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# A Foundation for Transnational Obligations

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# **A FOUNDATION FOR TRANSNATIONAL OBLIGATIONS**

**JAMES M. DONOVAN**

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A stubborn problem for philosophers working to trace the outlines of a just arrangement of political institutions has been the relationship between states. After the characteristics of the just State have been detailed, how should it then relate to other states? What are its duties (e.g., is a prosperous state ethically required to redistribute its wealth to poorer states?) and what principle if any, other than superior power, exists to compel one State to yield to the demands of any other, even in the cause of right?

Such questions are more than pedantic. Issues on the front pages of daily newspapers underscore the complexity of state interactions. The question to be asked is whether, even in principle, there can exist an obligation for a State against its will to either do or to refrain from doing certain things, including actions that collectively can be glossed as falling into the rubric of “human rights.” On what basis would another State be ethically justified to enforce such duties? These obligations, if they exist, by their nature supersede the traditional sovereignty of the individual State.

Some philosophers deny the possibility of transnational binding obligations that follows from anything more than consent of the individual State. Others point to the existence of such obligations as evidence that the understanding of the State as “sovereign” has ended. By most accounts, sovereignty and human rights appear to be mutually exclusive.

Richard Winfield would perhaps look to achieve the same result as an international law by allowing an expansive right of intervention by one State in the affairs of another, provided the intervening State ranks higher on the scale of realized political

rights than does the state intervened upon. This solution is sufficiently problematic however, in that it depends wholly upon the self-judgments of the state actors as to their relative merits of desert, a condition that Locke recognized was an insufficient basis upon which to ground the exercise of legal sanction.

Even lacking such drawbacks, we would be rightly uneasy of solutions that encourage a rank ordering of moral worth, not because the project cannot be defended but because in practice the enterprise so rarely benefits anyone other than the State claiming the moral superiority. If temptation for such opportunism can be avoided by finding a solution that is at least equally effective at providing a rationale for intervention between states, but lacks the implicit encouragement for international adventurism, that search is warranted.

The manner in which the question is asked provides footing for the initial attempt at its answer. The very nature of an “international law” on any topic, including human rights, presupposes the multiplicity of states. Part I considers whether this observed severality of nations is an historically contingent fact, or is instead necessary to the existence of any political states at all. It concludes that the solitary state is a conceptual oxymoron.

In light of that outcome some other means must be sought to resolve the dilemma of human rights enforcement. Part II shall attempt to sketch one possible alternative grounded in joint operation of the mutual recognition that is entailed by political identity and state sovereignty and the Hohfeldian application of legal primitives to the human rights context.

## **Part I: The Necessary Existence of Many States If There Are Any At All**

Winfield suggests that multiple states are a contingent fact, and allows that a fully-formed state could emerge in complete isolation from any other (although any actually existing state would in fact reflect the reality of other states in the details of its structural arrangements).<sup>1</sup> If Winfield's account holds, then no theoretical basis appears to prevent the formation of a world-state (i.e., a state that encompasses all people). There may be practical obstacles to this outcome, but the potential realizability of a Kantian world-state offers one solution to our problem in that it renders moot the need for a binding international law on any subject, including human rights, in two ways.<sup>2</sup>

Any cosmopolitan community dissolves the subject of an "international" law in that there are no relations *between* states that must be ordered, there being only the one State. In its place is only the problem of conforming actions of entities subordinate to the State to standards of ethical behavior, such as the respect for fundamental human rights. The troubling challenge of international human rights violations has here been reduced to an analogue to (if not the equivalent of) any other criminal actions.

More to the point, within the world-state the need for a binding law protecting human rights would be minimal. Beyond resolving the problem of human rights enforcement by reducing it to a facet of internal criminal law enforcement, the potential

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<sup>1</sup> Richard Dien Winfield, *The Just State: Rethinking Self-Government* (Humanity Books, 2005), p. 389 ("a state can practice self-government without relating to any other body politic....institutions of political freedom are determinable without reference to foreign relations.").

<sup>2</sup> The Kantian position on the world-state is discussed in his *Metaphysics of Morals*. According to Kant, geographical proximity underpins the emergence of the state as "a group of people whose members 'cannot avoid interacting.'" Given the limits of the earth, all humans must interact with one another, leading inevitably to the single cosmopolitan community. See Mark Tunick, "Hegel on Political Identity," in *Beyond Liberalism and Communitarianism: Studies in Hegel's Philosophy of Right* (Robert R. Williams, ed., SUNY Press, 2001), pp. 69-70.

for one world-state *dissolves* the problem because, as envisioned by political philosophers, that state will have realized self-determination of its citizens, and therefore have no need for a binding law against violation of human rights. By definition such prepolitical rights of its citizens would be protected in the structural arrangements of other components of the society leading up to the creation of the political world-state. Study may be necessary to fully recognize the nature of those rights, and to guide against any inadvertent limitation on them, but the just State will not intentionally violate them. If all the world's peoples reside within this one just State, then all people will have their human rights respected, eliminating any need for humanitarian intervention.

For these reasons the possibility of a world-state remains an attractive option. If that solution stands as at least a theoretical possibility, then it may indeed be the most efficient means to achieve a permanent solution to the problem of violation of human rights by sovereign states.

We have, however, cause to doubt the possibility of any single political entity in the form of a world-state. The argument takes the following form:

- 1) the political collectivity of the "state" is more than the sum of its encompassed parts;
- 2) this qualitative difference is rooted in the "self-consciousness" of the citizens as to the political nature of their constitution (as opposed to it being merely an means to manage the affairs of the constituent parts, such as civil society and the family);
- 3) political self-consciousness takes the form of a political identity;
- 4) identity at any level is based upon contrast with some other equivalent entity;
- 5) political identity as a State therefore requires at least two states.

If these points can be successfully argued, then it follows that the world-state solution to the problem of human rights violations is not reasonable. While world-level authority

structures could arise, under this argument that outcome would not be recognizable as a “state” in the ethical sense it has been argued by Hegel and other political philosophers. Instead, it would be a throwback to the level of Middle Ages feudalism, what Marx called “the *animal history* of humankind, its zoology,”<sup>3</sup> wherein the institutions of authority were fully reducible to the interests of civil society and the family, based on power rather than on right.

### **A. The State**

Any argument concerning the State must begin with some clarification of what is meant by the term. Popular understandings of the State are typically grounded in the legal understanding of what is required to be recognized as a State on the world stage. As outlined in the Montevideo Convention, 165 L.N.T.S. 19 (1933), statehood is defined by four elements:

1. a defined territory;
2. a permanent population;
3. a government in effective control of that territory; and
4. the capacity to enter into international relations.

The first element distinguishes a State from an ethnic aggregation (a “people” as opposed to a “nation”), the second requires that there be citizens within the State who recognize the legitimate authority of the government. Relatedly, a true State must be represented by a government that exerts control over that citizenry, as opposed to being one in name only. Finally, the State must be able to create binding agreements, which it cannot do if it is subservient to another State. While recognition of state governments can be withheld,

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<sup>3</sup> Karl Marx, “From the Critique of Hegel’s *Philosophy of Right* (1843),” *Early Political Writings* (Joseph O’Malley, ed., Cambridge University Press, 1994), p. 19.

according to Montevideo Article 6 recognition of states is “unconditional and irrevocable.”

All of these components have been interpreted flexibly in the actual practice of international law:

1. Kuwait was recognized as a State in 1961 even though it had serious border disputes with Iraq, precluding its having a “defined territory” at that time (a problem that would, we now know, initiate a chain of events that threatens the security of the world today);
2. the size of the population can be so small as to render the requirement *de minimis*, as is seen by the recognition of the Vatican as a State despite a permanent population of less than one thousand;
3. so long as a conflict is judged to be a “civil war” rather than war simpliciter, the nation does not cease to be a State despite the lack of any government in effective control over the entirety of the territory (as was illustrated by the American War between the States); and
4. Recognized States often cede many of their powers to other States, as in the case of Monaco’s exercise of foreign relations which it has given over to France.<sup>4</sup>

The legal conception of the State grounds the perception of its essential nature as “sovereign.” The four defining elements of the Montevideo Convention can be read as doing nothing more than deconstructing this presumed essential attribute of all states. It was Jean Bodin, a sixteenth-Century French philosopher who outlined the theory of sovereignty, which possessed full powers, remaining subject to only natural and divine laws.

Wherefore let this be the firft and chiefe marke of a foueraigne prince, to bee of power to giue laws to all his fubiects in generall, and to euerie one of them in particular, (yet is not that enough, but that we muft ioyne thereunto) without confent of any other great, equall, or leffer than himfelfe. For if a prince be bound not to make any law without confent of a greater than himfelfe, he is then a verie fubiect; if not without his equall, he then hath a companion: of not without the confent of his inferiours,

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<sup>4</sup> Examples have been drawn from Elizabeth F. Defeis, *International Law Video Course: States* (1995).

whether it be of his fubiects, of the Senat, or of the people, hee is then no foureraigne.<sup>5</sup>

The essence of sovereignty, although it may take various forms in sundry contexts, is that there is a monopoly of power. The State, consequently, is defined by just that territorial extent to which it is the exclusive authority. Where this is the empty set, no State exists; where this condition pertains over any territory, however small, then a State has come into existence.

For many people today the principle understanding of the modern State is equivalent to this approach to sovereignty. If it fully captures what it means to be a State, then nothing prevents there being only one State; if the essential attribute of law is supreme power, then conceivably that power can be consolidated to control all the planet. If, however, this characterization falls short of what it means to be State (as opposed to a mere locus of power, even supreme power), then the door is again open to questioning the philosophical coherency of the idea of the world-state.

In contemporary society the understanding of the modern State as reducible to an impermeable sovereignty seen as the uncontested exercise of power has become problematic. A corollary of the traditional approach—often termed “Westphalian” for emerging out the 1648 Peace of Westphalia which ended the Thirty Years War and established within Europe a generally recognized freedom of religion—is that sovereigns are free to decide what goes on inside their own borders.

Human rights principles contradict this premise, however, holding that the sovereign is limited with respect to even its own people. Yet, as Bodin framed the matter, any sovereign that is answerable to another power is no sovereign. Emerging human

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<sup>5</sup> Jean Bodin, *The Six Bookes of a Common-weal* (Translated by Richard Knolles, 1606), Book 1, chap. 10 (p. 159).



rights laws, therefore, seem inherently incompatible with the understanding of the modern state as grounded in sovereignty. Either one of three outcomes must be the case:

1. Human rights, despite the rampant rhetoric, hold no obligation for state sovereigns against their consent. States, in other words, cannot be required to observe principles of human rights, nor can human rights violations within a State's borders be the grounds for intervention by another State;
2. The emergence of human rights represent a new obligation for all states, and thus Bodinian sovereignty requires replacement; or
3. States retain their sovereignty as commonly understood, but the understanding of the basis and operation of that exclusive exercise of power must somehow be amended to recognize this new obligation.

While the parameters of the idea of the human right remain in flux—it is not clear what they are, or what follows from them—it does seem unlikely in the extreme that modern society will walk away from them, not least because we have seen what can occur in a world that lacks that idea. Similarly, the concept of the presumed integrity and ordinary inviolability of the State has proven value, minimizing the merits of any serious call to do away with sovereignty in its entirety. The most likely solution, one that would allow state sovereignty and human rights to coexist, is to reframe the detailed understanding of the relevant sovereignty. The next section looks at one such approach, one based on Hegel's systematic analysis of political institutions comprising the State.

## **B. The State as Political Self-Consciousness**

The previous section demonstrated that while the common understanding of the State is planted in ideas of supreme power, that conception conflicts with other of today's political desiderata, including observance of human rights. If human rights are to be recognized and protected, then a more nuanced approach to state sovereignty must be articulated. Hegel's analysis can offer one approach.

According to Hegel, the political State is the culmination of the arrangement of institutions that have as their ground the mutual recognition of rights. The basic problem is one that Hegel articulates with more detail in other works, including the *Phenomenology of Spirit*, especially in the section “Independence and Dependence of Self-Consciousness: Lordship and Bondage” (*PoS* §§178 et seq.).<sup>6</sup> In this myth Hegel recounts the first meeting of two self-conscious beings. That meeting disintegrates the sense of self of each, since it “finds itself as an *other* being,” but also denies individuality to the other, since it “does not see the other as an essential being, but in the other sees its own self” (*PoS* §179). The experience of the other as an obstacle to realizing its own goals is an unavoidable consequence of social life. This other cannot be destroyed, because to do so would be to destroy oneself, since, as mentioned, upon the meeting one reflexively finds oneself in that other. The only productive solution is to achieve a rapprochement, one that reconciles the self with the other. Although personal individuality is retained, the other is no longer experienced as an obstruction but as a part of one’s awareness of one’s own self:

[Consciousness] is aware that it at once is, and is not, another consciousness, and equally that this other is *for itself* only when it supersedes itself as being for itself, and is for itself only the being-for-itself of the other. Each is for the other the middle term, through which each mediates itself with itself and unites with itself; and each is for itself, and for the other, an immediate being on its own account, which at the same time is such only through this mediation. They *recognize* themselves as *mutually recognizing* one another. (*PoS* §184)

This understanding that self-consciousness “exists only in being acknowledged” (*PoS* §178) informs Hegel’s political philosophy, which seeks to apply these conclusions to the realization of the rational political State. As in the *Phenomenology of Spirit*, the goal in

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<sup>6</sup> All references to the *Phenomenology of Spirit* [*PoS*] are to G.W.F. Hegel, *Phenomenology of Spirit* (A.V. Miller, trans., Clarendon Press, 1977).

*Philosophy of Right* is to remove the experience of the other as a limitation on subjective will, and instead to incorporate those external demands so that they are experienced instead as being one's own. Through that universalization of will, achieved by the rational ordering of institutions, living in conformity with duties becomes an expression of freedom, and not a restriction upon it.

The way in which this outcome is achieved begins with the analytic claim that my own right to property must be coterminous with my obligation to respect your right to your property. From such simple beginnings Hegel traces out the manner in which the human spirit becomes actualized in freedom, which can only be achieved in a rationally organized society. When institutions of the state are organized in this manner (that is to say, rationally), a feeling of "trust" is created within the citizen, which Hegel describes as

the consciousness that my substantial and particular interest is preserved and contained in the interest and end of an other (in this case, the state), and in the latter's relation to me as an individual. As a result, this other immediately ceases to be an other for me, and in my consciousness of this, I am free. [*PoR* §268]<sup>7</sup>

The condition of freedom therefore relates not to a purely formal grant of rights and privileges by a sovereign state (as the Bodinian theory of sovereignty would imply), but rather to the citizen's recognition and understanding of the reasonableness of the arrangement of social institutions. The emergence of the State follows upon the necessary precondition of the self-conscious awareness of the citizen that the rationality of state institutions effectively achieve the ends for which they are intended, the realization of right. Having recognized their rationality, the person can be at home in the demands of

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<sup>7</sup> All references to the *Philosophy of Right* [*PoR*] are to G.W.F. Hegel, *Elements of the Philosophy of Right* (Allen W. Wood, ed., Cambridge University Press, 1991).

these social institutions, and experience fulfilling those obligations as actualization of rather than limitation upon freedom (*PoR* §149).

Anything less than the arrangement described by Hegel results in an exercise in power, not a State. The appearance of the State is therefore a relatively recent phenomena, one that required the working through the precursor forms of political institutions (*PoR* §§341-360), a sequence that allows the understanding of the individual to mature into full political freedom.

Hegel's exposition incorporates language of exclusive sovereignty that fully evokes the image of the Bodinian modern State. The distinction to be asserted here is that what for Bodin was a *sui generis* defining element of states becomes in Hegel the consequence of more fundamental aspects.

Although couched in terms of Hegel's philosophy, the present argument holds true of any system of thought that regards the function of political organization to realize freedom or a similar concept. Freedom entails some manner of choosing (although not necessarily the arbitrary subjective will many assume to be the *sine qua non* of freedom); in order for the choice to have ethical significance, the options must be fully known to chooser. Self-consciousness must therefore be a necessary component of any arrangement of political institutions designed to maximize that ethical goal. If one wanted to frame this thesis without reference to Hegel, one could find other authorities developing much the same point.

### **C. Self-Consciousness as Identity**

As Hegel's myth illustrates, self-consciousness is to be aware of one's self in distinction from others. Self-consciousness is thus rooted in the recognition of one's individuality,

out of which is formed the specific content of a self. Another way of putting this is to say that self-consciousness bears some nontrivial relationship to the concept of the personal identity. The contents of consciousness of self by some process are formed into a stable structure what the I recognizes as being who I am.

If Hegel is correct in his relation of self-consciousness to the emergence of the modern State, it follows that political identity is also required for a true State. The citizen becomes at home living within the social institutions comprising the State because they also form part of his identify.

In this regard Hegel's comments on the monarch appear to be psychologically insightful. His constitution of the ideal State includes as a necessary element a single person to embody the "personality of the state" (*PoR* §279). Although undoubtedly reflecting his historical context, the inclusion of this necessary figurehead underscores both the need for a means to enable identification between the citizens and their State, and points to the most likely institution to fulfill this function.

As Winfield convincingly articulates, there arise serious problems in any expectation that the legislative branch of a just State will embody the electorate in any direct manner. Overly close association between the voters and the candidate lead to expectation that the candidate will push the private agendas of the party or other constituency that elected him. Within the just State the legislator must be free to represent the universal good, and not the particular goals, of the citizens. Consequently the impulse to identify over-closely with the legislator should be actively discouraged.

In contrast, "in a well-ordered monarchy, the objective aspect is solely the concern of the law, to which the monarch merely has to add his subjective 'I will'" (*PoR*

§280). Assigned such a minimal role, little danger arises from close identification between the citizens and this subjective embodiment of the State, allowing them to see him as an extension of themselves. An attack on him becomes an attack on them in a way that a similar attack upon a legislator would not. While not every just State will include a monarchical figure, the present discussion predicts that some entity will emerge to play the same psychological role of a living incarnation of the State with which each citizen can identify.

#### **D. Structuring Self-Definition**

Identity is but one form of definition, in this sense self-definition. Self-consciousness leads to self-definition. Political identities are accordingly formed through the recognized processes for all definitions.

For present purposes, the primary observation is that definitions (and perhaps especially self-definitions) are fundamentally structural. Terms are assigned meaning not by reference to intrinsic qualities, but through contrast with others. What a thing “is” is what we are left with after we have listed everything that it is *not*.

Meaning is made out of difference. Definition begins in negation, in the designation of what a thing is not. The process of separating a name, a word, an identity, from those surrounding it begins in differentiation. It must be marked as other than these, as “not—,” outside those which might be thought to contain it.<sup>8</sup>

Backgrounding this description is Saussurean linguistics, which begins with the observation that the relationship between any word and its referent is arbitrary.<sup>9</sup> From

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<sup>8</sup> Anne Norton, *Reflections on Political Identity* (Johns Hopkins University Press, 1988), p. 3.

<sup>9</sup> There does exist a few examples of language uses that employ “sound symbolism,” wherein sounds are non-randomly associated with particular meanings. Subjects are able to identify with high probability, in unrelated languages that they do not speak, which member of a contrastive pair carries a certain meaning,

this perspective words derive meanings from their places in a larger network of related terms. Each term is contextualized relative to its lexical neighbors, allowing them to mutually define and delimit one another. Meaning follows from synchronic structural relationships with other words rather than from diachronic historical processes or from the referent's essential properties.

The "I" is in this setting little different from any other term to be defined (despite its being a semantic shifter). To be self-aware is to have some set of concepts, structurally defined, that in combination set "me" apart from all the other potential "I"'s. For Hegel the problem is to define the I in such a way that those co-existing others cease to present an obstacle to the exercise of my freedom. This he achieves by finding the citizen at home in a rationally organized society. But for the purpose of this section, we need to realize that this is just an exercise of (self-)definition.

Structural definition requires not just other concepts, but other closely related ideas. We get a better idea of "red" not by playing it off the concept of "cat," but by relating it to collateral concepts such as "blue" and "yellow." My self-awareness as a "male" requires primarily the recognition of its otherness from "female," and not from exposure to concepts about snowflakes.

We see this process in full operation in Hegel's description of the functioning of corporations within civil society. Individuals come together with others who share their particular interests, and thereby their selfish ends are transmuted into the particular ends of an "enclosed sphere" (*PoR* §252). The corporation thus mediates between the natural grouping of the family, and the political association of the State. Corporations are

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just on the sound alone. Typical pairs include high-low, light-dark, small-large. The existence of this linguistic subset, however, does not detract from the general soundness of Saussure's principle.

formed out of “the inherent likeness of such particulars” as describe the natures of each of the branches of work performed within civil society (*PoR* §251). This most important of prepolitical identities, we see, is formed exactly according to Saussurean structuralism.

### **E. The Necessary Severality of States**

According to the present analysis, the State emerges out of self-consciousness (Point B), which involves the formation of a political *identity* (Point C). As all identities emerge out of contrast with reflective coordinate others (Point D), then such political identity requires an “other” against which to define itself. To recognize oneself as having a political identity that contains specific content that is not reducible to reiteration of the component parts of family and civil society which are encompassed by the State, one must form that identity through contrast with another State.<sup>10</sup> Without such contrastive others, there can be no positive formation of a State identity, which is necessary if, as Hegel argues, the emergence of the State is out of self-consciousness (which itself is required if the goal of the state is to actualize freedom).

Hegel provides a pointed illustration of the kind of political identity formation involved. The ordinary process he describes becomes madly efficient during times of war. If there are to be any benefits at all to armed conflict, the resulting consolidation of national self-definition in contrast to the enemy is certainly to be counted among them. The individuality of each state that appears through the ordinary “*relation* [of the state] *to other states*, each of which is independent in relation to the other” (*PoR* §322) functions here even more efficiently. “The ethical *moment of war*” impels the subordination of particular goals in favor of the universal good:

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<sup>10</sup> For a contrary argument, see Arash Abizadeh, “Does Collective Identity Presuppose an Other? On the Alleged Incoherence of Global Solidarity,” 99 *American Political Science Review* 45-60 (2005).



War is that condition in which the vanity of temporal things and temporal goods...takes on a serious significance, and it is accordingly the moment in which the ideality of *the particular attains its right* and becomes actuality. (*PoR* §324)

Conflict of any kind, but most especially that which threatens life and way of life, eliminates ambiguity about who “we” are in contrast to “them.” These contrasts are not random, and usually involve the inflation of our own virtues and the exaggeration of the opponent’s vices. Typical would be Arthur Schlesinger’s description of the premise of the Cold War as the conviction “that the United States [was] infinitely virtuous and that the Soviet Union [was] infinitely wicked.”<sup>11</sup> The lesson here is that such war rhetoric represents simply a heightening of the ordinary process of political identity formation by contrast with other States.

An additional reading drives this point home even deeper. If the shortcomings within civil society are chronic, occasional war may be necessary to keep civil society together by periodically reminding it to overcome its inherent conflicts of interest in order to pursue the universal good. From this more extreme understanding of the role of war within even just societies then comes the implication that the attempt at world-state is inevitably unstable because, without others against whom to war and thereby to purge and renew civil society, those differences can accumulate to the detriment of political cohesion.

It is possible to accept the conclusion that the requirements of political identity require the juxtaposition of the State against some parallel institution without acquiescing to the claim that this argument requires the concurrent existence of more than one State.

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<sup>11</sup> Arthur Schlesinger, Jr., *Foreign Policy and the American Character*, 62 *Foreign Affairs* 1, 5 (1983).

Two rebuttals can be anticipated: can the contrastive others be either (a) a non-state political organization, or (b) an imaginary State?

*Rebuttal 1: The non-state neighbor.* The usefulness of non-state neighbors in the role of contrastive other is to be doubted on two counts. First, it is not clear, given the process of identity formation outlined in (D), that non-states can offer the kind of clear counterpoint upon which a vital identity *as a State* can be formed. As presented, identities are formed by contrast with a parallel entity, and not with just any available other. While non-states can provide a contrast, it would be a political level more general than that of the State, and thus the resulting identity, while admittedly qualifying as a political identity, would not be a self-identity as a *State*.

Consider, for an illustrative example, whether a football sports team would form a more articulated identity of itself as a football team when contrasted with a rival football team, or when comparing itself to the debate team. Experience shows that the rival provides the more pertinent fulcrum for self-conscious identity. The latter would perhaps suffice to form an identity of itself as a generic “team,” or even as a “football team” in the abstract. But this fails to generate a fleshed-out definition of the self as this particular football team.

Similarly, comparison with a non-state neighbor would be adequate to form a concept of the State as a nation, but not as the kind of freedom-fostering, rights-protecting institution that makes it a “State” rather than some lesser political organization. It could *think* of itself in those terms in the flatly abstract, but not in the concrete way required to create a true identity, and which is revealed only in difference.

The second reason this approach provides little resolution to the puzzle is that, even if non-state neighbors suffice to form a State's political identity, in the scenario of interest here, the possibility of the world-state, no such non-state neighbors will exist. The only available contrastive other, then, will be nonexistent ones, leading to consideration of the second possible rebuttal.

*Rebuttal 2: The historical antecedent.* Perhaps the foil for the formation of political identity exists not in a simultaneously existing second State, but in some imagined State. The most effective form of this nonexistent State would be the historical antecedent of the current one. In other words, the political "other" for the present State could be its own earlier iteration. Whereas a wholly imaginary State would lack the necessary specificity against which to read off defining traits, current citizens of the one State would know the historical forms of their own organization, and would define themselves in opposition to that more primitive arrangement.

This rebuttal raises its own problems, however, which diminish its attractiveness. An already difficult question concerns the binding-ness of a constitutional arrangement that was ratified by no person currently alive. While it can be argued that the constitution arises out of the sociocultural practices and understandings of the founding generation, it is not clear why this should bind subsequent generations, a problem that led Thomas Jefferson to conclude that all laws and constitutions should expire after thirty-four years.<sup>12</sup>

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<sup>12</sup> Thomas Jefferson, "Letter to James Madison (Sept. 6, 1789)," *The Writings of Thomas Jefferson* (Andrew A. Lipscomb and Albert Ellery Bergh, eds., Thomas Jefferson Memorial Association, 1904), Vol. 7, p. 459. Other sources attribute to Jefferson an even shorter lifespan for constitutions of nineteen years.

Whatever else the complete solution will include, it would be difficult to imagine that somewhere within it will not be the expectation of some meaningful continuity of society between the founders and contemporary citizens.<sup>13</sup> The suggestion that contemporary political identity can be formed by using as the required contrastive other the historical antecedents of the current society therefore introduces a problematic disruption that severs the presumptive continuity between generations and their political institutions.

Whereas the one argument would find binding obligation in historical continuity, the other seeks to define political identity out of historical discontinuity. Consequently, even if it were conceded that the necessary “other” can be carved out of the State’s own history, the price may be too high, quite like trying to solve one’s loneliness by slicing the body in half.

## **Part II: State Obligations Based on Reciprocal Recognition**

The result of the discussion of Part I is a realization that the hope for a world-state is intrinsically contradictory. One can either have a world-government, or one can have a freedom-promoting State, but you cannot have both. Because it cannot be sufficiently self-consciousness of itself as a *State* rather than a mere political bureaucracy, the world-state cannot be a *State* in the sense of fostering freedom and right (unless we discover extra-terrestrial States). “According to the Hegelian analysis, free men make *states* to regulate their freedom; free *states* in turn regulate their freedom not by making ‘still

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<sup>13</sup> Sociocultural continuity is not the only response to the difficulty of transgenerational legitimacy of a constitution. Randy Barnett argues that, given the such constitutions cannot meaningfully be based on the “consent of the governed,” constitutional legitimacy must be based on something else altogether. His solution is in the procedural assurances “that enacted legislation does not violate the [natural] rights retained by the people.” Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton University Press, 2004), p. 52.

another' state, however irresponsibly large, but by making *history*, whose court of judgment is indeed a *world* court in the profoundest sense."<sup>14</sup> Consequently, the political terrain will consist of multiple states if there are any true states at all, a point endorsed by Carl Schmitt, who asserted that "the political world is [necessarily] a pluriverse, not a universe."<sup>15</sup>

Such a conclusion seems to put us back where we began: multiple Bodinian sovereign states upon whom there can be no binding obligation exclusive of their consent to be bound (i.e., no international law, and thus no protection of the human rights of citizens not one's own). But from the previous discussion we have gained two clarifications. First, the proper philosophical goal is the articulation of a binding *obligation*, not a binding *authority*; there can be no higher authority than the sovereign State, but that does not mean there cannot be a binding obligation upon said State that cannot be enforced by sister states (but without recourse to a potentially self-serving evaluation that the transgressing state is inferior to the enforcing state, or lacks a right to exist).

Second, we now possess the means toward a more positive solution because we see that Winfield has been overly pessimistic on another point. He has denied the structural mutual self-definition of states analogous to that which pertains between individuals.<sup>16</sup> We have seen from the earlier analysis, however, that this is not the case.

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<sup>14</sup> Henry Paolucci, "Hegel and the Nation-State System of International Relations," in *Hegel's Social and Political Thought: The Philosophy of Objective Spirit* (Donald Phillip Verene, ed., Humanities Press, 1980), p. 164-165.

<sup>15</sup> Carl Schmitt, *The Concept of the Political* (George Schwab, trans., University of Chicago Press, 1996), p. 53.

<sup>16</sup> See p. 395. His reasons are two: First, "a sovereignty ... does not emerge in and through intercourse between nations," a claim addressed in Part I of this discussion, and second, whereas persons are normatively equal, he withholds similar equality between states, arguing instead that "the normative

While states may not need other states for the identification of what prepolitical rights merit protection (i.e., each State will realize for itself what are the “human rights”), they do need other states for their self-identity as a *State*, rather than as a corporate aggregate for the administration of the affairs of civil society. Just as freedom consists in the recognition of the rights of others, so too does the sovereignty of the State depend upon the presence of external others. In Hegel’s words to the same effect, “Without relations with other states, the state can no more be an actual individual than an individual can be an actual person without a relationship with other persons” (*PoR* §331). The State is not in principle as solipsistic as perhaps Winfield imagines that it could be (although never in fact actually is), opening the way for a reciprocal engagement between states for the recognition of rights analogous to that which exists between persons.

Anthony D’Amato’s theory of reciprocal-entitlement violation offers one model for just such mutual relationship.<sup>17</sup> Just as self-conscious identity emerges out of confrontation with an appropriate other, that encounter renders additional effects in the realm of actuality. A political entity becomes a State by being recognized as such by other states. That recognition entails, without anything further, the assignment of entitlements and duties to the recognized State. If the initial entitlement concerns the sanctity of its borders, D’Amato identifies a longer list of additional ones that similarly follow merely from state status:

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equality of individual states is relative to the justice of their domestic institutions.” Hegel similarly believes in the lesser moral worth of nations below his articulated standard (*PoR* §347). Space does not permit a full discussion of this point, other than the comments above. A further illustration of the undesirable outcomes resulting from such moral rankings would be this troubling comment: “Nor can any [states of equivalent legitimacy] justifiably wage war against noncombatants of enemy peer nations.” Falling short of an outright prohibition on targeting noncombatants, on its face this passage appears to open the door to conclusions that a “superior” nation can, in fact, justifiably target noncombatants.

<sup>17</sup> Anthony D’Amato, *Is International Law Really “Law”?*, 79 Northwestern University Law Review 1293-1314 (1985).

The full list of entitlements embraces areas such as the entitlement to protect nationals abroad, the protection of the laws of war and rules regulating the conduct of hostilities, rules regarding the exertion of extraterritorial jurisdiction, and among other topics the following: international servitudes, succession of states, international rivers, lakes, canals and straits, polar regions, rights and duties of states in outer space, nationality and status of ships, piracy, slavery, international traffic in narcotics, nationality and statelessness, rights of aliens, asylum, extradition, international communications including satellites and “jamming” of broadcasts, immunities of states and their agencies and subdivisions, protection of human rights, diplomatic and consular privileges and immunities, status and privileges of international organizations, status of armed forces on foreign territory, limits of criminal jurisdiction, enforcement of foreign judgments and commercial arbitrations, treaties (entry into force, modification, termination), pacific blockade, reprisals, arms shipments, relations between belligerents and neutrals, etc. (p. 1308)

All these, and perhaps more, are “thrust upon our new nation without its initial consent” (p. 1307). In a manner analogous to that in which Hegel describes the criminal accepting punishment because that sanction respects his status as a self-determined person, D’Amato suggests that states can be compelled to fulfill their obligations. States that violate their duties can be effectively brought into line by curtailment of its privileges. D’Amato suggests that a *different* entitlement should be limited than the one that initiates the confrontation. Thus the United States froze Iranian bank assets as a response to the violation of its embassy rather than jailing Iranian diplomats.

This kind of “tit-for-different-tat” recognition of the rights the define states is functionally parallel to the kind of rights recognition required at the lower level (e.g., my right to your recognition of my property requires that I reciprocally recognize your claims to property), but is limited to those rights for which the state itself is the subject. In other words, it gets us only as far as Westphalian international law, but not yet to the post-Nuremberg version wherein individuals can also be the subject of binding international

obligation. To take this additional step to find an ethical foundation for transnational obligations, we must introduce another concept.

According to Wesley Hohfeld, all legal relationships can be parsed into relationships of a small set of legal primitives.<sup>18</sup> Hohfeld built his system upon four fundamental concepts, each of which has an opposite and a correlative:

For every *right*, there is the opposite (no-right), and a correlative duty;  
For every *privilege*, there is the opposite (duty), and a correlative, no-right;  
For every *power*, there is an opposite disability, and a correlative liability;  
For every *immunity*, there is an opposite liability, and a correlative disability.

Within the Hohfeldian perspective, all rights, including human rights, must relate to a reciprocal duty that is owed by someone. Human rights by definition are rights that accrue by virtue of one's status as "human" (setting aside the potential problematic details of assigning specific content to this idea). Arguably, *human* rights incur a correlative duty from all other humans at least to prevent their deliberate infringement, if not to foster actively their exercise. These rights can be contrasted with *civil* rights that have their basis in one's status as a citizen of a specific nation, and thus incur no duties in those outside that political boundary.

D'Amato above included within his list of automatically incurred entitlements and duties by a recognized State the protection of human rights. According to this analysis, this duty to protect extends beyond one's own citizens to all possessors of those rights. Each State, therefore, has a joint duty to recognize and respect human rights, and to seek to rectify their violation wherever they occur.

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<sup>18</sup> Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale Law Journal 16-59 (1913).



Importantly, this liability to have other States act to protect human rights violations within State borders is not, by this interpretation, a violation of sovereignty, but is a consequence of the process by which sovereignty is endowed. As reasoned by Jean Cohen, because “sovereignty and international law are coconstitutive,”

The mere fact that there are rules obligating states or rules that ascribe competence over what were once considered internal matters to supranational bodies does not mean that states are no longer sovereign, for [as D’Amato argued] it is the rules of international law that tell us in what sovereignty consists. Thus, the new *jus cogens* status of certain human rights norms are now part of the rules that constitute and limit sovereignty, but they are not proof that it is irrelevant.<sup>19</sup>

Just as all States must, by virtue of being the kind of thing that is a State, risk retribution for violating the rules of conduct of war, so too would they risk intervention for violating the human rights of their own citizens; just as all states have a duty to protect diplomats within their borders, so too must they protect the human rights of all persons. The details of these obligations of course differ, but at the level of their philosophical justifications they do not.

## **Conclusions**

Human rights have, over the last fifty years, risen to the forefront of foreign relations. Whereas Marx could refer them as the “so-called *human rights*,”<sup>20</sup> few today would be so bold as to question the cogency of the category itself. Despite this pervasive influence, the concept of human rights sits uneasily with other deeply-entrenched categories, not

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<sup>19</sup> Jean L. Cohen, “Whose Sovereignty? Empire Versus International Law,” 18 *Ethics & International Affairs* 1, 15 (2004).

<sup>20</sup> Karl Marx, “On the Jewish Question,” *Early Political Writings* (Joseph O’Malley, ed., Cambridge University Press, 1994), p. 42.

least being the sovereign state. Without some ethical reconciliation between these two, enforcement of these rights will remain opportunistic.

Some will argue that, just as the rights are predicated on the universal concept of the human, the mechanisms for their enforcement should also be universal, leading to considerations of the possibility of the eventual formation of one world-state. The greater part of this essay, however, has been to demonstrate that that outcome is precluded on theoretical grounds. Any State intending to be more than an organization for the exercise of power, one that instead aims toward the realization of right and freedom, requires self-consciousness and a political identity grounded in those rights and freedoms, both of which necessarily out of contrast and recognition by contrastive others. States organized in these terms are therefore several if they exist at all.

A different solution to human rights enforcement can be found, however, in that same need for mutual recognition. States as states immediately acquire rights and obligations that can be used to regulate behaviors between states. Moreover, the correlative duties that go along with those rights justify the enforcement of human rights (which impose duties upon all) even when doing so involves crossing national borders.

Critical to the success of this project is the principled disentanglement of the human from the civil rights. This project can be intimidating. As one example, while Winfield would be expected to include among the fundamental human rights that of political participate, Jean Cohen would not:

To construe popular sovereignty or democracy as a human right is to make a category mistake: it collapses political into moral categories, reducing the citizen to “person.... Popular sovereignty is a regulative principle, not an individual right. (p. 17)

Clearly, there remains much work to be done.