is not a matter of a single polity allocating powers and responsibilities among its constituent parts – from its inception the United States has respected the remnants of sovereignty left to the nations incorporated into its expanding territory.

The nations indigenous to the mainland were not, of course, the only nations conquered by the United States. In 1893 the United States occupied the Kingdom of Hawaii in reaction to a constitution proposed by Queen Lili’uokalani.⁸⁸ A U.S.-controlled provisional government

⁸⁴ U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.”); see Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 542-548 (1996) (discussing legislative interpretations of the Indian Commerce Clause); Henry Paul Monaghan, *The Sovereign Immunity “Exception”*, 110 HARV. L. REV. 102, 118-19 (1996) (discussing judicial application of the Indian Commerce Clause).

⁸⁵ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

⁸⁶ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542-43, 583 (1832).

⁸⁷ See *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (stating that the sovereignty of Indian Tribes is not extinguished and derives from a source other than the United States or its organic documents); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1075-76 (stating that a “fundamental principle” of federal case law is that “Tribal sovereignty is not a product of the Constitution. Nor should we view tribal sovereignty as emanating from federal statutes. Unlike cities and counties, tribes are not the subunits of another sovereign. Instead, Indian tribal sovereignty is ‘primeval,’ predating the Constitution, and, indeed, the United States.”).

⁸⁸ The proposed constitution would have restored to Hawaiians power that had been subsumed by foreign businesses (mostly from the United States) through a constitution written by foreign businessmen and forced upon a previous King. See Jon M. Van Dyke, *Population, Voting, and*

applied for annexation to the United States, which – even though President Cleveland called the overthrow of the Queen an act of war – did annex the territory.⁸⁹ The United States has since apologized for the act of aggression against an independent nation,⁹⁰ and the United Nations continues to consider the status of that once recognised Pacific nation within the United States.⁹¹ What that status ultimately may be cannot be foreseen, but it is entirely possible that it, like the status of the Indian Tribes on the mainland, will not fit within the definition of sovereignty.⁹²

The Pacific Ocean holds other contradictions to the accepted definition of sovereignty. For almost forty years after the Second World War, the United States administered four regions of the Pacific as a trustee authorised by the United Nations, and exercised full authority over

Citizenship in the Kingdom of Hawai'i, 28 HAWAII L. REV. 81, 100-02 (2005) (describing Queen Lili'uokalani's constitution).

⁸⁹ See Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 550-51 (1996) (reciting history of Hawaiian annexation).

⁹⁰ Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to offer an Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993).

⁹¹ UNCHR, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: United States ¶ 37 (2006) UN Doc. CCPR/C/USA/Q/3/CRP.4, at <http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf>. The Kingdom of Hawaii has filed a complaint within the United Nations suggesting a breach of international law during the “prolonged and illegal occupation of the entire territory of the Hawaiian Kingdom by the United States of America since the Spanish-American War of 1898” consisting of “the failure on the part of the United States of America to establish a direct system of administering the laws of the Hawaiian Kingdom.” Complaint Against the United States of America ¶ 1.1 (filed July 5, 2001) <http://www.hawaiiankingdom.org/pdf/Hawaiian_UN_Complaint.pdf>.

⁹² See Jocelyn B. Garovoy, “*Ua Koe Ke Kuleana O Na Kanaka*” (*Reserving the Rights of Native Teneants*): *Integrating Kuleana Rights and Land Trust Priorities in Hawaii*, 29 HARV. ENVTL. L. REV. 523 (2005) (discussing the difficulties); John Heffner, *Between Assimilation and Revolt: A Third Option for Hawaii as a Model for Minorities World-Wide*, 37 TEX. INT'L L.J. 591, 613-618 (2002) (suggesting that international law already places Hawaii in a special position with respect to the United States). Heffner reports that more than 42% of Native Hawaiians favor some degree of autonomy from the United States. Heffner, *supra*, at 594. The Kingdom of Hawaii recently appeared as a party at a proceeding before the Permanent Court of Arbitration at The Hague. *Lance Paul Larsen v. Kingdom of Hawaii* (Perm. Ct. Arb. 2001) <<http://www.pca-cpa.org/ENGLISH/RPC/LAHK/lahkaward.htm>>. The case is discussed briefly in Le'a Malia Kanehe, *The Akaka Bill: The Native Hawaiians' Race For Federal Recognition*, 23 HAWAII L. REV. 857, 898-899 (2001).

these regions that were not part of the United States.⁹³ Three of those regions have become “independent” nations whose actions with respect to the United States (as are those of the United States with respect to those nations) are bounded by a Compact of Free Association between each and the United States.⁹⁴ The Compact entered into by Palau illustrates these boundaries. It declares that “the entry of their Government into this Compact of Free Association by the people of Palau constitutes an exercise of their sovereign right to self-determination”⁹⁵ – the compact is a foundational structural document. The Compact delineates many rights and responsibilities among the two polities; most interestingly it allocates to the United States responsibility for security and defence and prohibits Palau from inviting onto its territory any foreign militia other than that of the United States and from taking any action that the United States deems “incompatible with its authority and responsibility for safety and defence.”⁹⁶ While the Compact itself may be terminated by Palau, the restrictions on Palau with respect to security and defence cannot be terminated for fifty years.⁹⁷ Palau’s structure, its inception, allows another country to constrain its actions, even if Palau vehemently objects, for a period of fifty years. The United Nations considers compacts of free association in general to encompass transitory states between colony or protectorate status and sovereignty.⁹⁸ Nonetheless, and in spite of the fact that the compacts of free association give the United States considerable control within these polities, these former regions of the Trust Territory – Palau, the Marshall Islands, and the Federated States of Micronesia – are considered fully sovereign members of the United Nations.⁹⁹

⁹³ Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301.

⁹⁴ Compact of Free Association Between the Government of the United States and the Governments of the Marshall Islands and the Federated States of Micronesia, Pub. L. No 99-239, § 201, 99 Stat. 1773 (1986) (codified as amended at 48 U.S.C. § 1901 (1994)); Compact of Free Association Between the United States and the Government of Palau, Pub. L. No. 99-658, § 101, 100 Stat. 3673 (1986) (codified as amended at 48 U.S.C. § 1931 (1994))[hereinafter “Compact”].

⁹⁵ Compact, *supra* note 94, preamb.

⁹⁶ Jon Hinck, *The Republic of Palau and the United States: Self-Determination Becomes the Price of Free Association*, 78 CALIF. L. REV. 915, 928-932 (1990).

⁹⁷ Compact, *supra* note 94, § 451(a).

⁹⁸ Howard L. Hills, *Free Association for Micronesia and the Marshall Islands: A Transitional Political Status Model*, 27 HAWAII L. REV. 1, 4 (2004).

⁹⁹ For a full list of members of the United Nations see <http://www.un.org/members/>. The United Nations Charter specifically notes that “the Organization is based on the principle of the sovereign equality of all its Members.” U.N. CHARTER art. 2, para. 1.

The fourth region in the former Trust Territory of the Pacific Islands became a Commonwealth of the United States. The Covenant between the United States and the Northern Mariana Islands, under the auspices of the United Nations, provides for self-governance by the Commonwealth and allows the Commonwealth to overrule any federal legislation that it considers to not be in conformance with the Covenant; changes to the Covenant require approval of both the United States and the Commonwealth.¹⁰⁰ Joseph Horey (approvingly) notes the contradiction between this arrangement and the traditional notion of sovereignty: “has not the power of government been vested in two different places at once?”¹⁰¹ As is the case with the Indian Tribes, courts have difficulty interpreting this odd permutation of sovereignty but recognise it as something other than under the absolute control of the United States.¹⁰²

The bridge between the Pacific and the Atlantic Oceans also involved a construct that defied the traditional notion of sovereignty. The Panama Canal Zone ceded to the United States, in the words of the Attorney General of the United States,

not the sovereignty by that term, but “all the rights, power, and authority” within the Zone that it would have if it were sovereign, “to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority” . . . The omission to use words expressly passing sovereignty was dictated by reasons of public policy, I assume; but whatever the reason the treaty gives the substance of sovereignty, and instead of containing a mere declaration transferring the sovereignty, descends to the particulars “all the rights, power, and authority” that belong to sovereignty, and negatives any such “sovereign rights, power, or authority” in the former sovereign.¹⁰³

Once again, courts did not know precisely how to work with this incarnation that did not fit the traditional notion of sovereignty, but once again the demands of the empirical world required all

¹⁰⁰ Covenant to Establish a Commonwealth of the Northern Mariana Islands, 48 U.S.C. § 1801 art. 1 (2006). See Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 HAWAII L. REV. 445, 480-87 (1992) (explaining the Covenant).

¹⁰¹ Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 ASIAN-PAC. L. & POL’Y J. 180, 183 (2003).

¹⁰² See *Wabol v. Villacrusis*, 898 F.2d 1381, 1390 n.18 (9th Cir. 1990) (“It is undisputed that the Commonwealth is not an incorporated territory, though the precise status of the Commonwealth is far from clear.”).

¹⁰³ 26 Op. Att’y Gen. 376, 377 (1907).

parties to develop methods of resolving issues.¹⁰⁴ While many issues were in dispute, what cannot be argued is that between 1903 and 1979 the Zona del Canal de Panamá did not fit within traditional notions of sovereignty for either the United States or for Panama.¹⁰⁵

Continuing into the Atlantic Ocean, the Commonwealth of Puerto Rico has followed the lead of the Commonwealth of the Northern Mariana Islands to claim that the documents ceding Puerto Rico to the United States not only reserve for Puerto Rico the right of self-governance but also forbid the United States from altering those organic documents.¹⁰⁶ The status and resolution of Puerto Rico continues to be negotiated and debated: “Puerto Ricans are simply trying to find a place within the U.S. Constitution while maintaining a separate national identity.”¹⁰⁷ The possible outcomes of those negotiations have lead Alexander Alienikoff to warn that “our usual assumptions about sovereignty appear naïve.”¹⁰⁸

Finally, Guantanamo Bay on the island of Cuba presents issues regarding sovereignty. The United States leases Guantanamo Bay from Cuba through a perpetual lease that cedes all

¹⁰⁴ *E.g.*, *Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974); *see* Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1228 (1996) (discussing the governance of the Canal Zone).

¹⁰⁵ Interestingly, the treaties ceding/returning control of the canal to Panama imposes a requirement on Panama that the canal permanently remain neutral and gives to the United States the power to defend the canal; Panama to this day does not exert absolute control over its own territory. *See* JULIO E. LINARES, *TRATADO CONCERNIENTE A LA NEUTRALIDAD PERMANENTE Y AL FUNCIONAMIENTO DEL CANAL DE PANAMÁ* (1983) (explicating the Torrijos-Carter Treaties).

¹⁰⁶ Ediberto Roman, *The Past, Present and Future of the Puerto Rico-U.S. Colonial Relationship: Vieques, Transculturation, and Reparations: Reparations and the Colonial Dilemma: The Insurmountable Hurdles and Yet Transformative Benefits*, 13 LA RAZA L.J. 369 (2002).

¹⁰⁷ Angel R. Oquendo, *Liking to be in America: Puerto Rico's Quest for Difference in the United States*, 14 DUKE J. COMP. & INT'L L. 249, 250-51 (2004).

¹⁰⁸ T. Alexander Aleinikoff, *Sovereignty Studies in Constitutional Law: A Comment*, 17 CONST. COMMENT. 197, 203 (2000). Elsewhere in the region, the U.S. Virgin Islands has less autonomy than Puerto Rico, but unlike Puerto Rico it maintains its own customs territory distinct from that of the United States. *US v. Hyde*, 37 F.3d 116, 117 (3d Cir. 1994); *see* Gregory T. Arnold, *Bordering on Unreasonableness?: The Third Circuit Again Expands the Border Search Exception in United States v. Hyde*, (1995) 40 VILL. L. REV. 835. The Virgin Islands belong to the United States but have the power of self-governance, although probably not the power to overrule federal legislation. *See* Organic Act of the Virgin Islands, S. 4524, 74th Cong., 49 Stat. 1807 (1936); Revised Organic Act of July 22, 1954, ch. 558, 68 Stat. 497.

control and rights over the bay to the United States.¹⁰⁹ The Ninth Circuit Court of Appeals, in litigation involving the rights of alien detainees held at the Naval Station at Guantanamo Bay to petition for habeas corpus, found that the degree of control exercised by the United States over the bay constitutes sovereignty – a characterization with which the federal government disagrees.¹¹⁰ Notwithstanding Kal Raustiala’s exclamation that “[f]or several reasons, it strains credulity to argue that Guantanamo is foreign soil,”¹¹¹ the issue remains unresolved. What cannot be argued is that neither Cuba’s nor the United States’ relationships with the bay fit within the traditional definition of sovereignty.

An empirical analysis of the United States reveals that the United States is not sovereign under the traditional notions of sovereignty. The United States does not exercise absolute control over its territory, and is subject to external control in many circumstances. Interestingly, an analysis of the United States also reveals that its constructs and arrangements also render other nations, such as Cuba, Panama, Palau, the Marshall Islands, and the Federated States of Micronesia as not sovereign.

3.2. *The World*

The constructions that disqualify the United States under traditional notions of sovereignty exist elsewhere. The Åland Islands are an integral part of Finland, but pursuant to a treaty predating the cession of those islands to Finland the islands must remain demilitarized and neutral.¹¹² As a legal matter, Finland certainly does not maintain absolute control over that part of Finland. Similarly, Norway acquired the Svalbard Islands subject to a number of constraints through the Svalbard Treaty; it too (and like the United States) does not enjoy full control of its own territory.¹¹³ The Cook Islands and the state of Niue exist through free association with New

¹⁰⁹ Lease of Lands for Coaling and Naval Stations, U.S. – Cuba, Art. III, T.S. No. 418, Feb. 23, 1903, TS No. 418; *see* Raustiala, *supra* note 22, at 2536-46 (thoroughly explicating the lease).

¹¹⁰ *Gherebi v. Bush*, 352 F.3d 1278, 1290 (9th Cir. 2003).

¹¹¹ Raustiala, *supra* note 22, at 2535.

¹¹² Luke T. Lee, *The Law of the Sea Conventions and Third States*, 77 AM. J. INT’L L. 541, 565 (1983).

¹¹³ Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British overseas Dominions and Sweden concerning Spitsbergen signed in Paris 9th February 1920, *available at*

Zealand, which both requires cooperation and limits the authority of all parties.¹¹⁴ As is the case in the United States, it is difficult to reconcile this arrangement with traditional notions of sovereignty. And just as the treaty that brought the Commonwealth of the Northern Mariana Islands into the United States allows the Commonwealth considerable control over how it is treated, the Acts of Union that joined Tanganyika and Zanzibar constrain Tanzania's control over the island of Zanzibar.¹¹⁵

Other constructs exist, not found in the United States, which similarly defy the traditional notions of sovereignty. The co-Princes of Andorra – a sovereign member of the United Nations – are the President of France and the Bishop of Urgel in Spain.¹¹⁶ According to its organic documents, the Head of State of Monaco must be appointed from a list of three French citizens provided to Monaco by the government of France, and the Councilor of the Interior must be a French citizen; moreover, the exercise of government by Monaco must conform to the political and economic needs of France.¹¹⁷ Monaco – a sovereign member of the United Nations – does not satisfy the traditional definition of sovereignty. Northern Cyprus operates as an independent state but depends on either Turkey or Cyprus for international recognition – representation made difficult by the fact that Turkey (and Turkey alone) recognizes the Turkish Republic of Northern Cyprus as a separate sovereign nation.¹¹⁸ Traditional notions of sovereignty are of little use with respect to Northern Cyprus. The Sovereign Military Order of Malta, unlike the Turkish Republic of Cyprus, enjoys extensive international recognition and representation; its “territory,” however, consists of a building in Rome.¹¹⁹ It certainly does not enjoy the absolute control described in

<http://www.lovddata.no/traktater/texte/tre-19200209-001.html>; see GEIR ULFSTEIN, *THE SVALBARD TREATY: FROM TERRA NULLIUS TO NORWEGIAN SOVEREIGNTY* (1995).

¹¹⁴ Howard L. Hills, *Free Association for Micronesia and the Marshall Islands: A Transitional Political Status Model*, 27 HAWAII L. REV. 1, 5 (2004).

¹¹⁵ The Acts of Union of Tanganyika and Zanzibar, Apr. 27, 1964, 3 I.L.M. 763, 764.

¹¹⁶ Frederick Tse-shyang Chen, *The Meaning of “States” in the Membership Provisions of the United Nations Charter*, 12 IND. INT’L & COMP. L. REV. 25, 33 n.25 (2001).

¹¹⁷ *Id.* at 32.

¹¹⁸ Heinrich Klebes, *Membership in International Organizations and National Constitutional Law: A Case Study of the Law and Practice of the Council of Europe*, 1999 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 69, 78-79.

¹¹⁹ The most comprehensive information about the Sovereign Military Order of Malta is found at <http://www.orderofmalta.org/index.asp?idlingua=5>. Jason Kovacs provides an interesting analysis of the sovereignty of the Order in Jason J. Kovacs, *The Country Above the Hermes*

doctrinal sovereignty. As many as seventy-five nations as well as the Organization of African Unity recognize the Sahrawi Arab Democratic Republic as the legitimate government of the territory of Western Sahara, but the United Nations does not.¹²⁰ How the territory of Western Sahara comports with traditional notions of sovereignty, apparently, is a matter of taste. The status of Tokelau, on the other hand, defies easy explanation: it considers itself to be associated with New Zealand, even though other nations negotiate with it as an independent polity.¹²¹ Hong Kong and Macau are part of China, but China's control over those parts is constrained by the Agreements ceding (or returning) those territories to China.¹²² As with the United States, China as a legal matter does not satisfy the traditional definition of sovereignty. As with the United States, however, almost any plain speaker would consider China to be sovereign.

This list is, by necessity, illustrative rather than complete. Dozens of nations considered sovereign have arrangements that do not fit the doctrinal concept of sovereignty. The empirical understanding becomes even more complex when one takes into account polities accorded some degree of sovereignty but not considered nations. The world is littered with autonomous regions, with protected regions, with de facto states, with polities evolving toward statehood, with nations that have been absorbed. The legal lexicon does not adequately describe polities such as Abkhazia, Anguilla, Jubaland, Kosovo, Kurdistan, Nagorno-Karabkh, Palestine, Rodrigues,

Boutique: The International Status of the Sovereign Military Order of Malta, 11 DIGEST 27 (2003).

¹²⁰ Thomas D. Grant, *Hallstein Revisited: Unilateral Enforcement of Regimes of Nonrecognition Since the Two Germanies*, 36 STAN. J INT'L L. 221, 233-235 (2000).

¹²¹ Among them the United States, which negotiated a border between islands associated with American Samoa and islands claimed by Tokelau. Mark B. Feldman & David Colson, *The Maritime Boundaries of the United States*, 75 AM. J. INT'L L. 729, 749 (1981). Barry Bartmann joins other development theorists in describing Tokelau as a Sub National Island Jurisdiction, and argues that "paradiplomacy" is a necessary aspect of their quasi-state status. Barry Bartmann, *In or Out: Sub-National Island Jurisdictions and the Antechamber of Para-Diplomacy*, 95 ROUND TABLE 541, 547 (2006).

¹²² See Albert H.Y. Chen, *The Basic Law and The Development of The Political System in Hong Kong*, 15 ASIA PAC. L. REV. 19, 20-40 (2007) (discussing the development of political order in Hong Kong pursuant to the Basic Law); Po Jen Yap, *Interpreting the Basic Law and the Adjudication of Politically Sensitive Questions*, 6 CHINESE J. INT'L L. 543, 544 (2007) (outlining five principles for interpreting the Basic Law, which emphasizes distinctiveness from China).

South Ossetia, Taiwan, Tamil Eelam, and more.¹²³ The traditional jurisprudential understanding of sovereignty does not account for the world.

4. *What is Sovereignty?*

The traditional legal conception of sovereignty is final control over everything within the sovereign's jurisdiction. As one might expect of a definition that is more the product of historical necessity than of empirical fact, the traditional definition of sovereignty does not work. Sovereignty is not absolute control over everything. Myriad polities thought of as sovereign do not satisfy this definition.

What then is sovereignty? Dahl's descriptive method suggests finding commonalities in polities considered sovereign in common usage.¹²⁴ The polities considered sovereign do not have absolute control over everything, but they do have final control over something. Indian Tribes in the United States retain, in principle, final say over certain issues regarding their culture, their organization, and to some extent over their land. Those nations created through compacts of association with the United States have final say over most issues other than defence. The United States does not have unfettered authority in the Commonwealth of the Northern Mariana Islands, but it does have the final say over many issues.

Sovereignty, therefore, is not absolute control over everything. Rather, sovereignty is the ultimate control over something. Sovereignty does not seem to exist in isolated clumps, like billiard balls rolling around on a table.¹²⁵ Rather, sovereignty overlaps and is arranged in small amounts and larger amounts. It is impossible to draw a distinct line between the United States

¹²³ The inclusion of some of these polities might evoke a strong reaction from those who deny that particular polity any degree of control whatsoever. Setting aside for a moment that each has de facto control over territory, each has an arguable legal claim to some degree of control as well; whether or not their claims ultimately prevail, each has supporters who make claims of sovereignty. Some readers may also feel slighted by the fact that polities they support do not appear on this list; indeed, the list could stretch into the hundreds.

¹²⁴ See *supra* note 1 and accompanying text.

¹²⁵ The billiard ball model of sovereignty, which describes states as "closed, impermeable, and sovereign units, completely separated from all other states," like balls rolling about on a billiard table, has long been used in political science. See ARNOLD WOLFERS, *DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS* 19 (1962); see also Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 *YALE J. INT'L L.* 301, (1998) (noting billiard ball model).

and the Navajo Nation, or between the United States and the Federated States of Micronesia, or between Andorra and France or Spain, or between Monaco and France, or Northern Cyprus and Turkey, or Tokelau and New Zealand. On the other hand, there are separations between all of these polities, between the United States and its Commonwealth of the Northern Mariana Islands, between Finland and Åland, between Denmark and Greenland, and between Norway and the Svalbard Islands. Only when each of the different sets of ultimate control are integrated does one find a construct approaching the traditional, idealized conception of sovereignty.

4.1. *An Analogy to Property*

Neither the law nor those who study the law should be daunted by the fact that as an empirical matter sovereignty is parcelled out but also integrated. Other legal constructs exhibit the same conditions, and scholars (and particularly practitioners) have approached these constructs with sophistication. Property¹²⁶ exemplifies jurisprudential sophistication.

Arguably, the possession of objects, real or intangible, might be an inherent aspect of humanness.¹²⁷ Nonetheless, as Emmanuel Kant noted, “the origin of ownership is difficult to comprehend.”¹²⁸ It is law that gives expression to that particular relationship between persons and objects, and property is thus – like sovereignty – a legal construct.¹²⁹ Interestingly, as was

¹²⁶ In conversation, Professor Lee Reed pointed out to the author some confusion in the use of the term “property.” The preferred usage refers to a relationship to an object rather than to the object itself, even though both the relationship and the object are sometimes – confusingly – called property in the vernacular. This paper defines property as a relationship with an object, which may be tangible or intangible. Cf. Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2058 (2004) (defining “property as any interest in an object”).

¹²⁷ See O. Lee Reed, *What Is “Property”?*, 41 AM. BUS. L.J. 459, 461 (2004) (describing natural law theory of property); see also Karen Clay & Gavin Wright, *Order Without Law? Property Rights During the California Gold Rush*, 42 EXPLORATIONS ECON. HIST. 155, 159-163 (2005) (describing the creation of property rights in the legal vacuum of California gold rush).

¹²⁸ B. Sharon Byrd & Joachim Hruschka, *The Natural Law Duty to Recognize Private Property Ownership: Kant’s Theory of Property in his Doctrine of Right*, 56 U. TORONTO L.J. 217, 217 (2006) (quoting Emmanuel Kant: “*Der Anfang des Eigentums ist schwer zu begreifen*”).

¹²⁹ See Byrd & Hruschka, *supra* note 128, at 220 (observing that law gives expression to the ability to own objects); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics*, 111 YALE L.J. 357, 357-58 (2001) (describing a predominant theory of property: “Property is a composite of legal relations that holds between persons . . .”). Merrill

once the case with the ordering of relationships among polities in different regions, the construct varies throughout the world.¹³⁰

William Blackstone pronounced an early definition of property: “sole and despotic dominion . . . over the external things of the world.”¹³¹ Blackstone’s definition closely mirrors the traditional definition of sovereignty. Unlike the definition of sovereignty, however, the treatment of property has undergone a sophisticated evolution.

For centuries the common law has promoted carving out discrete interests in property to maximize its utility. Whether it be the subdivision of large estates, the creation of leasehold interests for a limited duration of time, or the independent sale of mineral rights, severance is an essential core of Anglo-American conceptions of property. From Locke’s application of his “labor theory,” to the creation of interests in property, to more recent utilitarian approaches to the theory of property, a hallmark of every such theoretical conception is that property is divisible, with discrete interests controlled by discrete entities.¹³²

The rigorous analysis by Wesley Hohfeld serves as a starting point for many who wish to understand the complexity of property.¹³³ Hohfeld identified eight fundamental concepts in law and “remove[d] the overlap and inconsistency, forcing a judge or other user to have a clear and definite meaning (thought, concept) and to choose the one word that would convey that exact

and Smith suggest two competing theories of property, both of which depend on law. Merrill & Smith, *supra*, at 397-98.

¹³⁰ See HIROYUKI YANAGIHASHI, *HISTORY OF THE EARLY ISLAMIC LAW OF PROPERTY: RECONSTRUCTING THE LEGAL DEVELOPMENT, 7TH-9TH CENTURIES* (2006) (describing different property system); Lord Hope of Craighead, *The Place of a Mixed System in the Common Law World*, 35 *ISR. L. REV.* 1, 17 (2001) (noting that common and civil law differ markedly in the perfection of property rights); George L. Gretton, *Reception Without Integration? Floating Charges and Mixed Systems*, 78 *TUL. L. REV.* 307, 310 (2003) (describing property law as “fragmented” between nations); Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and in the United States*, 39 *VAND. J. TRANSNAT’L L.* 435, 474 (2006) (observing that property laws and societal goals regarding property differ in different jurisdictions); Michael J. Whincop, *Conflicts in the Cathedral: Towards a Theory of Property Rights in International Law*, 50 *U. TORONTO L.J.* 41, 46 (2000) (noting that property laws differ among jurisdictions).

¹³¹ 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 2 (facsimile ed. 1979) (1766).

¹³² James S. Burling, *Private Property Rights and the Environment after Palazzolo*, 30 *B.C. ENVTL. AFF. L. REV.* 1, 51 (2004).

¹³³ See Hanoch Dagan, *The Craft of Property*, 91 *CALIF. L. REV.* 1517, 1531-32 (2003); Leif Wenar, *The Concept of Property and the Takings Clause*, 97 *COLUM. L. REV.* 1923, 1926 (1997).

meaning to another person.”¹³⁴ The application of Hohfeld’s rigorous analysis to property yields discovery of the “vest[ing] by the law with a complex – exceedingly complex, be it noted – aggregate of legal rights, privileges, powers, and immunities – all relating of course to the [object] in question.”¹³⁵ Once scholars and practitioners understand that property consists of an aggregate of relationships rather than a singly unitary relationship, they can then disaggregate those relationships and distribute them among a number of people.¹³⁶

The debate engendered by Hohfeld’s analysis goes beyond the focus of this paper.¹³⁷ Hohfeld’s analysis, under the appellation “bundle of sticks,” finds tremendous use in application and theory.¹³⁸ Neo-Blackstonians such as Thomas Merrill and Henry Smith continue to emphasize the right of exclusion as the most salient characteristic of property.¹³⁹ Anthony Honore and his followers suggest a set of core “incidents” that constitute property.¹⁴⁰ Thomas Grey suggests that the notion of property has become so fragmented that a generalized theory of property is impossible.¹⁴¹

¹³⁴ Arthur L. Corbin, *Foreword to WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTS AS APPLIED IN JUDICIAL REASONING* vii, viii (Walter Wheeler Cook ed. 1919).

¹³⁵ Walter Wheeler Cook, *Introduction to HOHFELD*, *supra* note 134, at 1, 12.

¹³⁶ See J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 *UCLA L. REV.* 711, 712-13 (1996) (discussing the many ways that property rights can be divided); Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 *HARV. L. REV.* 2055, 2095 (2004) (following Hohfeld’s analysis, “[t]here are distinguishable classes of jural relations that relate to a single piece of property; indeed, a person’s ability to possess or do something with a single stick in the bundle can be ‘strikingly independent’ of the person’s relation to another stick” (*citing* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710, 747 (1917))).

¹³⁷ See Lee Anne Fennell, *Property and Half-Torts*, 116 *YALE L.J.* 1400, 1438-39 (2007) (discussing debate and noting that “[p]roperty scholars have long struggled over the most useful characterization of property”).

¹³⁸ See Thomas C. Grey, *The Disintegration of Property*, 22 *NOMOS* 69, 69 (1980) (suggesting that this constitutes the modern understanding of property); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *HARV. L. REV.* 621, 662-63 (1998) (discussing the bundle of sticks theory).

¹³⁹ Fennel, *supra* note 137, at 1438; see Merrill & Smith, *supra* note 129, at 357.

¹⁴⁰ A.M. Honore, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107, 108-34 (A.G. Guest ed., 1961); see JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 49 (1988) (purporting to refine Honore’s list of incidents of property); see also STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 27 n.14 (1990) (“The Hohfeld-Honore analysis is common among philosophers.”).

¹⁴¹ Grey, *supra* note 138, at 74.

The debate itself offers two valuable lessons for those pursuing a more sophisticated and empirically accurate understanding of sovereignty. First, all who study property now agree that property is not a unitary, indivisible phenomenon.¹⁴² Even neo-Blackstonians posit that Blackstone’s insight was in the exclusive nature of property (whosoever possesses a property right has final say with respect to that right) rather than in his suggestion that property is absolute and sole.¹⁴³ If the “owner” of a piece of land conveys a right of way in that land to another person, common usage does not suggest that the owner no longer has property in that land, even though another person also has property in that some piece of land.¹⁴⁴ Property theory accounts for common usage and understanding. On the other hand, even though as an empirical matter the United States is bounded and limited in several ways; sovereignty theory ignores this empirical fact.

The second lesson is that law is capable of dealing with Daedalian legal concept in a sophisticated way. The law does so with property.¹⁴⁵ Any argument that a simplistic conceptualization of sovereignty is necessary so that it may function as an ordering mechanism for states falls flat in the face of the treatment of property.¹⁴⁶

4.2. *Ordering Separate and Integrated Constructs*

Scholars also have experience in working with overlapping and integrated communities. Social contract theory provides one example. Legal scholars are familiar with the concept of social contract and have used the analytic of social contract in a great variety of ways.¹⁴⁷ Social

¹⁴² Fennell, *supra* note 137, at 1439.

¹⁴³ See Merrill & Smith, *supra* note 129, at 360-361.

¹⁴⁴ See Heller, *supra* note 138, at 663 (discussing common usage).

¹⁴⁵ Abraham Bell and Gideon Parchomovsky point out that “experimentation with new and exciting property regimes” both makes more likely that “more individuals [will] satisfy their property preferences” and “expand[s] the menu of available property forms.” Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 115 (2005).

¹⁴⁶ See Perrez, *supra* note 75, at 1208 (discussing arguments that sovereignty is useful in protecting the weak from the strong and in delineating rights and responsibilities).

¹⁴⁷ E.g., Paul Lermack, *The Constitution is the Social Contract so it Must be a Contract ... Right? A Critique of Originalism as Interpretive Method*, 33 WM. MITCHELL L. REV. 1403 (2007); Don Mayer, *Corporate Citizenship and Trustworthy Capitalism: Cocreating a More Peaceful Planet*, 44 AM. BUS. L.J. 237, 268 (2007); Jeffrey Nesteruck, *A New Role for Legal Scholarship in Business Ethics*, 36 AM. BUS. L.J. 515 (1999); Steven R. Salbu, *True Codes*

contract theory is also a widely explored analytical tool in the field of business ethics.¹⁴⁸ Within the field of business ethics, Thomas Dunfee and Thomas Donaldson's "integrative social contract theory" is probably the most developed use of social contract theory.¹⁴⁹ And, as with social contract theory in general, legal scholars exhibit skill in using Dunfee and Donaldson's integrative social contract theory.¹⁵⁰

Integrative social contract theory extends the tradition of social contract theorists such as Locke and Rousseau to contemporary structures.¹⁵¹ The appellation "integrative" refers to the

versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities, 15 U. PA. J. INT'L BUS. L. 327, 351 (1994); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991); Marshall S. Shapo, *A Social Contract Tort*, 75 TEX. L. REV. 1835 (1997); Anita Silvers & Michael Ashley Stein, *Disability and the Social Contract*, 74 U. CHI. L. REV. 1615 (2007).

¹⁴⁸ See Jeffrey Nesteruk, *The Moral Dynamics of Law in Business*, 34 AM. BUS. L.J. 133, 133 (1996) ("virtue ethics and social contract theory . . . are increasingly influencing our understanding of ethical issues in business"); J. (Hans) van Oosterhout, Pursey P.M.A.R. Huegens & Muel Kaptein, *The Internal Morality of Contracting: Advancing the Contractualist Endeavor in Business Ethics*, 31 ACAD. MGMT. REV. 521, 521 (2006) ("social contract theory . . . appear[s] to be best able to provide the basic conceptual structure of the much sought after theory").

¹⁴⁹ See Lawrence Lavengood, Book Review, 111 ETHICS 627, 629 (2001) (describing Dunfee and Donaldson's "extended argument [a]s the most thorough application of contractarianism to practical ethics that we have"); Ben Wempe, *On the Use of the Social Contract Model in Business Ethics*, 13 BUS. ETHICS: A EUR. REV. 332, 332 (2004) (describing Dunfee and Donaldson's work as "one of the more authoritative recent contributions"); see also THOMAS DONALDSON & THOMAS W. DUNFEE, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* (1999).

¹⁵⁰ See, e.g., Terry Morehead Dworkin & Cindy A. Schipani, *Gender Voice and Correlations with Peace*, 36 VAND. J. TRANSNAT'L L. 527 (2003); Timothy L. Fort & James J. Noone, *Banded Contracts, Mediating Institutions, and Corporate Governance: A Naturalist Analysis of Contractual Theories of the Firm*, 62 LAW & CONTEMP. PROB. 163 (1999); David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 IOWA J. CORP. L. 41, 48 (1999) (using integrative social contract theory as "as a foundation for determining the parameters of social responsiveness"); Daniel J. McCarthy & Sheila M. Puffer, *Interpreting the Ethicality of Corporate Governance Decisions in Russia: Utilizing Integrative Social Contracts Theory to Evaluate the Relevance of Agency Theory Norms*, 33 ACAD. MGMT. REV. 11 (2008); Sheila M. Puffer & Daniel J. McCarthy, *Applying Integrative Social Contracts Theory to Russia*, 18 U. PA. J. INT'L ECON. L. 1281 (1997); Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, (1999).

¹⁵¹ See Michael Keeley, *Continuing the Social Contract Condition*, 5 BUS. ETHICS Q. 241 (1995) (stating that Dunfee and Donaldson's work extends the work of the Sophists and of Locke to modern organizations).

integration of two distinct types of social contracts.¹⁵² First, a hypothetical macrosocial contract exists among all of the members of a given society, the contents of which are all of the economic rules to which all of the members would agree.¹⁵³ Obviously, completely agreed upon rules will not be great in number or in detail; therefore, within that hypothetical macrosocial contract a moral free space exists.¹⁵⁴ Inside that moral free space, discrete communities are free to enter into the second type of social contract: explicit contracts that provide more detailed rules concerning ethical behavior in economic life.¹⁵⁵ The existence of multiple, overlapping communities is similar to the concept of integrated sovereignty.

Dunfee and Donaldson define communities as “all coherent groupings of people capable of generating ethical norms . . . includ[ing] a corporation, a department or other subgroup within a corporation, a social club, an industry association, a faculty senate, a church or synagogue, a city government, an association of trial lawyers, and so on.”¹⁵⁶ Because these communities overlap and interact, an observer should “anticipate the certainty that legitimate community-generated norms would sometimes conflict with one another.”¹⁵⁷ Coherent ordering of these communities, therefore, requires priority rules; Dunfee and Donaldson suggest that such rules

¹⁵² See Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252, 254 (1994) (explaining the appellation).

¹⁵³ See Thomas Donaldson & Thomas W. Dunfee, *Integrative Social Contracts Theory: A Communitarian Conception of Economic Ethics*, 11 ECON. & PHIL. 85, 93 (1995) (explaining the hypothetical macrosocial contract).

¹⁵⁴ Donaldson & Dunfee, *supra* note 152, at 260-62.

¹⁵⁵ See Donaldson & Dunfee, *supra* note 153, at 94-95 (discussing microsocial contracts). Microsocial contracts are bounded by hypernorms, which are “principles so fundamental to human existence that they serve as a guide in evaluating lower level moral norms.” Donaldson & Dunfee, *supra* note 152, at 265. Microsocial contracts must also satisfy a requirement that individual members have consented to that contract. Donaldson & Dunfee, *supra* note 153, at 98. Consent can be indicated by, among other means, not taking advantage of an opportunity to exit. *Id.* at 99.

¹⁵⁶ Thomas W. Dunfee, *The Role of Ethics in International Business*, in BUSINESS ETHICS: JAPAN AND THE GLOBAL ECONOMY 63, 68 (Thomas W. Dunfee & Yukimasa Nagayasu eds., 1993).

“Thus defined, communities are groups that determine their own membership and apply their own preferred forms of rationality.” *Id.*

¹⁵⁷ DONALDSON & DUNFEE, *supra* note 149, at 44.

must comport in the case of social contracts with the overarching macrosocial contract.¹⁵⁸

Dunfee and Donaldson offer six possible rules for prioritizing community-generated norms. Interestingly, these rules “derive in large part from principles recognized in choice-of-law and extraterritorial jurisprudence.”¹⁵⁹ The finer points of their priority rules are not directly applicable to the concept of integrated sovereignty.¹⁶⁰ Instead, it is again the lesson that is important: scholars and practitioners can conceive of integrated structures, integrated structures can exist without each being absolute and independent of one another, and social scientists – particularly those versed in law – can develop rules for arranging and coordinating among the various structures. The argument that the traditional notion of sovereignty is useful because it allows for ordering of international relations¹⁶¹ is obsolete – the world is already aligned in overlapping and integrated ways. Aligning jurisprudence with empirical fact is possible, and will yield a more accurate application of law.

5. *Aligning the Definition of Sovereignty with Empirical Observations of Sovereignty*

Robert Dahl’s descriptive method suggests finding commonalities in entities considered sovereign. These entities share the fact that they possess final control over some issue. When integrated these various loci of control conform to the traditional notion of sovereignty, but it is important to understand that each separately constitutes, and is considered in the vernacular, a sovereign.

¹⁵⁸ *Id.* at 45-46; see Mark Douglas, *Integrative Social Contracts Theory: Hype Over Hypernorms*, 26 J. BUS. ETHICS 101, 109 (2000) (arguing that priority rules can serve the needs fulfilled by hypernorms in bounding microsocial contracts).

¹⁵⁹ DONALDSON & DUNFEE, *supra* note 149, at 184.

¹⁶⁰ The rules, summarized: 1) transactions within a single community are governed by that community’s rules; 2) extant rules for resolving conflicting norms should be used; 3) the norms of the largest community take precedence over subcommunities; 4) essential norms take precedence; 5) consistency among alternative norms should be respected; and 6) well-defined norms have precedence over generalized norms. *Id.* at 184-90.

¹⁶¹ See MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY* 32 (1995) (discussing the importance of a unitary conceptualization of sovereignty as a “guide to an entity’s international status,” and a tool in the resolution of disputes); Anne Orford, *The Politics of Collective Security*, 17 MICH. J. INT’L L. 373, 400 (1996) (discussing arguments that absolute sovereignty is necessary to protect global security).

5.1. *The Ordering of Politics*

Integrated sovereignty more accurately reflects the world as it is. One cannot say that the sovereign nation of Palau actually enjoys “supreme, absolute and uncontrollable power” or that it regulates its “internal affairs without foreign dictation.”¹⁶² It does not: the United States controls military issues within the territory of Palau. Together, however, the United States and Palau control a great deal of what may occur within the territory.¹⁶³ Similarly, the United States does not exercise unbounded control over the territory of the United States, but does possess control over most issues. Control over what happens within the United States is shared among several entities.

Integrated sovereignty also provides a coherent structure for ordering relationships among the various polities. An empirical examination of the United States and of the world reveals countless varieties of political arrangements, many of which defy easy explanation within the traditional legal framework.¹⁶⁴ The question of whether or not the United States has a sovereign interest in Guantanamo Bay is made difficult as a legal matter by the fact that sovereignty is evaluated on an all or nothing basis. In reality, the United States possesses a great deal of control over the bay. Giving a name and legal force to that control eases the strain on credulity that Raustiala so appropriately expressed.¹⁶⁵ Giving a name to and assigning respect for the control possessed by Andorra or Monaco allows for rational and straightforward relationships rather than what Frederick Chen considers an “astonishing” deceit in ignoring the fact that other countries play a direct role in the governance of those “sovereigns.”¹⁶⁶ Integrated sovereignty begins to sort out an answer to Robert Jackson’s heartfelt question: “Can we speak intelligibly of African “states” in such circumstances?”¹⁶⁷ Integrated sovereignty respects the

¹⁶² BLACK’S LAW DICTIONARY 1430 (8th ed. 2004).

¹⁶³ Other actors possibly possess sovereignty within the territory of Palau, as discussed *infra* notes 96-98 and accompanying text.

¹⁶⁴ See Pål Kolstø, *The Sustainability and Future of Unrecognized Quasi-States*, 43 J. PEACE RES. 723, 723-24 (2006) (discussing the number and characteristics of quasi states).

¹⁶⁵ *Supra* note 111.

¹⁶⁶ Chen, *supra* note 116, at 33 n.25.

¹⁶⁷ Robert H. Jackson, *Quasi-States, Dual Regimes, and Neoclassical Theory: International Jurisprudence and the Third World*, 41 INT’L ORG. 519, 528 (1987); see Wole Soyinka,

sovereignty of Indian Tribes, and protects that sovereignty from the vagaries of a legal structure that has no place for such an entity.¹⁶⁸

5.2. *The “All or Nothing” Approach to Sovereignty*

Integrated sovereignty also offers a way out of the “yes-they-are”/“no-they-aren’t” all or nothing analysis of sovereignty. As noted, many scholars dismiss the entire notion of sovereignty because in the real world no entity possesses absolute control over everything.¹⁶⁹ Such simplistic treatment is intellectually troubling, not least because it threatens abandonment of a concept widely used in the real world simply because it does not conform to an artificial ideal.

Integrated sovereignty salvages the concept of sovereignty. Sovereignty remains a useful concept in the empirical world because control does exist in the real world. John Jackson recognizes the value of identifying control in international entities. Jackson suggests that an important aspect of understanding sovereignty is finding the locus of control with respect to a given matter.¹⁷⁰ He also suggests that control may be allocated not only to nations but also to international organizations.¹⁷¹ While Jackson’s suggestion is, as usual, insightful, it is hindered

Centralism and Alienation, 53 INT’L SOC. SCI. J. 13, 15-16 (2001) (noting the need for structures that recognize the de facto organization of peoples in Africa in entities that do not reflect sovereign lines drawn by colonizing nations).

¹⁶⁸ See Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1183 (2004) (noting that the most recent Supreme Court decision leaves many questions open). Frank Pommersheim makes clear the threat facing Indian Tribes:

My experience as a tribal appellate judge in working with tribes, principally in South Dakota, is that as they tried to go forward they feel that they really cannot count on Congress, they cannot count on the Supreme Court, they really cannot count on the Constitution. They are just going to go and do what they think is right and see how it plays out. From the tribal perspective, that is a totally inadequate legal and ethical framework in which it must act.

Frank Pommersheim, *Lara: A Constitutional Crisis in Indian Law?*, 28 AM. INDIAN L. REV. 299, 306 (2004).

¹⁶⁹ See *supra* notes 41-43 and accompanying text.

¹⁷⁰ Jackson, *supra* note 40, at 794-95.

¹⁷¹ *Id.* at 795-96.

by a familiar weakness: he looks only to control at the level of the state or the supra state organization,¹⁷² and does not take into account the variety of ways in which control is vested throughout entities at all levels of the political structure.

Integrated sovereignty does allow for varied expressions of sovereignty. Integrated sovereignty does not suggest that the United States is not sovereign simply because the United States does not possess unfettered control. When the possessor of fee simple in a piece of land transfers a right of way to another in that land, neither the law nor common usage suggest that there is no longer a property interest in that land.¹⁷³ Similarly, the United States certainly has a sovereign interest in the United States, even given the empirical fact that it does not exercise absolute control. The fact that the United States possesses control over most issues must be taken into account¹⁷² and respected by the law.

5.3. *The Future of International Law*

If one takes the insights gleaned through Dahl's descriptive treatment of sovereignty to its logical conclusion, integrated sovereignty may help to resolve some of the most damaging criticisms of international law. Sovereignty remains the cornerstone of international law,¹⁷⁴ despite criticisms of the traditional notion of sovereignty.¹⁷⁵ International law as a whole has endured criticism for much of the last century, as a sterile body of rules that does little more than

¹⁷² See *supra* notes 38-40 and accompanying text (discussing the scholarly critique of sovereignty).

¹⁷³ Margaret Davies, *The Ethos of Pluralism*, 27 SYDNEY L. REV. 87, 104 (2005).

¹⁷⁴ See Paul W. Kahn, *Lessons for International Law from the Gulf War*, 45 STAN. L. REV. 425, 435 (1993) (“[S]overeignty is not a relative value in the system of international law. Rather, it is the foundation or starting point of the whole system.”); Thomas Rose, *A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada*, 27 YALE J. INT’L L. 193, 215 (2002) (“sovereignty remains a cornerstone of international law”); Jianming Shen, *The Relativity and Historical Perspective of the Golden Age of International Law*, 6 INT’L LEGAL THEORY 15, 17 (2000) (following the Peace of Westphalia, sovereignty formed the most important “foundation of international law”).

¹⁷⁵ Mary Margaret Penrose, *Impunity – Inertia, Inaction, and Invalidity: A Literature Review*, 17 B.U. INT’L L.J. 269, 277 (1999) (“Despite modern attempts to discredit a system based purely on principles of state sovereignty, sovereignty remains the cornerstone of modern international law.”).

provide a highly idealized description of the interaction of nations.¹⁷⁶ The Second World War sharply focused criticism of international law; the lack of an international law basis for condemning the internal acts of brutal governments startled many scholars and lay people alike.¹⁷⁷ The war crimes trials following the conclusion of the war, as well as the creation of the United Nations and other international organizations, had the practical effect of extending international law to individuals – both as protected objects and as liable parties – and to international organizations.¹⁷⁸

Doctrinal international law, of course, did not readily encompass these new objects of international law.¹⁷⁹ The “law of nations” was no longer the law of nations. The New Haven School of international law, begun at Yale Law School, proposed a more active role for international law by inserting international politics into international law and endowing

¹⁷⁶ See, e.g., Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in *THE RELEVANCE OF INTERNATIONAL LAW* 133, 138 (Karl W. Deutsch & Stanley Hoffman eds., 1968) (criticizing international law as a “repository of legal rationalizations”); Roscoe Pound, *Philosophical Theory and International Law*, I *BIBLIOTECA VISSERIANA* 73, 87-88 (1923) (vigorously attacking positivism in international legal scholarship); Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 *STAN. L. REV.* 811, 819 (1990) (criticizing “sterile positivism” in international law scholarship).

¹⁷⁷ David J. Bederman, *The New International Law in an Old Age of Indeterminacy*, 81 *TEX. L. REV.* 1521, 1527-28 (2003) (book review); William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 *AM. U.J. INT’L L. & POL’Y* 227, 227-29 (1997); see Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 *AM. J. INT’L L.* 205, 207-20 (1993) (reviewing development of international legal scholarship following the Second World War).

¹⁷⁸ Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *HARV. L. REV.* 815, 839 (1997) (discussing changes in the subjects of international law following the Second World War and the Nuremberg trials); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 *VA. L. REV.* 1071, 1135 (1985) (discussing the changes in the conceptualization of international law as reactions to the Second World War and the Nuremberg Trials).

¹⁷⁹ See Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act*, 26 *U. PA. J. INT’L ECON. L.* 193, 221-22 (2005) (describing inability of international law to cope with human rights and international organizations); see also PHILIP C. JESSUP, *TRANSNATIONAL LAW* 1 (1956) (suggesting a new name for international law because it is no longer purely the law of nations).

international law with purpose as a tool for policy objectives.¹⁸⁰ These changes were lauded as significant, but most of the basic contours and assumptions remained untouched, including the focus on the nation as the only legitimate international actor.¹⁸¹

In this century, the phenomenon underlying the term “globalization” sharply focuses the shortcomings of international law.¹⁸² Globalization engenders many definitions.¹⁸³ The least satisfying of the many theories or definitions simply observes that more economic transactions now occur across political borders than occurred a few years ago.¹⁸⁴ More troublesome theories of globalization invest those relationships with some form of animus, an attempt by those who possess power to take advantage of those without.¹⁸⁵ More interesting definitions try to explain the increase in transborder relationships, whether through changes in technology or changes in

¹⁸⁰ See Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991, 1992 (1995) (book review) (noting that the New Haven School “breaks radically” from positivism); Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 819-820 (1990) (“Connecting law with context and policy, the approach [the New Haven School] shows that legal decisions involve choice.”).

¹⁸¹ Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law*, 42 KAN. L. REV. 557, 593-94 (1994); see LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 10 (1989) (an advocate of the New Haven School suggests that there is too much emphasis on the state).

¹⁸² See Richard Frimpong Oppong, *Private International Law in Africa: The Past, Present, and Future*, 55 AM. J. COMP. L. 677, 679 (2007) (“Globalization is the defining characteristic of our age. The interactions it generates condition economic and social development.”).

¹⁸³ See Aaron Judson Lodge, *Globalization: Panacea for the World Or Conquistador of International Law and Statehood?*, 7 OR. REV. INT’L L. 224, 229-30 (2005) (providing dozens of definitions of globalization); see also ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE 8-32 (1992) (discussing disagreements over the definition of globalization).

¹⁸⁴ Richard H. Steinberg, *Who Is Sovereign?*, 40 STAN. J. INT’L L. 329, 337 (2004) (defining globalization as “freer movement of capital and goods”).

¹⁸⁵ E.g., Jamie Doucette, *APEC: The Long March Through the Inquiries; Inquiry Into Policing of Demonstrations at 1997 Meeting of Asia-Pacific Economic Cooperation*, CANADIAN DIMENSION, Nov. 1, 2001, at 35 (“We may even assist other complacent westerners in recognizing and publicizing the history of antidemocratic schemes that have been used to implement neoliberal globalization worldwide.”); see David A. Westbrook, *Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort To Think Gracefully Nonetheless*, 47 HARV. INT’L L.J. 489, 500 (2006) (“In popular and academic culture, globalization is often defined vaguely and negatively, the dark background against which meanings, legal and otherwise, are constructed among people.”).

attitude.¹⁸⁶ For the purposes of this paper, the superiority of one definition over another is not relevant. What is relevant is the observable and indisputable fact underlying the theoretical cacophony – more people are entering into more relationships, without reference to sovereign political boundaries.¹⁸⁷

These relationships highlight an axiological criticism of international law theory and practice. Traditional international law posits a handful of actors in a single, albeit complex, arena. For the most part the theory treats other entities as having only one important relationship – the relationship with the sovereign nation that represents them in international law as determined through internal processes within that nation, internal processes that for the most part lie outside the bounds of international law.

Law's response to reality has been weak. As discussed, some scholars suggest that some degree of sovereignty may have vested itself in supranational organizations,¹⁸⁸ and international law might in some unexplained manner recognize individuals.¹⁸⁹ Hector Fix-Fierro and Sergio Lopez-Allyan correctly point out, however, that traditional international jurisprudential thought

¹⁸⁶ See Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1644 (2006) (globalization has “changed the definition of what constitutes ‘local issues’”); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 615-16 (2008) (describing globalization in terms of changes in attitude). Anthony Giddens notes that technological changes have compressed time and space, a phenomenon he refers to as “distanciation,” and suggests that as a consequence relationships have been “disembedded” from the local context and restructured “across indefinite spans of time-space.” ANTHONY GIDDENS, CONSEQUENCES OF MODERNITY 14, 21 (1990). Roland Robertson similarly acknowledges the impact of technological changes but suggests they have led to a change in the way that people understand the world, a “simultaneity and the interpenetration of what are conveniently called the global and the local.” ROLAND ROBERTSON, GLOBAL MODERNITIES 35 (1995).

¹⁸⁷ See Jessica Matthews, *Power Shift*, FOREIGN AFF., Jan.-Feb. 1997, at 50, 50 (noting that relationships are now created with little regard for political boundaries); Barney Warf, *International Competition Between Satellite and Fiber Optic Carriers: A Geographic Perspective*, 58 PROFESSIONAL GEOGRAPHER 1, 5 (2006) (describing at length “the rapid expansion of demand for international telecommunications, itself driven by the steady growth of multinational corporations, global business travelers, international tourism, mounting transcontinental telephony, and cross-border sales of television shows”).

¹⁸⁸ See *supra* notes 38-40 and accompanying text.

¹⁸⁹ See *supra* note 36 and accompanying text.

is ill-prepared to deal with the broad concept of globalization because traditional international notions of jurisprudence are founded on the traditional notion of sovereign nations.¹⁹⁰

Polities designated as sovereign constitute important international actors, as do supranational entities and individual persons. The real world, however, encompasses a tremendous variety of actors, each of which has the potential to engage in international activities and to influence the international environment.¹⁹¹ These entities have the ability to enter into thousands of relationships across political borders every day.¹⁹² Moreover, as Dunfee and Donaldson demonstrate, an individual may belong to several communities, some existing solely within the political borders of one country, some explicitly crossing borders, and some with no reference to nations at all.¹⁹³ With rare exceptions these groups must create rules and institutions to facilitate their relationships. International law, however, does not recognize let alone explain or make predictions regarding these rules and institutions. International law, therefore, fails as a theoretic for the bulk of transnational activity.

¹⁹⁰ Hector Fix-Fierro & Sergio Lopez-Allyan, *The Impact of Globalization on the Reform of the State and Law in Latin America*, 19 HOUS. J. INT'L L. 78, 786 (1997).

¹⁹¹ Yishai Blank states:

The Westphalian paradigm of international law is slowly waning. States are no longer the sole bearers of rights and duties in the international sphere, nor are they the sole actors in the international arena. The more international law extends its reach over nonstate actors, the more they become involved in international relations, transnational dialogue, and conflict. Domestic interest groups, transnational corporations, and global networks of NGOs all take part in the new global, political, and social constellation that defines the age of globalization. Alongside the arrival of new actors on the international stage, a multitude of transnational agreements, institutions, and adjudicative tribunals has emerged, reflecting the corresponding move from international to transnational law.

Yishai Blank, *Comparative Visions of Global Public Order (Part 2): Localism in the New Global Legal Order*, 47 HARV. INT'L L.J. 263, 265 (2006).

¹⁹² See Steven R. Salbu, *Regulation of Borderless High-Technology Economies: Managing Spillover Effects*, 3 CHI. J. INT'L L. 137, 149 (2002) (“the Internet magnifies the speed and quantity of potential international transactions exponentially”); Richard S.J. Tol, *The Impact of a Carbon Tax on International Tourism*, 12 TRANSPORTATION RESEARCH: PART D 129, 129 (2007) (“International aviation is the fastest growing part of transport and it is more difficult to regulate than domestic transport, *inter alia* because it is outside the jurisdiction of a single country.”); Warf, *supra* note 137, at 9 (noting that between 1988 and 2003 transatlantic cable capacity increased by 103,000 percent and transpacific capacity by 1.6 billion percent).

¹⁹³ See *supra* note 156 and accompanying text.

International law is equally inadequate in practice. Law constitutes a critical element in creating and supporting relationships, and in regulating behaviors inimical to relationships and to groups.¹⁹⁴ International law, with its focus on only a handful of transnational actors, does not provide a structure, nor does it itself regulate most inimical behaviors. The scholarship of Douglass North and other institutional economists,¹⁹⁵ of Robert Putnam and other development theorists,¹⁹⁶ and of Neil Fligstein and other business sociologists,¹⁹⁷ clearly demonstrate the necessity of rules and institutions in effectuating relationships. International law provides no such support or regulation.

¹⁹⁴ See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS: A STUDY IN THE ECONOMICS OF INTERNAL ORGANIZATION* at xi-xii (1975) (noting that markets require institutions); Neil Fligstein, *Markets as Politics: A Political-Cultural Approach to Market Institutions*, 61 AM. SOC. REV. 656, 656 (1996) (noting that markets are inseparable from institutions).

¹⁹⁵ E.g., DOUGLASS C. NORTH, *CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS TO AN UNDERSTANDING OF THE TRANSITION PROBLEM* (1997) (discussing the relationship of institutions to relationships within emerging economies); Douglass C. North, *Dealing with a Non-Ergodic World: Institutional Economics, Property Rights, and the Global Environment*, 10 DUKE ENVTL. L. & POL'Y F. 1, 3 (1999) (discussing law as a necessary institution); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 562 (2005) (acknowledging theoretical groundwork of North with respect to the interaction between law, institutions and relationships); Lan Cao, *The Ethnic Question in Law and Development*, 102 MICH. L. REV. 1044, 1069-70 (book review) (describing North's and other's work).

¹⁹⁶ E.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); ROBERT D. PUTNAM, ROBERT LEONARDI & RAFFAELLA Y. NANETTI, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993); see Timothy L. Fort & Cindy A. Schipani, *The Role of the Corporation in Fostering Sustainable Peace*, 35 VAND. J. TRANSNAT'L L. 389, 436 (2002) (discussing Putnam and other theorists); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 504 (2002) (discussing concern over a decline in social institutions as described by Putnam); John Wilson & Marc Musick, *The Effects of Volunteering on the Volunteer*, 62 LAW & CONTEMP. PROB. 141, 142 (1999) (discussing Putnam's theories); see also Sidney Tarrow, *Making Social Science Work Across Space and Time: A Critical Reflection on Robert Putnam*, 90 AM. POL. SCI. REV. 389 (1996) (discussing the impact of Putnam and especially the concept of institutions).

¹⁹⁷ E.g., Neil Fligstein, *Sense Making and the Emergence of a New Form of Market Governance*, 49 AM. BEHAV. SCIENTIST 949 (2006) (describing the use of institutional heuristics by economic entities); Neil Fligstein, *Markets from Networks: Socioeconomic Models of Production*, 32 CONTEMP. SOC. 673 (2003); see Mauro F. Guillén, *The Economic Sociology of Markets, Industries, and Firms*, 32 THEORY & SOCIETY 505 (2003) (describing economic sociology's attempt to integrate multiple phenomenon and noting Fligstein and other economic sociologists); Rudolph J. R. Peritz, *History as Explanation: Annals of American Political Economy*, 22 LAW & SOC. INQUIRY 231, 243 (1997) (discussing Fligstein and other economic sociologists).

Integrated sovereignty suggests one part of the resolution of these criticisms. To the extent that the nation states no longer hold a monopoly on sovereignty, to the extent that the law recognizes that polities other than nation states possess final control over certain matters, then there is no reason why the law cannot recognize sovereignty in other communities and even in individuals. To do so not only better reflects reality, it also opens the door to the creation of transnational legal structures to support existing relationships.

Integrated sovereignty, for example, sheds light on the opaque relationship between the individual and the state, the lack of explanation of which has been criticized by legal scholars.¹⁹⁸ Integrated sovereignty characterizes the relationship as a relationship between entities that each possess sovereignty – sovereignty being the final control over some matter. Human rights, then, are recast as those matters over which individual persons have final control. Individual persons do have final control over certain matters, and the fact that they do does not make the state vulnerable nor does it shatter the concept of sovereignty when sovereignty is not defined in absolutist terms. Designating human rights as those issues over which an individual – or a family, or a collective, or some other group – has the final say creates a logical background against which those rights can be claimed against a state. Human rights are no longer an anomaly, an abrogation of the absolute sovereignty of the state;¹⁹⁹ instead, they are one expression of sovereignty to be arranged with other expressions.²⁰⁰

An obvious question asks over what matters an individual has control; two different methods of answering this questions might lead to similar sets of answers. The first, in some

¹⁹⁸ See, e.g., G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 901-03 (1995).

¹⁹⁹ See BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE 172-73 (2003) (discussing, and disagreeing with, perception that human rights constitute a threat to sovereignty); C. Cora True-Frost, *The Security Council and Norm Consumption*, 40 N.Y.U. J. INT'L L. & POL. 115, 179 (2007) (“some state actors might perceive human rights norms as threats to their sovereignty”).

²⁰⁰ See Michael C. Dorf, *Incidental Burdens of Fundamental Rights*, 109 HARV. L. REV. 1175, 1176-78 (1996) (discussing different methods of arranging incidental and direct burdens on rights); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 537 (2001) (discussing means of arranging competing claims by host countries and foreign investors); Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 59 (1992) (discussing the arrangement of rights and drawing a distinction between categorization and balancing). Legal scholarship and practice have much experience in arranging claims and rights.

ways more comfortable for the legal scholar, turns to legal instruments for information. Agreements such as the United Nations Universal Declaration of Human Rights²⁰¹ could be a good starting point. While certainly not without controversy, instruments such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights²⁰² and the International Covenant on Civil and Cultural Rights²⁰³ memorialize the consensus of many cultures and to some extent already delineate the accepted relationship between that which the state controls and that which remains in the control of the individual.²⁰⁴ Bruce Ackerman suggests, for example, that article four of the International Covenant on Civil and Political Rights “sets the proper standard” regarding the right not to face disparate treatment based “solely on the ground of race, colour, sex, language, religion or social origin.”²⁰⁵

The second possible method of answering this question seeks to find that which should be controlled by the individual not in instruments created by states but instead in the cultural instruments created by humans.²⁰⁶ This, of course, is the means suggested by Dunfee and Donaldson for the discovery of the social contracts created by the various communities within the moral free space bounded by the macrosocial contract.²⁰⁷ While this sounds far outside of

²⁰¹ G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948); see Ratner, *supra* note 200, at 455 (discussing memorialization human rights starting with the Declaration. Domestic law sometimes turns to the Declaration; Judith Resnick notes, for example, that proponents of human rights in the United States offered the Declaration as evidence that racially discriminatory laws violated basic principles. Resnick, *supra* note 186, at 1574.

²⁰² 993 U.N.T.S. 3 (1966).

²⁰³ 999 U.N.T.S. 171 (1966); see Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2568 (1991) (describing these instruments as comprehensive).

²⁰⁴ See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1977-1988 (2002) (using empirical indicators to find a general degree of compliance among ratifying nations).

²⁰⁵ Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1075-76 (2004), quoting International Covenant on Civil and Political Rights, *supra* note 203, art. 4, 999 U.N.T.S. at 174.

²⁰⁶ See Rajat Rana, *Symphony of Decolonisation: Third World and Human Rights Discourse*, 11 INT'L J. HUM. RTS. 367, 367-68 (2007) (suggesting that a culture-based approach would achieve the universal standards sought by international law); see also Bert Scholtens & Lammertjan Dam, *Cultural Values and International Differences in Business Ethics*, 75 J. BUS. ETHICS 273, 275-80 (2007) (conducting a detailed examination of the cultural aspects of ethical behavior to find common standard and rules).

²⁰⁷ See DONALDSON & DUNFEE, *supra* note 149, at 87-94; see also Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215, 257-58 (2001) (discussing the means and difficulties of discovering norms).

the realm of law, international practitioners already engage in a similar process when attempting to determine customary international law.²⁰⁸ Fleshing out the nature of sovereign interests in an integrated system should not be a daunting process for legal scholars.

By recognizing the individual as an entity that possesses a sovereign interest, integrated sovereignty also allows international law to support relationships not currently supported by international law. Integrated sovereignty breaks the artificial monopoly held by states over international law and returns it to the pre-Westphalian days when *lex mercatoria* and a variety of forms of transnational law supported relationships across political borders.²⁰⁹

Conclusion

Three hundred and fifty years of instrumental use have rendered notions of sovereignty somewhat rigid. While scholars recognize weaknesses in traditional notions of sovereignty, the absolutist idea of sovereignty continues to have a great deal of vitality in practice. Scholars reinforce the absolutist conception by approaching sovereignty as an all or nothing construct.

Sovereignty is not all or nothing. Borrowing Robert Dahl's methodology of empirical observation, the world is filled with sovereigns who do not have control over everything that occurs within their borders. To disqualify these entities as sovereign would render international law meaningless.

These sovereigns do, however, control something. Empirical observation shows that control does not exist in delineated packages, like billiard balls, nor does it exist in neat columns. Control – sovereignty – overlaps, and is spread throughout a variety of communities and even individuals. What doctrinal international law considers a unitary, indivisible phenomenon is actually integrated sovereignty.

Legal scholarship must take account of integrated sovereignty. Rather than ignoring the lack of absolute control or treating that lack as an inchoate defect in an "otherwise" sovereign country, rather than treating it as a near miss in those entities not recognized as states, legal

²⁰⁸ See Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 37 (1995) (discussing sources that provide information about the customary law of human rights); Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 527 (2000) (discussing sources of customary international law).

²⁰⁹ See KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* (1999) (describing *lex mercatoria*); David J. Bederman, *The Foundations of Law: World Law Transcendent*, 54 EMORY L.J. 53, 63 (2005) (describing forms of laws and their uses).

scholarship must develop rules for prioritizing and creating relationships among entities that possess sovereignty. Decades of sophisticated work with property law, as well as more recent forays into the realm of social contract, indicate that legal scholarship is well equipped for this task. By undertaking this task, legal scholars will align law more closely with the empirical world, and will better position law to accommodate the evolving requirements of that changing world.