THE LITERARY EFFECT OF SOVEREIGNTY IN INTERNATIONAL LAW

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"*To speak is to act; anything which one names is already no longer the same . . . .*"
- Jean-Paul Sartre[1]

"*[Words] may be imbued with emptiness—but this emptiness is their very meaning.*"
- Maurice Blanchot[2]

I. INTRODUCTION

The perception of state *sovereignty* as a "bedrock" principle of international law has resulted in a straw horse debate regarding alleged tension between the state-centered international legal system resulting from that perception and the increasing recognition of evolving international norms—particularly human rights norms—that function contrary to the accepted dogma of this state-centered system. This debate is neither a recent development nor one that has escaped commentary. To the contrary, the debate has consumed a vast amount of legal journal white-space. Some participants in the debate argue that the manifestation of sovereignty in the international system—the doctrine of sovereign equality—must be preserved not only to guarantee the efficacy of the international system, but to protect the individual citizens of states whose rights might be violated by external state action.[3] Others argue that the state-centered system of sovereign equality is outmoded and out-of-step with evolving legal norms protective of individual human rights.[4] Other participants in the debate have called for a re-interpretation of sovereignty based on historical precedent that would better accommodate individual rights in international law.[5] Still others point a finger at sovereignty itself and note that sovereignty is just a misunderstood linguistic signifier or semiotic ruse,[6] or even an outright *myth*.[7]

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1. JEAN-PAUL SARTRE, LITERATURE AND EXISTENTIALISM 22 (Bernard Frechtman trans., Carol Publ'g Group 1994) (originally published as WHAT IS LITERATURE? 1948).

2. MAURICE BLANCHOT, *Literature and the Right to Death*, *in* THE STATION HILL BLANCHOT READER 359, 368 (George Quasha ed., Lydia Davis, et al. trans., 1999).

3. *See* Brad R. Roth, *The Enduring Significance of State Sovereignty*, 56 FLA. L. REV. 1017 (2004).

4. *See* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 869 (1990).

5. *See* Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992).

6. STÉPHANE BEAULAC, THE POWER OF LANGUAGE IN THE MAKING OF INTERNATIONAL LAW 70 (2004).

7. Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 31 (1995-1996).

On the human rights side of the debate, the tension with a state-centered view of international law is found in the occasional assertion that human rights norms occupy a special position in international law, exempt from the "bedrock" sovereignty rule holding that a state's actions within its own national borders are exempt from international legal scrutiny. This "specialness" has been asserted with regard to the ability of states to apply reservations to human rights treaties[8]—the supremacy of *jus cogens* human rights norms over contrary norms.[9] It has also been raised by those wishing to preserve the domestic protections of an international system premised upon the legal equality of states—that is, the right to humanitarian intervention.[10] The result, hypothetically, is a patchwork international system protective of individual rights but lacking the premise of state consent, a system without the mechanisms necessary to enforce individual rights, and a system of normative hierarchy undercut by its own over-willingness to find exceptions to the hierarchy.

For their part, the international relations theorists and other realists have demarcated sovereignty to accommodate definitions more easily equated with—and more easily *explained by*—states' material powers.[11] Sovereignty's various aspects—internal, external, domestic jurisdiction, international jurisdiction—have been "unbundled" under this approach[12] to apply this otherwise nonsensical concept to factual questions. This "unbundling" exacerbates the definitional problems with sovereignty by making a non-circular debate on the subject generally impossible. It exemplifies the historical trend, as discussed in this paper, of viewing sovereignty as an entirely situational and prescriptive concept with no fixed content outside its immediate literary use.

This paper is not intended to be an examination of the merits of the sovereignty debate itself, which primarily has been waged within the human rights context and in the areas of international economics, environmental law, and criminal law. Rather, this paper is an examination of sovereignty itself—its historical bases, its intended audience, the scope of each of its historical iterations, and the literary, rather than political, effects of each iteration upon subsequent iterations. Ultimately, I will argue that sovereignty's scattered uses over the past 500 years failed to provide a coherent political concept that should provide the basis for any argument of international law.

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8. *See* Elena A. Baylis, Comment, *Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT'L L. 277, 277 (1999).

9. *See* Dinah L. Shelton, Are There Differentiations Among Human Rights? *Jus Cogens*, Core Human Rights, Obligations *Erga Omnes*, and Non-Derogability (Sept. 21, 2005) (unpublished manuscript, on file with author).

10. *See* Fernando R. Tesón, *The Liberal Case for Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 93 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

11. *See, e.g.*, Robert O. Keohane, *Political Authority after Intervention: Gradations in Sovereignty*, *in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS, *supra* note 10, at 275.

12. *Id.* at 276.

Every discussion involving sovereignty invariably begins with a definition of the term. Sometimes, depending upon the argument pursued by the author, a single definition is ascribed to the word.[13] Other times, if an objective view is taken, various definitions are supplied.[14] In either case, authors have at their fingertips numerous definitions of historical origin, any one of which may be utilized for a single prescriptive purpose. While the most influential of these definitions are examined below, it is sufficient to note for now that the history of sovereignty is not a linear conceptual evolution; it has not resulted in a quantifiable political or legal term denoting specific duties and responsibilities.

Instead, sovereignty's history has been one of disparate conceptual and linguistic *usages*. The cumulative result of those disparate uses is a term whose effect cannot be explained through legal or political means.[15] This paper's object is to offer a coherent account of sovereignty's effect upon the international legal system—an effect which has resulted in an ongoing debate *about* sovereignty—by explaining it as a *literary* effect.

The next section of the paper (Section II) parses the conceptual history of sovereignty and examines its Sartrian literary use in the hands of specific authors as a figment of political speech—from Bodin's crystallization of sovereignty as a politically useful assertion arising out of Roman and Medieval law through Vattel's translation of the word to connote a body of rules governing the external relations of states. Section III examines the current juridical reality of sovereignty as it has been constructed under the United Nations Charter System. In addition, it explores the question of the U.N.'s "institutional authorship" of sovereignty: whether the U. N. has done so in the same manner as individual historical authors and whether it has done so successfully and coherently to allow agreement upon a specific "current juridical reality" of the concept. Finally, Section IV discusses what is meant by the "literary effect" of sovereignty. This final Section attempts to explain its operation in international law, in a way that law cannot or has not, by applying to the concept of sovereignty two theories of literary criticism: Sartre's

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13. *See*, *e.g.*, Daniel James Everett, *The "War" on Terrorism: Do War Exclusions Prevent Insurance Coverage for Losses Due to Acts of Terrorism?*, 54 ALA. L. REV. 175, 186-87 (2002).

14. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 192-263 (1989); s*ee* BEAULAC, *supra* note 6.

15. DJURA NINČIĆ, THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS xii (1970).

> The Charter and the practice of the United Nations have modified not only the scope of sovereignty, but also its substance; they not only limit sovereignty but tend to endow it with a richer meaning. Both sovereignty and the United Nations thus appear in a new light, in a light which cannot always be adequately explained or understood in traditional legal terms.

Id.

littérature engagée and Maurice Blanchot's responding theory on the autonomy of literary language.

The paper will conclude that "sovereignty," as a component of language, demonstrates the "literary effect" described by Blanchot in his famous essay, *Literature and the Right to Death*.[16] Sovereignty has developed as literary rather than political (or "normal") language. Consequently, an autonomous, non-signifying language has developed that eradicates its own meaning with each use. As a part of a literary language, sovereignty is without political and legal effect. Therefore, it should not be *used* but merely *contemplated* as a literary term in a non-legal reality.

II. THE EVOLUTION OF DOMESTIC SOVEREIGNTY

Sovereignty has evolved into a concept of international law and relations through roughly five centuries of modification and redefinition by philosophers, political scientists, and legal academics. Sovereignty was originally a domestic political concept remarking upon the locus of supreme power within a state's internal hierarchy of powers. However, it has become something quite different in international law. Nonetheless, even the current international understanding of sovereignty contains the germ of its original domestic origin. The doctrine of sovereign equality, as it has come to be understood or misunderstood, remains dependent upon the definitions of sovereignty elaborated over the past 500 years by a succession of authors with widely varying motives.

A. The Political Birth of Sovereignty: Jean Bodin, François Hotman, and the Monarchomachs of the Sixteenth Century

To the extent that there can be said to be a modern concept of sovereignty, it is typically considered the great-grandchild of Jean Bodin's original work on the subject in 1576, *Les Six Livres des République*.[17] Although sovereignty had been originally conceived in Roman law as locating the locus of state power or the power of office (the *imperium*) in the community as a whole,[18] Bodin's theory of "absolute" sovereignty rejected the notion of a divisible sovereignty. He maintained that sovereign authority could only belong to one body within a state's hierarchy of authority—a body that persisted at the pleasure of no higher authority.[19] This absolutist explanation of sovereignty, which Bodin intended to bolster France's monarchy (and probably to secure the favor of the monarch),[20] is less than absolute in several respects. The general

16. *See* BLANCHOT, *supra* note 2, at 359-400.

17. *See* Roth, *supra* note 3, at 1020.

18. M.J. Tooley, *Introduction* to JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH vii, xxiv (M.J. Tooley ed., Barnes & Noble, 2d ed. 1967) (1576).

19. *Id.*

20. Julian H. Franklin, *Introduction* to JEAN BODIN, ON SOVEREIGNTY x-xi (Julian H. Franklin ed., Cambridge Univ. Press 2001).

perception of sovereignty as possessing a mandatory quality of "absoluteness" is the aspect of his work most important to subsequent authors.

1. Sovereignty Before Bodin: Aristotle, Roman Law, and the *Ius Commune*

Long before Bodin, the concept of sovereignty emerged from Aristotle's *Politics*, Roman law, and medieval law.[21] First, Aristotle postulated that there must be a supreme power in the state but that it might belong to one, a few, or many.[22] The placement of sovereignty in "the many" was derived from Aristotle's notion that sovereignty was coexistent with *citizenship*.[23] In Greek society, citizenship was a designation belonging wholly to the ruling class as opposed to the "people" later thought to hold sovereign power in Hotman and Rousseau's work.[24] According to Aristotle, the ruling class was composed of individuals who shared in the state's judicial and deliberative functions, and who had been made "citizens" by the state's constitution.[25] Aristotle's ruling class determined the constitution, which, in turn, determined the state.[26] By "constitution," Aristotle meant the entire system of ethical, social, legal, and economic aims of the state.[27] His theory of sovereignty was a prescriptive method intended to encourage the individual's pursuit of the higher aims of society in a civic life.

Roman law held that the *imperium*, or the source of authority, lay with the Roman community, which conferred it upon the ruler.[28] The *lex regia* of the *Digest* of the Justinian Code was interpreted from the eleventh century onward "to mean that the emperor's authority ultimately derived from a grant of the community."[29] Thus, under Roman law, the popular sovereignty could not

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21. C.E. MERRIAM, JR., HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU 11 (The Lawbook Exchange, Ltd. 1999) (1900).

22. *Id.* at 11 (citing ARISTOTLE, THE POLITICS, Book III, ch. 7 (Benjamin Jowett trans., 1943)).

23. Curtis Johnson, *The Hobbesian Conception of Sovereignty and Aristotle's* Politics, 46 J. HIST. IDEAS 327, 333-34 (1985).

24. *Id.*

25. *Id.*

26. C.H. McIlwain, *A Fragment on Sovereignty*, 48 POL. SCI. Q. 94, 95 (1933).

27. *Id.*

28. MERRIAM, *supra* note 21, at 12; Tooley, *supra* note 18, at xxiv.

29. Julian H. Franklin, *Introduction to* CONSTITUTIONALISM AND RESISTANCE IN THE SIXTEENTH CENTURY: THREE TREATISES BY HOTMAN, BEZA, & MORNAY 12 (Julian H. Franklin ed. & trans., 1969). Franklin notes that the term *lex regia* was

> the term used in the *Corpus juris* for the *lex de imperio* by which the people and the Senate were supposed to have given all power to the emperor at the beginning of each reign. The best known formulation is *Digest, I, 4, I* (from Ulpian): "The pleasure of the prince has the force of law because, by passing the royal law concerning his authority, the people transfers to him and vests in him all of its authority and power."

ultimately be challenged by the state.[30] At the core of the state's inability to challenge popular will lay an analogy with private contractual law in that the community's grant of authority was revocable *for cause*.[31]

Roman law's primary contribution in the development of modern sovereignty lies, however, in its impact upon medieval and canonical law as incorporated in the *ius commune*, the medieval common law of Europe.[32] The Roman emperor Justinian presented himself as *lex animata in terris*, a living personification of law, and medieval commentators later used this conception to justify assertions of sovereign power by their princes.[33] However, this justification was problematic. First, Roman law provided no clear definition of the state, and medieval feudal society was organized according to principles of private solidarity and interest in a manner contrary to conceptions of public sovereignty.[34] This required the tracing of princes' sovereign prerogatives to preexisting Roman law,[35] and such tracing transformed Roman law on the contemporary medieval plane. Another problem lay in interpreting the *ius commune*. The scattered theories of sovereignty formulated by medieval commentary, which relied heavily upon Justinian's Codes and other sources of Roman law, were often based upon misconceptions of the original sources.[36] From the twelfth century to the fifteenth century, commentators poured over the Roman texts and drafted commentaries and glosses that were intended to be studied and cross-referenced along with the Roman texts themselves.[37] Where this was not successfully accomplished, misconceptions regarding the nature of Roman law were sometimes superimposed over jurists' contemporary factual settings and transformed into prescriptions that the Romans would not have embraced.[38] In fact, the *ius commune* actually preserved the rights of individuals by limiting the powers of the princes. It provided a constitutional framework for medieval jurisprudence in which individual rights were recognized and detailed by generations of jurists.[39] With

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Id.

30. MERRIAM, *supra* note 21, at 12.

31. Franklin, *supra* note 29, at 12.

32. *See* Kenneth Pennington, *Roman and Secular Law*, *in* MEDIEVAL LATIN 254-66 (F.A.C. Mantello & A.G. Rigg eds., 1996).

33. Laurent Mayali, Foreword, *Social Practices, Legal Narrative, and the Development of the Legal Tradition*, 70 CHI.-KENT L. REV. 1469, 1469 (1995).

34. *Id.*

35. *Id.* at 1469-70.

36. Pennington, *supra* note 32, at 258

37. *Id.* at 258-60.

38. Pennington, *supra* note 32, at 259. As Pennington notes in a discussion regarding the work of the English jurist Bracton, if the modern reader reads Bracton's paragraph on kingship with the supposition that he employs the technical terminology of the *ius commune* with sophistication, the unwary reader will be seriously misled: "[Bracton's] *imperium* and *principatum* are not the powers of the 'prince' as found in the *Corpus iuris civilis*. Bracton's English king exercised limited, circumscribed power; the *ius commune* could not accurately define his authority." *Id.*

39. Kenneth Pennington, *Sovereignty and Rights in Medieval and Early Modern Jurisprudence: Law and Norms Without a State, in* ROMAN LAW AS FORMATIVE OF MODERN LEGAL

regard to sovereignty, the establishment of individual rights was foundational to medieval thinking.[40]

This was the framework against which Jean Bodin rebelled.

2. Jean Bodin and the Authoring of Absolute Sovereignty

In his 1576 treatise *Six Livres de République,* Jean Bodin authored what has inaccurately come to be known as the theory of "absolute" sovereignty. This theory has since become the starting point for most academic discourse on the subject of sovereignty. Intended as a prescription for the maintenance of a stabilizing, monarchical authority within an unstable France in the sixteenth century, the *République* arrived in the midst of France's religious wars and was an immediate hit.[41] The *République* was a systemic exploration of an absolutist view of monarchical sovereignty. It was valuable for its breakthrough "scientific" methodology; however, because Bodin sewed it to his specific political context, the theory still retained some of the limitations on governance derived from medieval conceptions of sovereignty.[42]

Bodin initially defined sovereignty as "the absolute and perpetual power of a commonwealth,"[43] or, as translated from Bodin's later Latin edition, "[t]he supreme power over citizens and subjects, unrestrained by law."[44] This "supreme power" is conventionally thought to be absolute, by which Bodin meant that it must be indivisible, perpetual, and inalienable.[45] With the establishment of these criteria, a large part of Bodin's achievement was in providing a definition of sovereignty that could be readily applied to the political circumstances of his day. His motivation for accomplishing this, in addition to providing a political justification for absolute monarchy, was to provide a basis of comparison for states—a comparison that was required for the further discovery of "universal" laws, which might remedy what he saw as deficiencies in Roman law.[46] Thus, Bodin's theory of sovereignty was intended as one of the first scientific legal studies: a means of empirically analyzing the legal and political structures of states.

Turning to the first of Bodin's criteria, sovereignty is "absolute" in that it requires freedom from legal constraint.[47] By this, Bodin intends that a genuine sovereign must possess the full power that could be legitimately exercised by a

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SYSTEMS 2.25-36 (J. Sondel, J. Reszczyński, & P. Ściślicki eds., 2003), *available at* http://faculty.cua.edu/pennington/Law508/Sovereignty.htm.

40. Pennington, *supra* note 39, at 2.25-36.
41. Franklin, *supra* note 20, at x.
42. *Id.* at xii-xiii.
43. JEAN BODIN, ON SOVEREIGNTY 1 (Julian H. Franklin ed., 1992) (1583).
44. MERRIAM, *supra* note 21, at 14.
45. *Id.* at 14-16.
46. Franklin, *supra* note 20, at xv-xvi.
47. MERRIAM, *supra* note 21, at 14.

state.[48] This quality of absoluteness and the extent to which an "absolute" sovereign is truly free of constraint and limitation depends upon whether the exercised power is indivisible and perpetual. Absolute power has "no other condition than what is commanded by the law of God and of nature."[49] Thus, Bodin's conception of absolute power is legitimate to the extent allowed by natural law—"the law of God and of nature and . . . various human laws that are common to all peoples."[50] Although the sovereign is subject to no law, whether made by a previous sovereign or by himself,[51] according to Bodin, every sovereign on earth is still subject to divine and natural laws, "and it is not in their power to contravene them unless they wish[ed] to be guilty of treason against God."[52]

To understand this limitation requires illuminating the relationship between God and the purpose of the state, as prescribed by Bodin. The unifying element of Bodin's state is not, as with Hobbes, that of individuals subjected to a common power,[53] but rather, that individuals within states possess certain rights, the preservation of which demarcate a rightly-ordered state from a tyrannical state.[54] A tyrannical government is one in which individuals' liberty and property (the sanctity of which Bodin sees as divinely ordained) is arbitrarily circumscribed, and a legitimate government is one that protects these things.[55] A legitimate government is a *droit gouvernement*—"droit" meaning the man's entire good, fostering the Aristotelian goal of *contemplation*, or the development of those qualities of mind whereby individuals may properly distinguish between good and evil.[56] In other words, religion is the foundation of the state.[57]

Bodin considers the sovereign Prince alone capable of creating an environment conducive to the creation of a state in which individuals may live virtuous and pious lives.[58] This does not mean that Bodin's theory of the state and its sovereign rule embraces any level of popular emphasis. Rather, Bodin sees the state in terms of power—a *puissance souveraine* of necessarily absolute, indivisible, and perpetual nature.[59] Individuals might enjoy divinely anchored rights to private property, but it is their *subjection* to the *puissance souveraine* that makes them *citizens*.[60] In Bodin's state, the sovereign is absolute in relation to the subject, but God is absolute in relation to the sovereign.[61] *Law* is the rule that proceeds from the sovereign, but the rule that proceeds from God is

48. Franklin, *supra* note 20, at xxii.
49. BODIN, *supra* note 43, at 8.
50. *Id.* at 10.
51. *Id.* at 12-13.
52. *Id.* at 13.
53. Tooley, *supra* note 18, at xxvi.
54. *Id.* at xxi.
55. *Id.*
56. *Id.* at xxii.
57. *Id.*
58. *Id.*
59. Tooley, *supra* note 18, at xxiii-xxiv.
60. *Id.* at xxvi.
61. *Id.* at xxvii.

equity.[62] In a rightly ordered society, there is no conflict between these types of rules: law conforms to equity, divine justice, and natural law. The sovereign's absolute power is tempered by this requirement of equitable conformity.[63]

Equitable conformity manifests in various limitations throughout the *République*. Bodin's "absolute" sovereign remains subject to obligations common to all individuals, whether they be purportedly sovereign or private citizens. The sovereign is, therefore, bound to the contracts and promises he makes in the absence of "just cause"[64] for overturning them.[65] He is also prevented from revoking or altering laws that "concern the state of the kingdom and its basic form."[66] The sovereign is likewise restrained by natural law from taking privately owned property without *just and reasonable cause*, which is defined as "purchase, exchange, lawful confiscation . . . in negotiating terms of peace with an enemy," or for any other purposes than preservation of the state.[67]

The true sovereign, Bodin writes, is identified by his power of "giving law or issuing commands to all in general and to each in particular."[68] These definitional powers are: first, what Locke termed the "federative power,"[69] the power to declare war, make peace, and strike alliances;[70] second, the power to assign to and remove from public office all high officers and other appointments;[71] and third, the power to require subjects to swear loyalty oaths.[72] Other defining sovereign powers include the power to impose taxes, to grant dispensations, and to determine the nature of the state's coinage.[73] These powers must not be delegated or alienated, for so doing would risk revealing a lack of essential sovereignty.[74]

Bodin crystallizes his theory's quality of absoluteness as consisting of the sovereign's ability to give laws to his subjects without their consent.[75] We see, however, that even this simple statement underplays the extent to which Bodin's "absolute" sovereignty is something less than absolute. At the very

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62. Tooley, *supra* note 18, at xxvi.
63. *Id.* at xxvii.
64. BODIN, *supra* note 43, at 14. Julian Franklin explains that by "just cause," Bodin means that the sovereign cannot return on a promise specifically made without specific mention as to the laws to be overturned. Given this "specific derogation," the sovereign possesses "just cause" for reneging on promises and contracts. Julian H. Franklin, *Textual Notes to* BODIN, *supra* note 43, at 130, n.28.
65. Julian H. Franklin, *Textual Notes to* BODIN, *supra* note 43, at 13-14.
66. *Id.* at 18.
67. *Id.* at 39.
68. *Id.* at 58-59.
69. Tooley, *supra* note 18, at xxv.
70. BODIN, *supra* note 43, at 58-59.
71. *Id.*
72. *Id.*
73. *Id.*
74. Tooley, *supra* note 18, at xxv.
75. BODIN, *supra* note 43, at 23.

least, for Bodin, "absolute" does not mean "underived."[76] The difference between Bodin and Huguenot writers such as François Hotman is the source from which sovereign power is derived (God rather than the people themselves).[77] This difference allows Bodin to reject from his equation a requirement of popular consent, along with an associated right of resistance.[78] It is from this difference that Bodin's reputation as an absolutist is derived.

Next, Bodin requires that sovereignty be perpetual. This is the aspect of his theory that most firmly embraces monarchy as the proper governmental form of a truly sovereign state. This requirement is intended to exclude officers such as Roman dictators and Greek archons from being considered sovereigns by virtue of the durational limits upon their offices.[79] Perpetuity, in this case, is meant to signify the lifespan of the ruler rather than an infinite duration of power.[80] According to Bodin, a ruler without perpetual sovereign right is not truly sovereign:

> [I]t can happen that one or more people have absolute power given to them for some certain period of time, upon the expiration of which they are no more than private subjects. And even while they are in power, they cannot call themselves sovereign princes. They are but trustees and custodians of that power until such time as it pleases the people or prince to take it back, for the latter always remain in lawful possession.[81]

To Bodin, it is an impossibility for a person or body other than the prince to temporarily hold an absolute power. In such a case, the prince would then be the subject of that temporary holder of power, rather than the other way around, and could not then be the sovereign.[82] No power that can be removed can be called sovereign under Bodin's theory. The sovereign is only he who "recognizes nothing, after God, that is greater than himself."[83] For Bodin, the primary example of a ruler capable of defining himself to such an extent was the King of France, whose continued power he advocated as a counter to revolutionary anarchy in the *République*.

The final and most important requirement of Bodin's sovereignty is that sovereignty is indivisible; it may not be located in any power subject to division. This prohibition primarily arises as a response to the question of where sovereignty might be located in the body politic, particularly in the cases of "mixed constitutions" or constitutions espousing a government composed of some mixture of monarchy, aristocracy, and democracy.[84] Individually, these three forms are the only legally valid forms of state for Bodin because a

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76. Tooley, *supra* note 18, at xxiv.
77. *Id.* at xxiv.
78. *Id.* at xxiv-xxv.
79. BODIN, *supra* note 43, at 2-3; MERRIAM, *supra* note 21, at 14.
80. BODIN, *supra* note 43, at 6; MERRIAM, *supra* note 21, at 14-15.
81. BODIN, *supra* note 43, at 1-2.
82. *Id.* at 2.
83. *Id.* at 4.
84. Franklin, *supra* note 20, at xvii.

unified legal system requires power to be unified in a single ruler.[85] Bodin views mixed constitutions as impossible; either the will of the sovereign is absolute or it is not.[86] He proposes that states in which the sovereign prerogatives were divided among various individuals or governmental components had never existed and could never exist, because those prerogatives are themselves indivisible from each other:[87]

> For the part that has the power to make law for everyone . . . will forbid the others to make peace or war, to levy taxes, or to render fealty and homage without its leave . . . and will obligate the nobility and the people to render obedience to no one but himself.[88]

Therefore, Bodin says, any attempt at a mixed constitution will simply "come to arms" until the sovereign prerogatives reside in one location.[89] Therefore, mixture is not a state, but a corruption of a state.[90]

Bodin's authorship of sovereignty was both absolute and limited. His theory's limitations were external to the monarch, but only the monarch was capable of interpreting the scope of those limitations. As God's emissary, the monarch alone was the ultimate arbiter of natural law. This practical absoluteness has transmitted through generations, but the nature of Bodin's work itself sparked the literary process at issue. With his "scientific" method, Bodin rewrote sovereignty as it had existed prior to the sixteenth century and annihilated the previous reality, the previous object signified by the word "sovereignty."

3. Bodin's Contemporary Rivals: François Hotman and the Monarchomasts

Bodin's was not the only theory of sovereignty operating in the mid-sixteenth century. Concurrent conceptions, although similarly rooted in the Religious Wars, represented points of view politically and religiously opposite to Bodin's.

François Hotman, a Huguenot scholar who was among the leading jurists of the age, published *Francogallia*[91] in 1573 with the purpose of opposing the corrupt bureaucracy with which the French monarchy had become

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85. BODIN, *supra* note 43, at 103.
86. Tooley, *supra* note 18, at xxx.
87. BODIN, *supra* note 43, at 104.
88. *Id.*
89. *Id.* at 104.
90. *Id.* at 105.
91. FRANÇOIS HOTMAN, FRANCOGALLIA (1573), *reprinted in* CONSTITUTIONALISM AND RESISTANCE IN THE SIXTEENTH CENTURY: THREE TREATISES BY HOTMAN, BEZA, & MORNAY 53 (Julian H. Franklin trans. & ed., 1969).

associated.[92] Rightly blaming the monarchy for France's sorry state of affairs, Hotman emphasizes the popular right of resistance, locating sovereignty in the people and deeming the monarchy subject to removal by the people.[93] By the "people," Hotman means the Estates of France, which he considers to be adequately represented for political purposes.[94] In asserting the "people" as the locus of sovereignty, Hotman is really advocating a relocation of political power to the Estates, which traditionally was not much more than a consultative body.[95] Hotman supports this assertion through a historical examination of the French monarchy, where he finds that power had been conferred on the king and not passed on hereditarily.[96] He further finds that the power conferred upon kings by the people was checked and bounded by settled law.[97] These historical kingships were, according to Hotman, nothing more than "magistracies for life."[98] Therefore, Hotman attributes to the Estates nearly all of the powers and prerogatives that Bodin ascribed to the sovereign monarch.[99]

In the Appendix to the 1586 Third Edition of the *Francogallia*, Hotman sums up the primary examples of circumscription of the king's authority by settled law.[100] First, he states that "nothing which affects the interest of the public as a whole may be decided by the king without the authorization of the public council."[101] The public council was the Senate at Paris, which he claims expropriated the authority of the ancient parliaments for which this limitation was constructed.[102] He examines the Senate's working powers, enumerates several of the powers that might belong to the king under Bodin's theory, and notes that either the Senate usurped the powers or the king originally lacked the powers.[103] Hotman's second and third fundamental limitations can be conflated into the inability of the king to transmit the monarchy other than through primogeniture because of customary proscriptions on both the king's ability to dispose of the kingdom and to alter the fundamental inheritable rights of a first-born son.[104] Similarly, his fourth fundamental limitation is that no female may inherit the kingdom.[105]

The fifth limitation, which agrees with Bodin's theory to a certain extent, is that the king is prohibited from alienating "any part of his domain without the

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92. Franklin, *supra* note 29, at 19-20.
93. *Id.* at 20-21.
94. *Id.* at 25.
95. *Id.* at 26.
96. HOTMAN, *supra* note 91, at 53-56.
97. *Id.* at 55.
98. *Id.*
99. Franklin, *supra* note 29, at 26.
100. FRANÇOIS HOTMAN, FRANCOGALLIA (3d ed. 1586), *reprinted in* CONSTITUTIONALISM AND RESISTANCE IN THE SIXTEENTH CENTURY: THREE TREATISES BY HOTMAN, BEZA, & MORNAY 90, 90-96 (Julian H. Franklin trans. & ed., 1969).
101. *Id.* at 91.
102. *Id.* at 91.
103. *Id.* at 91-92.
104. *Id.* at 92.
105. *Id.* at 93.

authorization of the public council" or Senate.[106] Unlike Bodin, Hotman allows alienation of the royal domain. This departure is twofold: first, that alienation is permitted *at all*, and, second, that it may be accomplished only with the approval of a governmental component other than the monarch. Here, Hotman erodes Bodin's sovereignty at two points, by removing the inalienability of royal domain as a definitional component of sovereignty, and then relocating the true power to grant alienation of royal domain outside of the monarchy.

Hotman's sixth limitation is that the king has no power to pardon crimes or to revoke a sentence of capital punishment without council approval.[107] The seventh limitation is that the king may not remove any French officer unless removal is for a cause recognized by the Council of Peers. This is a law "so well known and so often repeated throughout France that documentation is unnecessary."[108] The eighth and final limitation that Hotman ascribes to the monarchy is "that the king has no right to alter coinage without authorization by the public council."[109]

Hotman's theory of sovereignty is more descriptive in nature than Bodin's; however, the overall motivation of Bodin's theory is no less prescriptive. Bodin attempts to locate sovereignty within France through an apparently objective inspection of the historical evolution of the French monarchy and of the location of the power to approve or disapprove certain governmental decisions. Hotman, therefore, regards sovereignty as normatively constituted and only effective in relation to any particular exercise of authority of the legitimate, fundamental framework of legality.[110] This framework is both the source of legitimacy and a limitation on the exercise of power, within which a monarch could not function absolutely.[111]

The Monarchomachs were also competing with Bodin.[112] With followers scattered across Europe, the Monarchomachs were removed from the specific French context in which Bodin and Hotman developed their theories, but, like Bodin and Hotman, their democratic theory also developed within the tension between monarchic and popular conceptions of sovereignty.[113] Like Hotman, their source of sovereign authority was decidedly popular in nature.[114]

Johannes Althusius of Germany is the best known of the Monarchomachs, and his 1609 work, the *Politica methodice digesta* ("*Politics Systematically Considered*"), is the most scientific of the Monarchomachic school.[115] In Althusius's theory,

106. HOTMAN, *supra* note 100, at 93.
107. *Id.* at 95.
108. *Id.*
109. *Id.*
110. Roth, *supra* note 3, at 1021.
111. *Id.* at 1021-22.
112. MERRIAM, *supra* note 21, at 17-21.
113. *Id.* at 17.
114. *Id.* at 18.
115. *Id.* at 17.

contract is the dominant element comprising the primary bonding mechanism of political associations.[116] Under this theory, the state is the final agreement in a series of contracts between the ruler and the ruled through which authority is tacitly or expressly derived.[117] He defines sovereignty as the "highest and most general power of administering the affairs which generally concern the safety and welfare of the soul and body of the members of the State."[118]

The Monarchomachs' goal, however, is not to define the content of sovereignty so much as to insist upon its popular locus and to defend its popular nature.[119] For Althusius, popular sovereignty is a result of the collective action of society as a whole, and not the result of individualized actions of any sort.[120] Althusius departs from Hotman's idea of popular sovereignty in asserting that this supreme collective power not only originates with the people, but is a permanent and natural consequence of the people.[121] Sovereignty's basis is entirely rooted in the community, and all governmental authority is derived from the community's sovereign power.[122] Rulers, in Althusius's view, are only temporary possessors of authority. The practical implication of this approach is that if the ruler violates the contract with the ruled, then the contract may be rescinded and the ruler may be removed.[123]

Because of Bodin, sixteenth-century France is often characterized as the temporal birthplace of the modern conception of sovereignty.[124] According to Bodin, the modern conception of sovereignty also has an originally absolutist nature, even if most legal commentators today deny that there is any current customary basis for this definition of sovereignty.[125] However, as will be shown, absolute sovereignty had yet to gain its firmest foothold. The "uncommanded commander" conception of sovereignty would, in the hands of Grotius and particularly Hobbes in the seventeenth century, continue to negate the sixteenth-century conceptions of sovereignty that were technically less absolute than those which followed.

B. Grotius and Hobbes: The New Reality of the "Uncommanded Commander"

Bodin's notion of absolutism was carried on in the seventeenth century by Hugo Grotius and Thomas Hobbes. While Grotius's conception of sovereignty was really something of a compromise between Bodin's absolutism and the Monarchomachs' democratic doctrines,[126] it has been

116. MERRIAM, *supra* note 21, at 18.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 18-19.
122. MERRIAM, *supra* note 21, at 19.
123. *Id.* at 19-20.
124. *See*, *e.g.*, Roth, *supra* note 3, at 1020.
125. Franklin, *supra* note 20, at xxvi.
126. MERRIAM, *supra* note 21, at 21.

portrayed—giving credence to the idea of sovereignty as a literary concept—as being more absolutist.[127] Hobbes, on the other hand, embraced absolutism to an extent that even Bodin did not. Hobbes fully developed the notion of the "uncommanded commander": the supreme power within state political hierarchy that is subject to no other laws, including those of God and nature.[128] Grotius and Hobbes were the primary commentators in the seventeenth century to build on Bodin's work, although they did so in essentially disparate ways. Although their work on this subject was separated by some decades—Grotius publishing *De Jure Belli ac Pacis* in 1625 and Hobbes publishing *De Cive* in 1642 and *Leviathan* in 1651—the extent to which Bodin's transmission of absolutism was received and re-created by these two authors is instructive of sovereignty's literary process at work.

Grotius not only attempts to find some doctrinal middle ground in the definitions of sovereignty proposed in the sixteenth century, but also, as befits the so-called "father of international law," elaborates sovereignty in the context of the relations between states for the first time. Grotius' work in this area pre-dates the evolution of the legal state in the nineteenth-century work of Hegel and others. However, the idea of the sovereignty of a state and the idea of the state as a legal entity emerges with Grotius. To Grotius, the state is an "organism" capable of imparting external powers of either a general or specific nature to the state bodies within which it may concurrently reside.[129] This equation of the state's personality to man's personality was shortly adapted by Hobbes and "became a powerful myth"[130] fueling the literary effect of these commentators' elaborations of sovereignty upon subsequent writers.

Grotius finds it necessary to define sovereignty for the purpose of deciding who within a state possessed the capacity to formally wage a legal "public" war.[131] Only the quality of legality separates "public" war from "private" war—or common violence—and only the sovereign possesses legal capacity to make such a distinction.[132] Such a statement, however, is only the beginning of Grotius's analysis. In *The Law of War and Peace,* he attempts to prescribe a law of nations through the accurate description of states as they were actually constructed and operated. Therefore, he distinguishes between the sovereign

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127. *See*, *e.g.*, Roth, *supra* note 3, at 1020 n.13. Roth, as a means of bolstering a description of Hobbes's absolutism, simply quotes Grotius's most famous statement regarding sovereignty: "That power is called sovereign whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will." *Id.* (quoting 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 102 (Francis W. Kelsey trans., Clarendon Press 1925) (1625)). Thus, Roth encapsulates and characterizes Grotius's theory in a manner not wholly accurate when the quotation is liberated from its operative context. *Id.*

128. *See* THOMAS HOBBES, LEVIATHAN (J.M. Dent & Sons, Ltd. 1973) (1651).

129. MERRIAM, *supra* note 21, at 22-23, 86.

130. Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16 EUR. J. INT'L L. 25, 37 (2005).

131. GROTIUS, *supra* note 127, at 97.

132. *Id.*

power and the extent to which it may or may not be wielded by any particular ruler within any particular state.[133] In so distinguishing, Grotius allows many more limitations on the sovereign power than does Bodin, even though Grotius begins his discussion of sovereignty's specific composition by describing it as not being subject to anyone else's legal control.

Grotius, like Bodin, thoroughly rejects the idea that sovereignty may lie with the people.[134] He does not, however, dwell on methods of transference of power and does not require that sovereignty be passed on hereditarily.[135] He provides that succession is only a continuation of already-existing power and not a means by which power is prescribed.[136] He likewise does not require that sovereignty be held for an unlimited duration.[137] The powers of "immaterial things," he states, are known by their effects, and an unlimited power held for a lesser duration than another unlimited power is just as unlimited in effect.[138] Duration of a power merely increases the "prestige which is commonly called majesty" with which a ruler might govern.[139] These allowances establish Grotius's attempt to separate the sovereign power from its full exercise, and thereby from the ruler who embodied state sovereignty under Bodin.[140]

Grotius's next limitations are his most significant. First, he states that sovereignty does not end when a ruler makes promises to his subjects or to God.[141] In such cases, the sovereign power is restricted, and acts performed contrary to the promise are unlawful.[142] However, this does not mean that the king has, by his promise, placed himself under any superior power. The acts performed contrary to the king's promise are not nullified by a superior force but are nullified *by law*.[143] The limitation of the ruler's own promise is significant because it allows sovereignty to be maintained even while a state is committed to international alliances or confederacies, or, by analogy, to international treaties or consent-based customary international laws.[144] Further, while explaining this, Grotius almost incidentally states that this limitation is not in reference to natural law, divine law, or the law of nations, because *all* rulers are bound to the observance of these sources of law.[145]

The final means by which Grotius's conception of sovereignty is limited, or rendered not strictly absolute, is in its divisibility.[146] He states that "while sovereignty is a unity, in itself indivisible . . . nevertheless a division is

133. GROTIUS, *supra* note 127, at 112-15.
134. *Id.* at 103-04.
135. *Id.* at 115-20.
136. *Id.* at 116.
137. *Id.* at 114.
138. *Id.*
139. GROTIUS, *supra* note 127, at 114.
140. *Id.* at 113-14.
141. *Id.* at 121.
142. *Id.* at 121-22.
143. *Id.* at 122.
144. *Id.* at 130-36.
145. GROTIUS, *supra* note 127, at 121.
146. *Id.* at 123.

sometimes made," either geographically or with regard to subject matter.[147] Here, Grotius speaks of the mixed constitution, which Bodin found so anathematic, stating that those who hold sovereignty to be improperly divided wherever a king declares certain of his acts to be invalid unless approved by a senate or other legislative-type body are mistaken.[148] "For acts which are annulled in this way must be understood as annulled by the exercise of sovereignty on the part of the king himself, who has taken this way to protect himself in order that a measure granted under false representations might not be considered a true act of his will."[149]

Applying this definition of sovereignty to the relations between states, Grotius decides that sovereignty may still be maintained by the lesser power, even in cases of abject subjugation of one state over another, such that one state gives tribute to another or becomes a more powerful state's vassal.[150] Such cases merely exhibit the divisibility of sovereignty.[151] Within this international context, Grotius concludes that a state may "cancel" its citizens' natural right of resistance to preserve the public tranquility.[152] Grotius's sovereignty is, in this sense, in agreement with Bodin's concept of sovereignty. Sovereignty is a power "not subject to the legal control of anyone else," but it is far from absolute. Unlike Bodin or Hobbes, Grotius maintains that a right to resist existed. He allows that men possess a right of resistance to defend themselves from injury, but asserts that this right is subject to cancellation by the state to preserve the public tranquility. Although not limited in exactly the same ways as under Bodin, the sovereignty of the state itself is at least limited in terms of natural law, divine law, and, most importantly to Grotius, the law of nations.

Building on the work of Gentilis, Suarez, and Vitoria, Grotius demonstrated a means by which the relations between states could be made a subject of law.[153] He recognized the independence of states while, at the same time, binding them under a uniform system of legal and moral principles.[154]

Thomas Hobbes, on the other hand, elaborated the quintessential theory of absolute sovereignty, beyond even the natural law-beholden "absolute" sovereignty of Bodin. Like Bodin, Hobbes's theory of sovereignty is normative, intended to bolster the power of the English throne against popular contest.[155] The theory is contractual in nature, set against an anarchic state of nature in which all men have equal rights and equal prerogative to

147. GROTIUS, *supra* note 127, at 123.
148. *Id.* at 124.
149. *Id.* at 124-25.
150. *Id.* at 130-37.
151. *Id.*
152. *Id.* at 136.
153. Cornelius F. Murphy, Jr., *The Grotian Vision of World Order*, 76 AM. J. INT'L L. 477, 483 (1982).
154. *Id.*
155. MERRIAM, *supra* note 21, at 24.

attain their desires through force.[156] Because this state is untenable, Hobbes suggests that men are forced to contract into government, to which they relinquish certain rights otherwise available to them in nature.[157] The contract is:

> the only way to erect such a Common Power, as may be able to defend them from the invasion of Forraigners, and the injuries of one another, and thereby to secure them in such sort . . . is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will, . . . to beare their Person; . . . and therein to submit their Wills, every one to his Will, and their Judgements, to his Judgement. . . . This done, the Multitude so united in one Person, is called a COMMON-WEALTH . . . . This is the Generation of that great LEVIATHAN, or rather (to speake more reverently) of that *Mortall God*, to which wee owe under the *Immortall God*, our peace and defence.[158]

This Leviathan is sovereignty, and separating the ruler from its power as Grotius did, it is this Leviathan that is said to have sovereign power.[159] All others in the state besides the sovereign are *subjects*.[160]

Hobbes's sovereign power includes several enumerated rights, as did Bodin's. The first of these rights is that the sovereign is not limited by any former covenants among its subjects. This right is really a duty upon the state's subjects not to cast off or otherwise transfer a formerly established monarchy without the sovereign's permission.[161] The second right is that the sovereign may not commit a breach of the covenant, which prevents the loss of his right over the people.[162] This is due to the nature of the covenant as an agreement struck between the people and the sovereign, and because the "people" did not exist prior to the covenant.[163] Given this, no one person can claim a breach by the sovereign. Under the contract, all acts of the sovereign are undertaken on behalf of the "people."[164] Third, the sovereign does not have to brook dissent from his subjects, the majority of them having declared him sovereign.[165] Fourth, the sovereign is incapable of injuring his subjects regardless of his actions because it is on the subjects' behalf that the sovereign acts.[166] "[E]very particular man is Author of all the Soveraigne doth; and consequently he that complaineth of injury from his Soveraigne, complaineth

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156. THOMAS HOBBES, DE CIVE, OR THE CITIZEN 21-29 (Sterling P. Lamprecht ed., Appleton-Century-Crofts, Inc. 1949) (1642).
157. HOBBES, *supra* note 128, at 89.
158. *Id.* at 89.
159. *Id.* at 90.
160. MERRIAM, *supra* note 21, at 25.
161. HOBBES, *supra* note 128, at 90-91.
162. MERRIAM, *supra* note 21, at 26.
163. HOBBES, *supra* note 128, at 91.
164. *Id.*
165. *Id.* at 92.
166. *Id.*

of that whereof he himself is Author . . . ."[167] Fifth, the sovereign may not be put to death or punished in any way by his subjects.[168] Sixth, it is the sovereign's right to decide what will be taught in the state, what doctrines will be communicated, and what constitutes "Truth."[169] Seventh, the sovereign has the right to prescribe all rules and civil laws.[170] Eighth, the sovereign has the right of "judicature"—of hearing and deciding all controversies.[171] Ninth, the sovereign has the right to make war and declare peace, to constitute the state's armies, appoint officers of the armies, and decide generally what is required to defend the state.[172] Tenth, the sovereign has the power to appoint all counselors, ministers, officers, and magistrates.[173] Eleventh, the sovereign has the power to punish and reward every subject according to the sovereign's law.[174] Finally, it is the right of the sovereign to accord titles of honor to the state's subjects and to define the signs of respect that the subjects should use to greet each other.[175] These rights are "incommunicable, and inseparable."[176] Within the state, there can be only one unitary sovereign authority.[177]

Thus, Hobbes describes an absolute sovereignty that greatly exceeds Bodin's and is subject to no exception in natural or divine law.[178] Whenever the question of sovereignty arises, as it does in questions of the reach of international law, the core issue remains the gap between a sovereignty that is vulnerable to sources of law external to the state and one that is not—that is, the gap between Grotius and Hobbes. In that regard, although few people today would back the "uncommanded commander" theory on its specific merits,[179] Hobbes's theories shaped the literature of international law throughout the remainder of the seventeenth century[180] and well into the twentieth century.[181]

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167. HOBBES, *supra* note 128, at 92.
168. *Id.*
169. *Id.* at 93.
170. *Id.*
171. *Id.*
172. *Id.* at 94.
173. HOBBES, *supra* note 128, at 94.
174. *Id.*
175. *Id.*
176. *Id.* at 95.
177. MERRIAM, *supra* note 21, at 26.
178. *Id.*
179. Roth, *supra* note 3, at 1021.
180. Murphy, *supra* note 153, at 484. Murphy notes that Hobbes was particularly influential in the work of Spinoza:

> Like Hobbes, Spinoza saw the natural condition of men as one of endless conflict. He also agreed that to avoid a war of all against all it was necessary for individuals to vest superior power and coercion in one man or group. And, like Hobbes, he saw power rather than some moral ideal as the fundamental concept in the study of societies. . . .

C. Pufendorf and Locke: The Conceptual Compromise and the Laying of Revolutionary Groundwork

Baron Samuel von Pufendorf's theory of sovereignty, elaborated as an effective compromise between the theories of Grotius and Hobbes, dominated Germany from the three-quarters mark of the seventeenth century until the French Revolution.[182] John Locke's theory justified the overthrow of the Stuarts in England and helped fuel the American Revolution.[183] These two contemporaries, whose respective theories embraced no particular common theoretical basis, closed out sovereignty's pre-Rousseau gestation period and represented notable iterations of sovereignty, elaborations upon previous definitions of the word, and a movement toward a new, language-conscious literary reality.

In 1672, Pufendorf attempted in his *De Jure Naturae Et Gentium* to capture Grotius's basic norms in a more secure foundation than the appeals to natural and divine law and basic honor in which Grotius had anchored them.[184] To accomplish this, Pufendorf attempted to lock Hobbes's positive features into a framework of universal jurisprudence.[185]

Pufendorf balances Hobbes's absoluteness and Grotius's compromise between popular and monarchical conceptions. He concedes a contractual basis as a foundational principle of the state but requires the completion of both an agreement to form a civil society ("*Pactum Unionis*") and a subsequent agreement between the people, formed by the first agreement, and the government ("*Pactum Subjectionis*").[186] The sovereignty created by the forging of both agreements is the state's supreme power.[187] As with Hobbes's theory, this supreme power is indivisible, incapable of having any of its acts voided by any other state organ, and free from the restraint of human law.[188]

Pufendorf distinguishes between sovereign and *absolute* power, however, defining sovereignty as mere *supremacy*.[189] This supremacy requires limitations

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> For Spinoza there was no natural law or covenant upholding a political compact. One's own safety and happiness are the ultimate measure of conduct. The sovereign serves the individual's interest so long as he is sovereign in fact and actually wields the power necessary to hold the community together. These general ideas were used to comprehend the relations between the individual and the supreme political authority within the nation-state. They were then applied *more geometrico*, to international relations.

Id. at 485.

181. *See* Jacques Maritain, *The Concept of Sovereignty*, 44 AM. POL. SCI. REV. 343, 349 (1950).

182. MERRIAM, *supra* note 21, at 28.

183. *Id.* at 30.

184. Murphy, *supra* note 153, at 486.

185. *Id.*

186. MERRIAM, *supra* note 21, at 28.

187. *Id.*

188. *Id.* at 28-29.

189. *Id.* at 29.

to prevent its usurpation of the entire authority, but any limitations imposed do not, as with Grotius's theory, indicate that the supreme power is not "sovereign."[190] According to Pufendorf, the only essential quality of the sovereign is that it be the supreme authority within the state; it is not essential that the sovereign be absolute.[191] Pufendorf's sovereign, unlike Hobbes's, is capable of committing injustices, but not with regard to the state's general welfare.[192]

Pufendorf's theory was influential in the reconciliation between Germany's despotic political order and the burgeoning societal emphasis upon individual liberty.[193] Most importantly, Pufendorf's theory provided a link between the emerging doctrine of sovereign equality and liberal theory by essentially arguing that "all persons in a state of nature are equal; the persons of international law are in a state of nature; therefore they are equal."[194] This remained the prevailing theory in Germany, expounded upon by eighteenth century commentators such as Wolff and Boehmer, until the development of the Kantian theory.[195]

In the latter half of the seventeenth century, John Locke's theory of sovereignty furnished yet another means of balancing Hobbes's absolutism with the limited notions of popular sovereignty. His *Second Treatise of Government*,[196] published in 1690, proposed a sovereignty that emphasized executive power only where the executive plays a role in the legislature. Locke viewed executive power as the sovereign governmental organ while the government endures and when the legislature is not constantly in session.[197] Only under those conditions may an individual wield power that could be called supreme.[198]

> [N]ot that he has in himself all the supreme power, which is that of lawmaking, but because he has in him the supreme execution from whom all inferior magistrates derive all their several subordinate powers . . . . Having also no legislative superior to him, there being no law to be made without his consent which cannot be expected should ever subject him to the other part of the legislative, he is properly enough, in this sense, supreme.[199]

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190. MERRIAM, *supra* note 21, at 29.

191. *Id.*

192. *Id.* at 29-30.

193. *Id.* at 30.

194. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 614, n.107 (1999) (quoting P. J. Baker, *The Doctrine of Legal Equality of States*, 1923 BRIT. Y.B. INT'L L. 1, 6).

195. MERRIAM, *supra* note 21, at 30.

196. *See generally* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (Thomas P. Peardon ed., Bobbs-Merrill Educ. Pub'g 1952) (1690).

197. MERRIAM, *supra* note 21, at 31-32.

198. *Id.*

199. LOCKE, *supra* note 196, at 85.

The scope of an individual's power extends only to the ruler's power to execute the laws enacted by the legislature; therefore, Locke's theory is neither particularly populist nor monarchist in nature.

Locke's sovereignty is premised upon a state of nature that is not as chaotic as Hobbes's but likewise fails to secure a perfect guarantee of individual rights.[200] Civil society and government are formed for the purpose of achieving this guarantee, and individuals surrender their natural rights to the community to secure the common good—but relinquish them no further.[201] According to Locke, a political society is nothing but a society of free individuals who are capable of forming a majority willing to unite or incorporate into a society.[202]

This political society is the legislature, in which Locke invests the true sovereign power of law-making.[203] The legislature is the supreme power of the commonwealth, unalterable once it has been constituted by the people. Only the legislature's edicts have the force of law because only its edicts have been consented to by the people.[204] The legislature's limitations are likewise based upon the idea of presumed consent by the people. First, because its power is specifically purposed to preserve the public good, the legislature cannot act arbitrarily with regard to the lives and property of the people.[205] It "can never have a right to destroy, enslave, or designedly to impoverish the subjects."[206] Second, the legislature cannot assume a power to rule by virtue of "extemporary, arbitrary decrees," and can only dispense justice and otherwise rule through established laws and "known" judges.[207] Third, because the preservation of property is one of the primary purposes of government, the legislature cannot deprive an individual of property without consent.[208] Fourth, the legislature cannot transfer its law-making power to any other entity.[209]

Therefore, Locke's sovereignty is premised not only on a weak conception of popular sovereignty, but also upon a preference for a mixed state of the sort that Bodin mistrusted. The sovereign legislature in Locke's theory is a *fiduciary* granted certain powers for designated purposes only.[210] Behind the legislature stands the political society that ultimately renders the law-making legislature subordinate to its own political sovereignty.[211] The grant of authority to the government by the people comprising the political society persists constantly in Locke's state of nature.[212] Thus, when the government

200. MERRIAM, *supra* note 21, at 30.
201. *Id.* at 30.
202. LOCKE, *supra* note 196, at 56.
203. *Id.* at 75.
204. *Id.*
205. *Id.* at 76-77.
206. *Id.* at 76.
207. *Id.* at 77.
208. LOCKE, *supra* note 196, at 79.
209. LOCKE, *supra* note 196, at 81.
210. MERRIAM, *supra* note 21, at 31.
211. *Id.*
212. *Id.* at 31-32.

attempts to deprive the people of its civil rights, the people are entitled to temporarily withdraw the legislature's sovereign power.[213]

> [T]he community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators . . . . [T]hus the community may be said in this respect to be always the supreme power, but not as considered under any form of government, because this power of the people can never take place till the government be dissolved.[214]

Thus, it is easy to see how Locke's theory could become a favorite of American revolutionaries,[215] whose particular motivation for revolution was to increase governmental preservation of civil rights through the protection of individual property and landowners' economic interests.[216] In any case, under Locke's theory, sovereign power latently rests in the people and is activated only upon the dissolution of the government.[217] For Locke, government power requires the people's consent for legitimacy.[218]

With Pufendorf's and Locke's more equivocal definitions of sovereignty, the signified object behind the word fades further into darkness. Although individually influential, their theories each require the specific context of their written work for full realization.

D. Rousseau and the Zenith of Popular Sovereignty

Natural law as the basis of popular sovereignty found its ultimate enunciation in the work of Jean-Jacques Rousseau.[219] In *The Social Contract*,[220] Rousseau attempted to conclusively relocate the sovereign power of states in the hands of the people. To reclaim for the people the same sovereignty elaborated by those earlier theorists, he utilized a language encompassing concepts such as the state of nature, the state of civil society, and self-preservation, pioneered by the earlier theorists—Hobbes in particular—as a basis for legitimate rule.[221] In doing so, Rousseau laid the foundation for the

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213. MERRIAM, *supra* note 21, at 32.

214. LOCKE, *supra* note 196, at 84-85.

215. *See* MERRIAM, *supra* note 21, at 30.

216. *See generally* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1015 n.5 (1984); James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189 (1990) (a contemporary interpretation of the U.S. Constitution in Lockean terms).

217. MERRIAM, *supra* note 21, at 32.

218. Mattias Ahrén, *Indigenous Peoples' Culture, Customs, and Traditions and Customary Law—The Saami People's Perspective*, 21 ARIZ. J. INT'L & COMP. L. 63, 82-83 (2004).

219. MERRIAM, *supra* note 21, at 33.

220. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES (Ernest Rhys ed., G. D. H. Cole trans., J. M. Dent & Sons 1913) (1762).

221. HILAIL GILDIN, ROUSSEAU'S *SOCIAL CONTRACT*: THE DESIGN OF THE ARGUMENT 1 (1983).

radical popular exercise of the French Revolution and helped to realize Bodin's worst fear: a supremacy of disorder. Rousseau's particular ambition for *The Social Contract* was prescriptive on a political level, not descriptive—and certainly not normative.[222]

In *The Social Contract*, Rousseau lays out the principles of law that set forth the conditions of legitimate sovereignty and the conditions that flow from the "social contract"[223] struck when each individual in a society surrenders all to all.[224] Rousseau reduces this contract to a simple formula: "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole."[225] This associative act creates a collective body—a public person—to be called a "state" when passive, a "sovereign" when active, and a "power" in relation to other collective bodies.[226] Collectively those individual members of this association are "the people," and individually they are "citizens" for purposes of sharing in the collectivity and "subjects" for purposes of their subordination to the law.[227] The abstraction of the "people's" will results in the general will—the sovereign of Rousseau's state.[228]

As a concretization of the general will of the people, Rousseau describes sovereignty as being inalienable.[229] The sovereign, a collective being, may transmit its power but not its will.[230] Only the sovereign body may exercise the sovereign will.[231] If the people promise to obey a ruler rather than to exercise their own will, the sovereignty is dissolved: "the moment a master exists, there is no longer a Sovereign, and from that moment the body politic has ceased to exist."[232] The commands of rulers may substitute for the general will, so long as the sovereign freely chooses not to oppose them.[233] In such cases, silence is considered assent,[234] but if the sovereignty is alienated—promised out—then the state no longer exists.[235] In this way, like Grotius and Hobbes, Rousseau protects the people against a voluntary loss of supremacy.[236] Representative government is also precluded by this

222. GILDIN, *supra* note 221, at 7-8.
223. *Id.* at 3.
224. MERRIAM, *supra* note 21, at 33.
225. ROUSSEAU, *supra* note 220, at 15.
226. *Id.* at 15-16.
227. *Id.* at 16.
228. MERRIAM, *supra* note 21, at 33.
229. ROUSSEAU, *supra* note 220, at 22-23.
230. *Id.* at 22.
231. MERRIAM, *supra* note 21, at 33.
232. ROUSSEAU, *supra* note 220, at 23.
233. *Id.*
234. *Id.*
235. MERRIAM, *supra* note 21, at 33.
236. *Id.*

inalienability.[237] For Rousseau, the people are the only acceptable holders of sovereignty, and the only acceptable form of government is democracy.[238]

The second feature of Rousseau's sovereignty is its indivisibility.[239] The will is either general or it is not, and "it is the will either of the body of the people, or only of a part of it."[240] If the latter is true, "it is merely a *particular* will, or act of magistracy—at most a decree."[241] In asserting this, Rousseau derides previously proffered metaphors of sovereignty as a divisible human body (i.e., Grotius), with certain sovereign powers and prerogatives residing in one limb of the metaphorical body.[242] The enumeration of powers and prerogatives in this fashion is seen by Rousseau as an impermissible division.[243] Enumerating such allegedly sovereign powers as the power to make war implies a supreme will under which the party who has been granted the divided power is subordinate and for which that party has merely been granted a power of execution.[244]

Rousseau next identifies his sovereignty as infallible.[245] The general will is, Rousseau says, always correct and always tending toward the general good.[246] It doesn't follow that the people, who may be deceived, are likewise always correct.[247] However, on the whole, he says, "the general will remains as the sum of the differences."[248]

From all of these qualities, Rousseau wrings absoluteness out of his conception of sovereignty, like Hobbes, but on behalf of the people rather than a monarch.[249] Rousseau arrives at the conclusion that his sovereignty is absolute not because he views absoluteness to be an inherent quality of sovereignty, as did Hobbes, but by virtue of the fact that his sovereignty is the general will of the people.[250] Rousseau's social compact establishes a binding equality among individuals, under which all are subject to the same rights and duties.[251] The nature of this compact ensures that every act of sovereignty and "every authentic act of the general will"[252] binds all citizens equally. It is not a compact between superior and inferior; it is legitimate in its common benefit

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237. MERRIAM, *supra* note 21, at 33-34.
238. *Id.* at 34.
239. ROUSSEAU, *supra* note 220, at 23.
240. *Id.*
241. *Id.* (emphasis added).
242. *Id.* at 23-24.
243. *Id.* at 24.
244. *Id.*
245. ROUSSEAU, *supra* note 220, at 25.
246. *Id.*
247. *Id.*
248. *Id.*
249. *See* MERRIAM, *supra* note 21, at 35; Maritain, *supra* note 181, at 353.
250. ROUSSEAU, *supra* note 220, at 26-29.
251. *Id.* at 28-29.
252. *Id.*

and equity.[253] Absoluteness arises from citizens' common participation in the general will and in the grant of absolute control to the body politic over its members through the social contract.[254] No rights are allotted to the individual; it is not possible for the people to guarantee rights to individuals or to surrender its rights to an individual ruler.[255] The general will—sovereignty—cannot bind itself, and it is thus absolute.[256]

Rousseau's sovereignty embedded the government in the people, imbuing the collective "people" with the only standard of legal personality possible: the ability to strike a social compact producing a supreme, law-making power.[257] The guillotine remains a stark symbol of the sometimes drastic effects of such arguments, but the use of Rousseau's absolute conception of sovereignty to de-legitimize government fulfills the idea of sovereignty as ideology.[258] Rousseau developed his prescriptive theory on an ideological basis. His mode of prescribing change—the writing and publication of *The Social Contract*—possibly influenced a political revolution. While Bodin's literary effect is more subtle, Rousseau's theory exemplifies Sartre's portrayal of literature as a call to action,[259] and his revolutionary purpose and effect provide a concrete example of the intertwining of politics, the law, and literature.

E. The Kantian Theory and the Reaction to Rousseau

In the late eighteenth and early nineteenth centuries, the idea of a popular basis for authority within a state was attacked by various schools of thought: the historical school, which considered law and the state to be a product of tradition, custom, and historical development rather than the artificial state consciousness proposed by Rousseau's revolutionary school; the religious school, which argued that the state was the result of divine command; the transcendentalist school, which postulated the creation of the state by universal will; and the Kantian theory of sovereignty.[260] All of these schools attacked Rousseau's sovereignty at the point of the creation of the state through his social contract.[261]

Kant, however, accepts Rousseau's contractual notion while attempting to avoid his de-legitimizing effect.[262] He accepts the identification of sovereignty

253. ROUSSEAU, *supra* note 20, at 28-29.
254. MERRIAM, *supra* note 21, at 34.
255. MERRIAM, *supra* note 21, at 34-35.
256. *Id.* at 35.
257. *Id.*
258. ALLEN D. ROSEN, KANT'S THEORY OF JUSTICE 139 (1993). Rosen points out that sovereignty has, as illustrated here, been traditionally bundled with ideology: "[Sovereignty's] function in the history of politics has been either to strengthen the claims of power or to strengthen the ways [by] which political power may be called to account." *Id.* (quoting F.H. HINSLEY, SOVEREIGNTY 25 (2d ed., Cambridge Univ. Press 1986) (1966).
259. *See* SARTRE, *supra* note 1.
260. MERRIAM, *supra* note 21, at 39-42.
261. *Id.* at 42.
262. ROSEN, *supra* note 258, at 140.

with supreme legislative authority but requires its location in the legislator's person.[263]

> Every state contains within itself three authorities . . . . The sovereign authority resides in the person of the legislator; the executive authority resides in the person of the ruler (in conformity to law), and the judicial authority (which assigns to everyone what is his own by law) resides in the person of the judge . . . .[264]

Kant does not mean that sovereignty is located in whatever body *ought* to possess it, but rather that sovereignty is located in the body that currently holds the legislative power as a matter of fact.[265] "The authority that is now here and under which you live already possesses the [right of] legislation."[266] In opposition to Rousseau, this amendment legitimizes governments, regardless of their character.[267]

Kant also tacitly divides sovereignty into *de jure* and *de facto* aspects.[268] Unlike Rousseau, Kant considers the social contract to be only a matter of theory, incapable of practical application[269] The value of the hypothetical contract is "its applicability as a criterion for the justification of [just] law," because the law has been made in accordance with the contract.[270] As with Rousseau, Kant's reversion of sovereignty arises from this contract, but unlike Rousseau, sovereignty remains hypothetical unless it can be located in physical persons.[271] The people are, therefore, the *de jure* or ultimate sovereign, while the body in current possession of the legislative power is the *de facto* sovereign.[272] While this would seem to imply that non-democratic or republican governments are illegitimate, Kant limits the ability of the people to reclaim *de facto* sovereignty to "moral" or "peaceful and non-seditious" means.[273]

In any case, while Kant claims that only *de jure* sovereignty is fully legitimate, he also believes that *de facto* sovereignty is all that is required for a government's maintenance of general authority.[274] The reason for this is that Kant equates sovereignty with coercive power and views the ruler in any state

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263. ROSEN, *supra* note 258, at 140.

264. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 78 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797).

265. ROSEN, *supra* note 258, at 140.

266. KANT, *supra* note 264, at 140.

267. ROSEN, *supra* note 258, at 141.

268. *Id.*

269. MERRIAM, *supra* note 21, at 44.

270. *Id.*

271. *Id.*

272. ROSEN, *supra* note 258, at 141.

273. ROSEN, *supra* note 258, at 141.

274. *Id.* at 142.

as possessing rights against his subjects without corresponding duties.[275] He considers the state's ruler immune to constitutional restriction or limitation, except by a materially more coercive power, which would then qualify as sovereign.[276] Kant refutes the right of resistance insisted upon by Rousseau: [277] "if the organ of the sovereign, the ruler, proceeds contrary to the laws . . . the subject may lodge a complaint . . . about this injustice, but he may not actively resist."[278] The product of the Kantian social contract is a civil body governed by the rule of law, and resistance and revolution are detrimental to that rule.[279] The operative government—regardless of whether it has been instituted by revolution—has been nominated by the people to achieve the highest good: the maintenance of the general welfare through the institution of the rule of law.[280] Any disturbance of the rule of law is sinful to Kant; through his hypothetical contract, the people have given up their right to adjudge the general welfare to the government and play no role in its maintenance.[281]

Kant's conception of sovereignty is absolute because he finds the idea of a sovereignty that is not absolute contradictory:

> To permit any opposition to this absolute power (an opposition that might limit that supreme authority) would be to contradict oneself, inasmuch as in that case the power (which may be opposed) would not be the lawful supreme authority that determines what is or is not to be publicly just.[282]

Like his antecedents' conceptions, Kant's sovereignty is also limited in its absoluteness. By virtue of the contractual basis of Kant's theory of sovereignty, the sovereign cannot do what the people could not.[283] Therefore, the sovereign cannot "interfere . . . in the ecclesiastical organization . . . [or] remove an office without cause . . . [or] establish a hereditary nobility."[284]

Kant, in characterizing the social contract as merely theoretical, distinguished between the ideal sovereign state and the practical sovereign state.[285] His ideal sovereign state was a goal to be attained that did not, in the meantime, endanger the public order.[286] In this sense, Kant may have simply been something of a peacemaker, retaining the republican elements he admired in Rousseau's theory and attaching them to absolutist elements that he could not intellectually exorcise but which mitigated the revolutionary effect of Rousseau's popular ideals.

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275. KANT, *supra* note 264, at 85.
276. MERRIAM, *supra* note 21, at 45.
277. *Id.*
278. KANT, *supra* note 264, at 85.
279. MERRIAM, *supra* note 21, at 46.
280. *Id.*
281. *Id.*
282. KANT, *supra* note 264, at 140-141.
283. MERRIAM, *supra* note 21, at 47.
284. *Id.*
285. MERRIAM, *supra* note 21, at 48.
286. *Id.* at 48-49.

The excision of the ideal from the practical and the demarcation between *de jure* and *de facto* sovereignty freed the concept of sovereignty from the firmament of the physical, political state. In addition, the excision paved the way for Hegel and the full realization of the legal state—a vital step in the translation of sovereignty into international law.

F. Hegel and the Rise of the Legal State

By the early nineteenth century, a single theory of sovereignty had failed to take hold in Germany. The political circumstances increasingly demanded a doctrine that could harmonize the pre-French Revolutionary regime with the requirements of the post-Napoleonic regime created in the former states of the Holy Roman Empire by the Congress of Vienna.[287] Previous theories of sovereignty were unable to help the Germans establish a new political science. German theory, building upon hundreds of years of approaches to the idea of state legal personality, put forth the idea of the state itself as the primary bearer of sovereignty.[288] Schelling and Wagner first propagated this notion, re-categorizing the state as an "organism"—a result of natural construction—and refuting the Kantian idea that the state was simply an institution for securing rights.[289]

Hegel took the idea to the next level. In his theory, the state evolved from the Kantian perspective to become the "realization of the moral idea."[290] Individuals, in Hegel's theory, have legal personality only as members of the state.[291] Like Schelling and Wagner, Hegel agreed that the state is an organism, but separately defines "organism":

> This organism is the development of the Idea to its differences and their objective actuality. Hence these different members [of the state] are the various powers of the state with their functions and spheres of action, by means of which the universal continually engenders itself, and engenders itself in a necessary way because their specific character is fixed by the nature of the concept. Throughout this process the universal maintains its identity, since it is itself the presupposition of its own production. This organism is the constitution of the state. . . . [I]t is produced perpetually by the state, while it is

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287. MERRIAM, *supra* note 21, at 85-86; GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 91-92 (2004); *see also* GermanCulture.com, German Confederation, 1815-1866, http://www.germanculture.com.ua/library/history/bl_german_confederation.htm (last visited Jan. 26, 2008).

288. MERRIAM, *supra* note 21, at 86-87.

289. *Id.* at 90.

290. *Id.* at 91 (citing GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT § 257 (T. M. Knox trans., Oxford Univ. Press 1952) (1821), *available at* http://www.marxists.org/reference/archive/hegel/works/pr/prstate.htm (translating this concept as "The state is the actuality of the ethical Idea").

291. *Id.* at 91.

> through it that the state maintains itself. If the state and its constitution fall apart, if the various members of the organism free themselves, then the unity produced by the constitution is no longer an accomplished fact.[292]

Thus, the state was not simply an organism but a "person" or a subject of juristic rights.[293] Hegel attributed sovereignty to this organic state that is subject to juristic rights.[294]

Hegel bifurcates the quality of the state's sovereignty between internal and external applications.[295] For Hegel, the basis for sovereignty lies in the exercise of the powers and functions of the civic body for the sake of the unity of the state itself rather than for governmental rights or as the property and province of individuals, as in previous conceptions.[296] The state has the sovereign personality in this view. Popular sovereignty exists only *externally*, referring to the state as one among others, a popular collective operating under the banner of the state itself.[297] Internally, the "people" possess sovereignty, but by this Hegel means the entire people *including* the monarch, and not, as Rousseau would have it, the mass of citizenry exclusive of the government of the state. In other words, the "people" are understood separately from the "ruler."[298] "Taken without its monarch and the articulation of the whole which is the indispensable and direct concomitant of monarchy, the people is a formless mass and no longer a state."[299] Hegel is a proponent of constitutional monarchy,[300] and he maintains that sovereign personality only manifests when expressed in an individual:[301]

> If the 'people' is represented neither as a patriarchal clan, nor as living under the simple conditions which make democracy or aristocracy possible as forms of government . . . nor as living under some other unorganized and haphazard conditions, but instead as an inwardly developed, genuinely organic, totality, then sovereignty is there as the personality of the whole, and this personality is there, in the real existence adequate to its concept, as the person of the monarch.[302]

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292. GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT § 269 & addition (T.M. Knox trans., n.d.) (1821), *available at* http://www.marxists.org/reference/archive/hegel/work/prindex.htm).

293. MERRIAM, *supra* note 21, at 92.

294. *See generally* HEGEL, *supra* note 290, at §§ 278, 279.

295. *Id.*

296. MERRIAM, *supra* note 21, at 92.

297. *Id.* at 92-93 (citing HEGEL, *supra* note 290, at § 279).

298. *Id.* at 93.

299. HEGEL, *supra* note 290, at § 279.

300. *Id.* "In the organization of the state—which here means in constitutional monarchy—we must have nothing before our minds except the inherent necessity of the Idea. All other points of view must vanish." HEGEL, *supra* not 292, at § 279 addition.

301. MERRIAM, *supra* note 21, at 93.

302. HEGEL, *supra* note 290, at § 279, para. 9.

Without a monarch, Hegel's sovereignty exists only abstractly in the people.[303] Additionally, the monarch's position is never derived or granted from the people but is always original.[304]

Hegel's achievement with the legal personification of the state was somewhat obscured by his requirement of a monarchic body in which to invest the associated sovereign power, as its immediate impact was similar to the impact of those theories advocating absolute monarchic sovereignty.[305] Eventually, however, the state sovereignty aspect of his theory gained ground, and the idea of a state as a legal personality bearing sovereignty continued to be recognized by political theorists.[306] Theorists such as Savigny, Bluntschli, Stahl, Gierke, and others continued to press the idea of the legal state throughout the nineteenth century. They based the concept of the legal state on ideals of natural science rather than transcendental idealism, and on the doctrine of the actual, rather than fictional, juristic personality of the state.[307]

The rise of the legal state is made possible by the literary effect of Hegel's theory of sovereignty: the realization of a literature of sovereignty premised upon the negation of the prior, strictly domestic theories. That literature is encompassed within the word "sovereignty," which, after Hegel, implies not only its own character but the character of the entire reality of international relations and the reality of the legal persons within it—a reality constructed from the literary conception of itself, for the sake of its literary conception.

G. John Austin and Utilitarian Positivism

In England, sovereignty was authored separate from the chain of influence shaping its conception in the rest of Europe.[308] England's monarch had allowed himself to be limited and constrained by the Parliament, which was the practical sovereign of the state[309] and the organ in possession of the law-making legislative power.[310] A new theory of sovereignty evolved that did not need to defend the powers of either the people or the monarchy, and it was influenced by the development of ethical conceptions of utilitarianism and jurisprudential conceptions of positivism.[311]

First, in his 1776 *Fragment on Government*, Jeremy Bentham rejected the contract theory of political relations. Bentham bases the structure of political society on the utilitarian idea that individuals submit to authority not out of

303. MERRIAM, *supra* note 21, at 94.
304. *Id.* (citing HEGEL, *supra* note 290, at § 279).
305. MERRIAM, *supra* note 21, at 94.
306. *Id.* at 95.
307. *Id.* at 95-120, 128.
308. *Id.* at 130.
309. *Id.* at 130.
310. *Id.* at 130-31.
311. MERRIAM, *supra* note 21, at 131.

voluntary agreement, but because it is favorable to their interest.[312] According to Bentham, political society is composed of a ruling body and a body of the ruled, who obey because they are in the habit of obeying.[313] The degree of obedience may differ, but habitual obedience to the command of the ruling body is the basis of Bentham's state.[314] Sovereignty for Bentham is not *infinite* but *indefinite*, unless curtailed by an express agreement.[315] Utility is the only means by which limitations on the sovereign can be defined.[316] Theoretically, Bentham's sovereignty is unlimited except for the possibility of an express agreement made by the ruling body, which Bentham defines as express agreements made between the state and other states.[317] In other words, Bentham means that a state's sovereign body is positively limited in its external relations; internally, Bentham's sovereignty remains formally unlimited and checked only by utilitarian considerations.[318]

John Austin carried on Bentham's utilitarian philosophy.[319] Austin likewise rejects the idea of the social contract in all of its forms, from Hobbes's and Locke's conceptions through the later German forms.[320] His view of law is entirely positivist, and it is this view of law that underlies his conception of sovereignty.[321] He defines a law as "a command which obliges a person or persons; and as distinguished from a particular or occasional command, obliges generally to acts or forbearances of a class."[322] Law is the command of a superior that requires the action or forbearance of a class of inferior individuals, rather than requiring the action or forbearance of a single individual.[323] Superiority is defined by *might*, the power to affect "others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes."[324] Austin divides law of this sort into positive law and positive morality, both enforced by superior might.[325] The legal superior is political in nature, while the moral superior is divine.[326] Austin then divides positive law into three categories: laws derived from the commands of monarchs or supreme political bodies; laws derived from men subjugated by those monarchs or political bodies (i.e., officers); and laws derived from private individuals pursuing legal rights.[327]

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312. MERRIAM, *supra* note 21, at 131-32.
313. *Id.* at 132.
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.* at 133.
318. MERRIAM, *supra* note 21, at 133.
319. *Id.* at 134.
320. *Id.* at 134-35.
321. *Id.* at 135-36.
322. JOHN AUSTIN, LECTURES ON JURISPRUDENCE 16 (Robert Campbell ed., abr. student ed., New York, Henry Holt and Co. 1875).
323. *Id.*
324. *Id.*
325. MERRIAM, *supra* note 21, at 136.
326. *Id.* at 136-37.
327. *Id.* at 137.

Austin's reliance upon the sovereign as the primary source of positive law's legitimacy requires him to define sovereignty.[328] According to Austin, the sovereign is the state itself, the sovereign portion of an independent political society.[329] The sovereign's primary features under Austin's theory are that the bulk of the society is in the habit of obeying it and that the sovereign is itself not in the habit of obeying another.[330] By "independent political society," Austin means a "political society consisting of a sovereign and subjects, as opposed to a political society consisting entirely of [subjected individuals]."[331] Independence occurs when the bulk of the society is in the habit of obeying a "common" or "determinate" superior, when obedience is habitually rendered by the bulk of the society to the same determinate superior person or body of persons, and when the bulk of the society obeys.[332] The superior may *occasionally* submit to commands by determinate parties, but the society remains independent as long as the superior does not submit "habitually."[333] "Habit" does not preclude the possibility of exceptions, either for the superior or for the subjected, and is both positive and negative in nature, requiring the superior to receive obedience and not to give obedience to another.[334]

Austin's sovereignty is absolute in that the supreme power cannot legally be limited.[335] According to the positivist nature of Austin's theory, the sovereign is the source of all law and not merely the supreme holder of the law-making power. The sovereign cannot be bound by the laws that exist by virtue of its command.[336] Austin claims that his absolute sovereign—which in a limited monarchy such as England's refers to the entire political body (i.e., the king, peers, and the electoral body of the House of Commons)—not only has no legal duties to its subjects but also can have no legal *rights*.[337] This is due to the impossibility of the sovereign adjudicating claims between a claimant and itself, a requirement for the fulfillment of legal rights.[338] All legal relations are, in Austin's literary reality of sovereignty, *de facto* and not *de jure*.[339]

Conclusion

This overview of the key theories of the domestic conception of sovereignty has not been intended to be comprehensive in either its selection

328. AUSTIN, *supra* note 322, at 82.
329. MERRIAM, *supra* note 21, at 139.
330. AUSTIN, *supra* note 322, at 82.
331. *Id.* at 83.
332. *Id.* at 83-84.
333. *Id.* at 84.
334. MERRIAM, *supra* note 21, at 140.
335. *Id.* at 143-44.
336. *Id.* at 144.
337. *Id.* at 144-45.
338. *Id.* at 145.
339. *Id.*

of commentators or its parsing of their theories' specific provisions. Rather, the intent of this Section has been to demonstrate the definitional variation in conceptions of sovereignty proffered since the sixteenth century, with particular attention paid to the extent to which sovereignty has or has not been considered absolute or illimitable, and with secondary attention paid to the prescriptive purposes of the authors of these theories. For present purposes, the point is that sovereignty as a domestic concept has never been consistently defined. Each new use of the word "sovereignty" has not only co-opted or transformed previous uses but, as Blanchot would have it, has *annihilated* the previous referential objects of the former uses. This destructive literary use was further exacerbated by sovereignty's translation into international law.

III. THE INTERNATIONAL LEAP: "EXTERNAL" SOVEREIGNTY AND INTERNATIONAL JURISDICTION

Sovereignty's use in international law and international relations today is a result of the literary effect of its continual rewriting. From its origin in the domestic political sphere to its position as a component of the doctrine of sovereign equality in the modern international vernacular, this rewriting has altered not only the reality of sovereignty but also the *perception* of sovereignty's reality.[340] Through an examination of three key developments, this Section explores how the domestic conception of sovereignty described above was translated into an international conception with its own meaning and transforming effect. The three key developments are: the Peace of Westphalia; the work of Emer de Vattel; and the series of international conferences predating the creation of the United Nations.

A. The Mythology of Westphalia as Context for The Authoring of International Sovereignty

The 1648 Peace of Westphalia is widely believed to be the starting point for the concept of sovereign equality underpinning the modern international system.[341] This characterization, however, is a myth.[342] This article is less concerned with the historical and factual misrepresentation of Westphalia than with the effect of that misrepresentation and with its authorship upon reality as it is remade through the literature of sovereignty. It is outside the scope of this article to delve too deeply into the actual history of the Treaties of

340. *See generally* BEAULAC, *supra* note 6, at 1-4.

341. *See generally* Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20 (1948).

342. *See* BEAULAC, *supra* note 6, at 70; SIMPSON, *supra* note 287, at 34-36; James A. Caporaso, *Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty*, INT'L STUD. REV., Summer 2000, at 1, 1; Stephen D. Krasner, *Compromising Westphalia*, INT'L SEC., Winter 1995-1996, at 115, 115; Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251, 251 (2001); Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 EUR. J. INT'L L. 447, 447 (1993).

Osnabrück and Münster, the treaties comprising the Westphalian Peace. Rather, it is the purpose of this sub-section to simply frame the context within which Vattel later wrote and within which later works, such as the Covenant of the League of Nations and the United Nations Charter, were authored. That context is the myth of what was established by the Peace of Westphalia—the myth of the creation of the doctrine of sovereign equality.

The myth of the paradigm-shift occurring as a result of the Peace of Westphalia has been described as possibly the greatest orthodoxy in public international law.[343] The orthodox belief is that the congresses of Osnabrück and Münster, which ended the Thirty Years War in Europe, were the forum in which separate states or polities became equally sovereign in relation to one another for the first time.[344] The Peace of Westphalia is typically described as a removal of the hierarchy between states, such as had been enforced by the Holy Roman and Habsburg Empires.[345] A recent articulation of the myth of Westphalia reads:

> The Peace of Westphalia legitimated the right of sovereigns to govern their peoples free of outside interference, whether any such external claim to interfere was based on political, legal, or religious principles. The two 1648 peace treaties elaborated in great detail which sovereign ruled what. The Peace was a great property settlement for Europe, a quieting of title across the continent. . . .
>
> . . .[The Peace] most significantly inaugurated . . . the organizing principle of the state, particularly the sovereign state. Sovereignty as a concept formed the cornerstone of the edifice of international relations that 1648 raised up. . . . The treaties of Westphalia enthroned and sanctified sovereigns, gave them powers domestically and independence externally.[346]

Earlier articulations described the myth in even loftier terms.[347] While some authors have long since noted the role played by writers of legal literature in the elaboration of the doctrine of sovereign equality,[348] the myth of Westphalia persists.[349]

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343. BEAULAC, *supra* note 6, at 67-68.

344. *Id.* at 67.

345. *Id.*; *see* Osiander, *supra* note 342, at 252.

346. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 162 (4th ed. 2003).

347. In 1948, Leo Gross deemed the Peace of Westphalia to have bestowed upon states "untrammeled sovereignty" over their territories, which are "subordinated to no earthly authority," and grandiosely called it "the majestic portal which leads from the old into the new world." Gross, *supra* note 341, at 20, 28.

348. *See, e.g.*, Herbert Weinschel, *The Doctrine of the Equality of States and Its Recent Modifications*, 45 AM. J. INT'L L. 417, 418 (1951).

> The doctrine of equality *had to await elaboration by writers*, especially by those of the naturalist school—led by Pufendorf—and by Vattel who

"Westphalia" is a myth insofar as it is not supported by historical fact, yet it remains widely believed by a majority of scholars.[350] Westphalia's representative and semiotic power has, in its active representation, transformed reality into one supportive of the theory of states' sovereign equality.[351] The historical reality is that the Thirty Years War was not fought defensively with the European powers fighting back against the Habsburg dynasty.[352] Instead, it was fought because the Habsburgs were weak, and not because the survival or independence of the "particularist" actors—France, Denmark, the Dutch Republic, and Sweden—was at stake.[353] The Holy Roman Empire had never fully secured overall authority in Europe.[354] As early as the fourteenth century, authority over secular matters was no longer considered the Emperor's exclusive province.[355] Emperor Ferdinand's signing of the 1629 Edict of Restoration weakened his political power over Germany soon after the failure of the Danish invasion, which had granted that power to him.[356] The war continued after this point because France and Sweden saw it as a means of enhancing their own power through the erosion of the Habsburgs' position.[357] Given that the war was not fought to ward off imperial or Habsburg expansion, the mythology concerning the 1648 Peace of Westphalia must be similarly incorrect.[358] For example, in the same month the Peace was signed, the Swedish army was looting Bohemia.[359]

> adopted their reasoning. . . . [T]he Peace of Westphalia formed a landmark in its development, and its elaboration is *due to writers* and to the strengthening of the state system.

Id. at 418 (emphasis added) (footnote omitted).

349. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 11 (7th rev. ed., Routledge 1999); MALCOLM N. SHAW, INTERNATIONAL LAW 1015 (5th ed. 2003); DANIEL PHILPOTT, REVOLUTIONS IN SOVEREIGNTY 75 (2001).

350. BEAULAC, *supra* note 6, at 70.

351. *Id.*

352. Osiander, *supra* note 342, at 252-60.

353. *Id.* at 252.

354. BEAULAC, *supra* note 6, at 76.

355. *Id.*

356. Osiander, *supra* note 342, at 255-57.

357. *Id.* at 258.

> There is no ambiguity regarding Richelieu's intentions [for France]. . . . In a 1632 memorandum, . . . Richelieu spells out what he saw as the point of direct French intervention in the war: to make it possible to "ruin the House of Austria completely, . . . to profit from its dismemberment, and to make the [French] king the head of all the catholic princes of Christendom and thus the most powerful in Europe."

Id. at 260.

358. Osiander, *supra* note 342, at 260.

359. PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS 65 (1987).

Further, neither of the two distinct treaties[360] comprising the Peace of Westphalia substantively support the Westphalian mythology.[361] The myth of Westphalia creates an impression that the Peace rescued the independence and autonomy of European states from the unjust oppression of international power.[362] The treaties themselves, which are concerned with practical settlements, espouse none of this sort of propaganda.[363] The treaties are devoid of any mention of sovereignty or of any related concepts, such as non-intervention, and there is no mention of imperial or papal prerogatives or of the balance of power.[364] Separating independent polities from higher authority was not a purpose of the Peace of Westphalia.[365]

Rather, the two main areas of concern in the treaties are related to the practice of religion and the settlement of territories.[366] The Empire remained a significant actor under the treaties comprising the Peace of Westphalia. Religious freedoms guaranteed by the treaties were to be enforced by imperial bodies such as the Diet and the Courts.[367] Sweden's just compensation with regard to territorial settlement was given in terms of imperial fiefdoms.[368] The German Princes' ability to conclude alliances after the Peace was qualified, and they had been in the habit of conducting their own foreign relations long before 1648.[369] Moreover, the Holy Roman Empire itself was preserved by the treaties of Westphalia, and it continued to exist until 1806.[370]

Given all of this, the question remains as to how the myth of the Peace of Westphalia came to be propagated. There are those, like Stéphane Beaulac, who elevate the question to a semiotic and linguistic inquiry.[371] On the other

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360. The two treaties are: (1) the Treaty of Osnabrück, concluded between the Queen of Sweden and her allies and their political adversaries: the Habsburg Emperor and the German princes, and (2) the Treaty of Münster, concluded between religious adversaries: the Catholic King of France and the German princes. BEAULAC, *supra* note 6, at 83.

361. Osiander, *supra* note 342, at 261.

362. *Id.* at 266.

363. Osiander, *supra* note 342, at 266.

364. *Id.*

365. BEAULAC, *supra* note 6, at 90.

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.* at 96.

371. BEAULAC, *supra* note 6, at 186-87.

> *Westphalia* constitutes a myth, an *aetiological myth*, which provides a way for society to explain itself to itself, that is, a way for international society to explain its genesis to itself. Semiotically, the linguistic sign "Westphalia," which represented/created the *material reality* of the twin peace congress, metamorphosed into a mythical sign which has represented/created a new reality, a *mythical reality*, about the present international state system. . . . [I]n the process whereby the initial sign was deemed a mythical sign, the historical facts and events surrounding the *Peace* became irrelevant and/or

hand, there are some, like Andreas Osiander, who cut to the chase: "the prevalence of the Westphalian myth . . . is the result of nineteenth- and twentieth-century historians adopting a certain standard account of 1648 . . ."[372] Both approaches are partially correct, but the answer to this question lies outside the fields of international law and international relations and does not require linguistic or semiotic applications. Beaulac is correct in providing that an altered reality has resulted from the myth of Westphalia, but Osiander is also correct that it is all the work of commentators propagating the factually incorrect alternate reality. If both authors are correct in these ways, then the conclusion is that the authors of Westphalia—the same writers authoring sovereignty—effected the superimposition of Westphalia's mythical reality through a literary process common to all writers, legal or otherwise.

B. The Externalization of Sovereignty

Post-Westphalia, the development of sovereignty's external aspect took major steps forward with the work of Emer de Vattel, and Vattel himself built on the work of several of the writers discussed above.

1. Bodin, Grotius, and Hobbes: The Foundations of External Sovereignty

From the beginning of the sixteenth century, writers like Gentilis and Suarez laid the foundation for an international jurisprudence by separating international law from theology and ethics.[373] At the same time, Machiavelli began considering the state's practical utility.[374] In 1576, Bodin joined these strands of thought in *Six Livres des République*, bundling them into his theory of sovereignty with regard to states' internal dynamics and external relations. Bodin's work was a realization that there was a need to improve outdated concepts of Roman law, such as the natural law-based *ius gentium*.[375] Bodin believed that natural law gave the *ius gentium* its binding power and that it constituted a limitation to earthly action. Nevertheless, he saw a need for positive international law, regardless of whether it coincided with natural law

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> incontestable. Put another way, although "Westphalia" changed from *lógos* to *mûthos*, it has nonetheless continued to be viewed in terms of *lógos*, that is, as the rational explanation of the origin of modern international relations. For human societies, and in particular for the international society, *Westphalia* is real, it is not fiction.
>
> By holding as unquestionably true and valid what is in fact a human-made fabrication, the aetiological myth of *Westphalia* has contributed to build[ing] a *religious-like belief-system*, about the whens, wheres and hows of the becoming and the being of international society.

BEAULAC, *supra* note 6, at 186-87.

372. Osiander, *supra* note 342, at 268.

373. HINSLEY, *supra* note 258, at 180.

374. *Id.*

375. *Id.*

on all points.[376] He sought to reconcile his notion of states' internal sovereign power with the practical needs of the international community by grafting positive international law on to the natural law, which he saw as limiting individual state sovereigns.[377]

Bodin's emphasis on sovereign statehood did not make as large an impact on international law as it did on states' internal hierarchies of authority,[378] but it provided a premise for Hobbes's and Spinoza's school of thought, which held that the natural condition between states was war.[379] In such a state, international law was not thought possible.[380] For Hobbes, subordination to a superior power is the only means to ensure peace.[381]

Grotius divided law into the divine, unchangeable natural law and positive law, and he applied this division in both the international and domestic spheres.[382] He insisted that natural law regulates the conduct of states in the international sphere by requiring a consideration of mankind as a whole and the consent and practice of independent states.[383] Grotius's primary purpose was to draw the existing positive law of nations closer to the principles of natural law to balance it with considerations of justice.[384] Moreover, he considered justice preeminent when it clashed with legality.[385] Thus, his requirement that the only war that could be legally waged be not only just but also *legal* (i.e., be waged to defend against injury or to recover "what was legally due") constrained independent sovereign states on the international plane; there was no absolute right to wage war.[386]

By insisting on a positive international law and binding its basis to the will and practice of sovereign states, Grotius attempted to ground a duty to accept its binding force in justice, as delimited by natural law.[387] His was the first attempt to distinguish morality and law, and then to insist that both were necessary in international jurisprudence.[388] In international relations, Grotius asserted that, while states' sovereignty must manifest in positive law, the state is no longer absolute when that positive law is subordinated to natural law on

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376. HINSLEY, *supra* note 258, at 180-81.

377. *Id.* at 186.

378. *Id.* at 182.

379. *Id.* at 184. Hobbes described this state of nature. "[T]hey are equals who can do equal things one against the other; but they who can do the greatest things, (namely, kill) can do equal things. All men therefore among themselves are by nature equal. . . ." HOBBES, *supra* note 156, at 25.

380. HINSLEY, *supra* note 258, at 184.

381. SIMPSON, *supra* note 287, at 33.

382. HINSLEY, *supra* note 258, at 186-87.

383. *Id.* at 187-88.

384. *Id.* at 190.

385. *Id.*

386. *Id.* at 191.

387. *Id.* at 191.

388. HINSLEY, *supra* note 258, at 191-92.

the international plane.[389] Despite the subsequent growth of positivism, no writer after Grotius considered the wills of sovereign states to be the exclusive source of international law.[390]

2. Vattel's Authoring of Sovereignty as the Law of Nations

Emer de Vattel advanced Grotius' position in his 1758 work *Le droit des gens*, or *The Law of Nations*.[391] Vattel considered himself a naturalist, and although it is conventionally said that he followed Grotius's lead, he was also influenced by Hobbes.[392] Vattel's *The Law of Nations* is the work most frequently attributed a primary role in the foundation of international law as it is conceived with regard to the doctrine of sovereign equality.[393]

Vattel begins *The Law of Nations* with a definition of the state which is instrumental in redefining sovereignty as an external commodity:

> Nations or States are political bodies, societies of men who have united together and combined their forces, in order to protect their mutual welfare and security.
>
> Such a society has its own affairs and interests; it deliberates and takes resolutions in common, and it thus becomes a moral person having an understanding and a will peculiar to itself, and susceptible at once of obligations and of rights.[394]

This definition is premised upon both the social contract and the moral, or legal, personhood of the state.[395] Vattel declares that the state is composed of individuals who are free in nature and that states "must be regarded as so many free persons living together in the state of nature."[396] Thus, Vattel defines the law of nations as "*the science of the rights which exist between Nations or States, and of the obligations corresponding to these rights*."[397] Therefore, the rights of states are the same enjoyed by individuals in nature.[398] However, Vattel does not strictly equate natural law with the law of nations. The law of nations results from the application of natural law to what Vattel calls the "*necessary* Law of Nations," and this is the law states are bound to observe.[399] It is only

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389. HINSLEY, *supra* note 258, at 192.

390. *Id.* at 193.

391. 3 EMER DE VATTEL, THE LAW OF NATIONS, OR THE PRINCIPLES OF NATURAL LAW (Charles G. Fenwick trans., Oceana Publ'ns 1964) (1758).

392. Nicholas Greenwood Onuf, Civitas Maxima*: Wolff, Vattel and the Fate of Republicanism,* 88 AM. J. INT'L L. 280, 283 (1994).

393. *See* Charles G. Fenwick, *The Authority of Vattel* (pt. II)*,* 8 AM. POL. SCI. REV. 375, 375 (1914); SIMPSON, *supra* note 287, at 31-32.

394. VATTEL, s*upra* note 391, at 3.

395. BEAULAC, *supra* note 6, at 135.

396. VATTEL, s*upra* note 391, at 3.

397. *Id.*

398. *Id.* at 3-4.

399. *Id.* at 4 (emphasis added).

this law that binds states as it binds individuals; otherwise, Vattel differentiates between these two categories of legal persons in terms of their obligations under natural law. It is the same law Grotius called the "*internal* Law of Nations."[400] This law is not subject to change, and states cannot alter it through agreement, or mutually or individually withdraw themselves from its application.[401] Hence, lawful and unlawful treaties are distinguishable under Vattel's theory.[402]

Under Vattel's law of nations, states are obligated to contribute toward the ends of international society—that is, the advancement of their own and other states' perfection—as far as they can, but they owe themselves primary consideration in this regard.[403] States are as free and independent under the law of nature as are individuals, but international society is impossible without mutual respect.[404] It is up to each state to decide what it must do to further these goals.[405] Vattel differentiates between internal and external obligations in explaining this: internal obligations are those that "bind the conscience" and are deduced from states' duty as elaborated above, and external obligations are those that derive from considerations of a state's position relative to other states.[406] External obligations are sub-divided into "perfect" and "imperfect" varieties, which give rise to "perfect" and "imperfect" rights.[407] Perfect rights are those with a corresponding right to compel the attached obligation; imperfect rights do not carry this corresponding right to compel.[408] A right is always imperfect, Vattel holds, when its corresponding obligation depends upon self-judgment—when the decision regarding how to act rests with the obligated actor alone.[409]

From this, Vattel develops his theory of sovereign equality:

> Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.[410]

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400. VATTEL, s*upra* note 391, at 4 (emphasis added).
401. *Id.*
402. *Id.*
403. *Id.* at 6.
404. *Id.* at 6.
405. *Id.* at 6-7.
406. VATTEL, s*upra* note 391, at 7.
407. *Id.*
408. *Id.*
409. *Id.*
410. *Id.*

For Vattel, equality is a natural right of communities.[411] States are therefore free to act as they please if their actions do not affect the rights of other states and if the state is under only *internal* and not *external* obligation.[412] The internal conduct of states is outside the scrutiny of other states.[413] States possess the right to remedy violations of the law of nations by other states through force, and to use force to defend themselves.[414]

In establishing a mutual basis for both individuals and states as "moral" individuals in natural law, Vattel handily transubstantiates domestic state sovereignty into his law of nations. Accomplishing this, Vattel imposes the reality of the "highest unified power" within a state onto the international plane through the use of the word "sovereignty."[415] "Sovereignty," according to Vattel, is synonymous with "sovereign state," with an implication of externality that persists in current rhetoric. Vattel defines sovereign states in the following manner:

> Every Nation which governs itself, under whatever form, and which does not depend on any other Nation, is a *sovereign State*. Its rights are, in the natural order, the same as those of every other State. Such is the character of the moral persons who live together in a society established by nature and subject to the Law of Nations. To give a Nation the right to a definite position in this great society, it need only be truly sovereign and independent; it must govern itself by its own authority and its own laws.[416]

Through his external use of the word "sovereignty," Vattel transposes the political power it implicates from the internal realm to the external realm, resulting in a conceptual equation of sovereignty with an independent and incorporated power, rather than a personal and interconnected power.[417]

Vattel further equates "sovereignty" with the *independence* of states and disallowed states' intervention with one another's domestic matters:

> It clearly follows from the liberty and independence of Nations that each has the right to govern itself as it thinks proper, and that no one of them has the least right to interfere in the government of another. Of all the rights possessed by a Nation that of sovereignty is doubtless the most important, and the one which others should most carefully respect if they are desirous not to give cause for offense.[418]

In elaborating this theory of states' independence, Vattel conflates the idea of sovereignty with that of independence—two separate linguistic signs, as

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411. SIMPSON, *supra* note 287, at 32.
412. VATTEL, s*upra* note 391, at 7.
413. *Id.*
414. VATTEL, s*upra* note 391, at 8.
415. BEAULAC, *supra* note 6, at 137.
416. VATTEL, s*upra* note 391, at 11.
417. BEAULAC, *supra* note 6, at 133.
418. VATTEL, s*upra* note 391, at 131.

Beaulac would have it.[419] The result is a series of various allowances and disallowances pertaining to the conduct of states with regard to one another, but the overall effect is an equality of rights without regard to intrinsic justice.[420]

Consequently, Vattel's theory of sovereignty changed the pre-existing reality of the concept in two ways that resulted in an external exclusivity of authority: first, in allowing nations exclusive authority to rule internally and externally through the principle of non-intervention, and, second, in creating a voluntary international legal system that does not effectively subject states to any higher authority.[421] *The Law of Nations* was phenomenally successful, and it had an enormous impact upon subsequent considerations of both the content of sovereignty and the assertions of legally equal relations between states.[422] As "the most widely used treatise until the late 19th century,"[423] *The Law of Nations* was quoted in judicial tribunals, speeches, and the decrees of legislative assemblies, and was used as a students' manual and a statesmen's reference.[424] After Bodin, Vattel is the most remarkable example of the single-handed authorship, or re-authorship, of sovereignty. His work formed the basis for the professional international legal "science" of the nineteenth and twentieth centuries[425] and thus wholly negated all precursory elaborations. The post-Vattel splintering of sovereignty into two use-specific modes, "internal" and "external," is evidence of the literary effect of Vattel's re-authoring of sovereignty.

B. Institutional Authorship: Sovereign Equality and Legalized Hegemony Through the Congress of Vienna and the League of Nations

"Sovereignty" entered the nineteenth century with the implications of external state independence and non-interference derived from Vattel. This made possible the "institutional" authorship of sovereignty through the development of the constituent treaties of the international organizations that would soon drive the development of international law. Sovereignty was further defined through the nineteenth-century rise and the twentieth-century fall of European colonization of the Third World, particularly in Africa. Colonization evolved the meaning and scope of territorial sovereignty through a political and academic debate over which "civilized" or "uncivilized" peoples

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419. BEAULAC, *supra* note 6, at 150-51.
420. *Id.* at 155.
421. BEAULAC, *supra* note 6, at 155.
422. *Id.* at 181-82.
423. KOSKENNIEMI, *supra* note 14, at 89.
424. BEAULAC, *supra* note 6, at 181-82 (citing Charles G. Fenwick, *The Authority of Vattel* (pt. I), 7 AM. POL. SCI. REV. 395, 395 (1913)).
425. KOSKENNIEMI, *supra* note 14, at 98-99.

were thought capable of exercising it.[426] A detailed explanation of the effect of colonization upon sovereignty is outside the scope of this article, but, for the sake of maintaining a comprehensive argument regarding sovereignty's authorship, it is worth noting that this phase of sovereignty's conceptual evolution also saw its share of supportive legal authors.[427] Otherwise, sovereignty was primarily authored in the nineteenth century by the first international institutions.

The 1815 Congress of Vienna consecrated this form of "authorship," an authorship of sovereignty by states and the lawyers employed by states in the course of constructing international organizations. The particular result of this form of authorship is, as detailed by Gerry Simpson, an international system of legalized hegemony premised upon the doctrine of sovereign equality first formulated by Vattel.[428] The Congress of Vienna, in which a collection of Great Powers—Great Britain, Prussia, Russia, and Austria—attempted to reorganize European political geography and international law in the waning days of the Napoleonic Wars, was a primary constitutional moment of regime design in international law.[429] The Congress of Vienna occurred under different circumstances and with a different character than the later conferences, and unlike those later conferences, it did not result in a standing international organization.[430] Instead, following Napoleon's defeat at Waterloo, the Congress resulted in the restoration of the European balance of power and the restoration of Louis XVIII to the French throne.[431] The Concert of Europe created by the Congress was a less formal institution than the later League of Nations or United Nations, and it did not attempt universalism.[432] The treaties struck by the Great Powers, both prior to and following Napoleon's defeat in 1814, attempted to balance legalized hegemony and sovereign equality in a manner that was usefully ambiguous to the Great Powers—who still required the lesser powers to show up, having invited all powers to the Congress with every intention of dominating it.[433]

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426. *See* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, at 127 (2001); PHILPOTT, *supra* note 349, at 151-219; ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 52-65 (2004); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 22-26 (1999) [hereinafter Anghie, *Finding the Peripheries*].

427. These authors include, among others, James Lorimer, W.E. Hall, John Westlake, Thomas Lawrence, and Henry Wheaton. *See* Anghie, *Finding the Peripheries*, *supra* note 426, at 8-9.

428. SIMPSON, *supra* note 287, at 91.

429. *Id.* at 91, 96.

430. *Id.* at 94-95.

431. *Id.* at 94.

432. *Id.* at 95. Article 1 of the Concert's constitutive Langres Protocol affirmed the motivation of the Great Powers, stating that "relations from whence a system of real and permanent Balance of Power in Europe is to be derived, shall be regulated at the Congress upon the principles determined upon by the *Allied Powers themselves*." *Id.* at 96 (citation omitted) (emphasis added).

433. *Id.* at 96-97.

With regard to the doctrine of sovereign equality, the outcome of the Congress of Vienna was that truly sovereign equality existed afterward only among the Great Powers themselves, who were the states whose collective hegemony was legally instituted by the resulting treaties.[434] Simpson suggests that legalized hegemony is dependent upon sovereign equality in that it requires a formal commitment to equality among the hegemonic Great Powers.[435] It is, he says, a mistake to conceive of sovereign equality as an all-or-nothing proposition, either fully implemented among all possible state actors or not implemented at all.[436]

Thus, at the Congress of Vienna, the evolution of sovereignty consisted not of the deconstruction of the mythological Westphalian system or of Vattel's conception of sovereign equality but of the incorporation of the doctrine of sovereign equality into a system of legalized hegemony. Even so, the myth of sovereign equality itself was not discarded in Vienna.[437] Simpson asserts that the Congress was a "constitutional moment" in its repudiation of the Westphalian system in favor of a system of legalized hegemony,[438] but the myth of Westphalia was implemented to give the impression of complete legal equality, even if individual delegates to the Congress knew better.[439] At Vienna, the formal divergence between the fact of legalized hegemony and the accepted conceptions of sovereignty and sovereign equality reveals the very essence of the literary effect under discussion.

A century later, at the close of World War I, the League of Nations was formed at Versailles as a means of forestalling future world wars. Conceived on the ashes of the 1907 Hague Conference, the League was constructed amidst ongoing tension between sovereign equality and legalized hegemony.[440] The formation of the League required a compromise between these conceptual poles.[441] However, President Wilson insisted on excluding those powers who were seen as responsible for World War I.[442] Strict equality among states was a consideration for the non-excluded, liberal cosmopolitan participants of the Congress who viewed the European balance of power as unstable.[443]

As at the Congress of Vienna, the drafting of the League's constituent instrument was left to a commission under the sway of the Great Powers authoring the institution.[444] In the end, the structure of the League itself offset

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434. SIMPSON, *supra* note 287, at 108-10.
435. *Id.*
436. SIMPSON, *supra* note 287, at 109.
437. *See id.* at 102.
438. *Id.* at 91-92.
439. *Id.* at 96-102.
440. *Id.* at 154.
441. *Id.*
442. SIMPSON, *supra* note 287, at 155.
443. *Id.*
444. *Id.* at 155-56.

the legalized hegemony of its governing Council with a nominally equal Assembly chamber with concurrent peace and security duties, equal representation of smaller states in the chamber, and some representation of smaller states in the more powerful chamber.[445] The League's judicial body, the Permanent Court of International Justice (PCIJ) also followed this structural pattern by securing permanent positions for the five Great Powers on a fifteen judge bench.[446] Compulsory jurisdiction of the PCIJ was rejected by the Great Powers as a threat to their hegemony.[447]

The primary substantive principles of the Wilsonian system—collective security and self-determination—incorporated aspects of both sovereign equality and legalized hegemony.[448] The collective security provisions were not as heavily dominated by the Great Powers as they would be after World War II in the U.N. Charter. The Articles of the League Covenant pertaining to collective security—Articles 10 and 16—provide for less than obligatory measures.[449] Article 10 merely requires the Council's "advice" when taking action;[450] Article 16 calls for the Council's recommendations.[451] The principle of self-determination reflected President Wilson's egalitarian tendencies and burdened a small number of states with duties toward their minority populations.[452] Additionally, using terminology that would later make its way into Article 2(7) of the U.N. Charter, Article 15(8) of the League Covenant barred recommendations by the Council when a matter fell into the "domestic jurisdiction" of the state in question.[453] While this phrase was intended as a new catchword to replace "'the somewhat battered idols of sovereignty, state equality, and the like,'"[454] in the League system, as differentiated from the later U.N. system, whatever the Covenant included was meant to be determined by the League's organs "under international law."[455] That is, domestic jurisdiction was to be constructed from the top down and defined as whatever rights were left to the states by international law as interpreted by the League's organs.[456]

With regard to the authorship of sovereignty and sovereign equality, however, an equally interesting and salient product of the League of Nations is the body of case law arising from the PCIJ. Several of the PCIJ's decisions attempted to define sovereignty. Judge Huber's definition of sovereignty in the *Island of Palmas* Case directly implicated state independence and Vattel's

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445. SIMPSON, *supra* note 287, at 157.
446. *Id.*
447. *Id.* at 158.
448. *Id.*
449. *Id.*
450. *Id.* (citing League of Nations Covenant art. 10).
451. SIMPSON, *supra* note 287, at 158 (citing League of Nations Covenant art. 16, para. 2).
452. *Id.* at 158-59.
453. KOSKENNIEMI, *supra* note 14, at 214 (citing League of Nations Covenant art. 15 para. 8).
454. *Id.* at 214 (quoting J.L. Brierly, *Matters of Domestic Jurisdiction*, 1925 BRIT. Y.B. INT'L L. 8).
455. *Id.*
456. *Id.*

notions of sovereign equality: "Sovereignty in the relations between States signifies independence, independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."[457] Independence was again made a cornerstone of sovereignty's definition in the *Austro-German Customs Union* Case: "[Sovereignty is] the continued existence of [a State] within her present frontiers as a separate State with the sole right of decision in all matters economic, political, financial, or other. . . ."[458] Prior to its decision in the *Wimbledon* Case,[459] the PCIJ stated that sovereignty had no static content and was "dependent on the development of international relations."[460] In that decision, the PCIJ distinguished sovereignty and sovereign rights, holding that a state has not necessarily lost its sovereignty simply because it has "contracted out" various sovereign rights.[461] The PCIJ stated that "any convention creating an obligation . . . places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."[462] The *Wimbledon* decision was descriptive of the "legal approach" to the definition of sovereignty described by Martti Koskenniemi, who defines it as a "'bundle of rights and duties,' determined from within an overriding international order."[463] The scope of sovereignty elaborated by the PCIJ in the *Lotus*

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457. KOSKENNIEMI, *supra* note 14, at 207 (quoting Island of Palmas (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829 (Perm. Ct. Arb. 1928)).

458. *Id.* (quoting Customs Régime Between Germany and Austria, 1931 P.C.I.J. (ser. A/B) No. 41, at 45 (Sept. 5)).

459. S.S. Wimbledon (U.K., Fr., Italy, Japan v. F.R.G.), 1923 P.C.I.J. (ser. A), No. 1 (Aug. 17).

460. KOSKENNIEMI, *supra* note 426, at 173.

461. *Id.*

462. S.S. Wimbledon (U.K., Fr., Italy, Japan v. F.R.G.), 1923 P.C.I.J. (ser. A), No. 1, at 25 (Aug. 17).

463. KOSKENNIEMI, *supra* note 426, at 173. Koskenniemi further states that, under this approach,

> [t]he idea of sovereignty as an "omnibus word" stems, obviously from the criticism which argues that "sovereignty" can have no essential content but is relative or "rule-determined." Thus [H.L.A. Hart] . . . is able to argue that to find out what rights and duties States have by looking at what kind of sovereignty States have is to "invert . . . the order in which questions must be considered. " We can know sovereignty only if we *first* have an idea of what rights and duties the normative order gives States.

KOSKENNIEMI, *supra* note 14, at 246 n.67 (quoting H.L.A. HART, THE CONCEPT OF LAW 218 (1961)).

Michel Cosnard has, alternatively, suggested that this decision restricts merely the *exercise* of the rights and duties of state sovereignty:

> In such a system [as that described by the Court in the *Wimbledon* Case], there can be no infringement of sovereignty, only the exercise of it.

Case,[464] on the other hand, is illustrative of what Koskenniemi calls the "pure fact approach."[465] In that case, the PCIJ presumed for the purpose of making its decision that sovereignty is as extensive as possible, unless limited by specific rules.[466] This idea has come to be known as the *Lotus* Principle, and it assumes "that State sovereignty is the starting-point of international law in the same way as individual liberty is the basis of the municipal legal order."[467] This "pure fact" approach holds that states are imbued with a natural independence that cannot be restrained when individual rules are ambiguous.[468] This approach was the motivating force behind other subsequent international judicial decisions, both by the PCIJ and the International Court of Justice (ICJ), despite being problematic on its merits.[469]

On the whole, the drafters of the League Covenant considered legalized hegemony to be an important component of the institution.[470] However, the idealized, egalitarian principle of sovereign equality, as authored by Vattel, tempered the Great Power's inclinations toward institutional domination. Decisions of the PCIJ elaborated a number of influential iterations of sovereignty. Sometimes, as in the *Island of Palmas* Case, the PCIJ conflated concepts of sovereignty and independence as Vattel did. At other times, as in the *Lotus* Case, the PCIJ attributed even greater levels of state prerogative to the concept of sovereignty. As an institution, the League perpetuated the myths of Westphalia and Vattel's theory while implementing a hegemonic structure which further removed "sovereignty" from any practical object of reference. After the League's formation, the PCIJ repeatedly rewrote sovereignty to suit the circumstances of individual cases by knitting the "sovereignty" concept to specific factual disputes, redefining it accordingly, and negating sovereignty's referential object in the process.

> Consequently, any infringement of sovereignty, understood as an encroachment on the freedom to enter—or not enter—into an international obligation, is always a fact, outside the international legal order.
>
> Therefore, when a State is not bound by an international obligation, it chooses not to be *above* international law, but *beside* international law.

Michel Cosnard, *Sovereign Equality—"The* Wimbledon *Sails On", in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 117, 125 (Michael Byers & Georg Nolte, eds., 2003).

464. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

465. KOSKENNIEMI, *supra* note 14, at 220. For the purpose of describing modern doctrine's inability to provide substantive resolution to disputes regarding the nature of sovereignty, Koskenniemi further examines these poles, through the work of Carl Schmitt and Hans Kelsen, as embodying the tension between law and power. *Id.* at 194-196.

466. *Id.* at 221.

467. *Id.*

468. *Id.*

469. *Id.* at 222-23.

470. SIMPSON, *supra* note 287, at 159.

IV. THE CURRENT JURIDICAL STATE OF SOVEREIGNTY IN INTERNATIONAL LAW

The current state of sovereignty is the intellectual property of the United Nations, as originally conceived and as practically implemented, revised, and interpreted by academic authors and judicial authors of the ICJ. This Section will discuss the U.N. Charter System from a functional viewpoint for the purpose of establishing the basis for the current sovereignty-human rights debate. It is first necessary, however, to develop the history of the U.N. as institutional author.

A. The Dumbarton Oaks Conference and the Authoring of the U.N. Charter System

The formational process of the United Nations began with the conference on August 21 through October 7, 1944, at Dumbarton Oaks in Washington, D.C.[471] This conference included only representatives of the so-called Great Powers—the United States, the United Kingdom, the Soviet Union, and China[472]—who were concerned with post-war security issues and their role in "policing the international order."[473] Human rights were not a particular concern of the Great Powers at the Dumbarton Oaks conference, although their resulting proposals did reference "'international cooperation in the solution of humanitarian problems.'"[474] Inherent in the Great Powers' discussions regarding security and their role in post-war maintenance of security, there was, as it had been with the formative League of Nations, a conception of sovereign equality as maintained or enforced by a legal hegemony.[475]

The content of the Dumbarton Oaks Proposals roughly followed that of the August 14, 1941 agreement between the United States and the United Kingdom known as the Atlantic Charter.[476] The Atlantic Charter envisioned a post-war landscape of rudimentary sovereign equality, in which

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471. Angeliki E. Laiou, *Dumbarton Oaks Conference, 1944-1994: Remarks from the Opening Session*, *in* THE DUMBARTON OAKS CONVERSATIONS AND THE UNITED NATIONS 1944-1994, at ix, ix (Ernest R. May & Angeliki E. Laiou eds., 1998).

472. *Id.*

473. SIMPSON, *supra* note 287, at 168 n.10.

474. SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 66 (1996) (quoting Washington Conversations on International Peace and Security Organization (The Dumbarton Oaks Conference), Aug. 21-Oct. 7, 1944, *Proposals for the Establishment of a General International Organization*, ch. 1, para. 3, *available at* http://www.ibiblio.org/pha/policy/1944/441007a.html).

475. SIMPSON, *supra* note 287, at 168.

476. Michael Howard, *The United Nations: From War Fighting to Peace Planning*, *in* THE DUMBARTON OAKS CONVERSATIONS AND THE UNITED NATIONS 1944-1994, *supra* note 471, at 1, 2.

> all nations could freely choose the form of government under which they would live, would have equal access to trade and raw materials needed for their prosperity, would collaborate in improving their standards of living, would be able to traverse the high seas without let or hindrance, and "for realistic as well as spiritual reasons . . . come to the abandonment of the use of force." Aggressor nations would therefore be disarmed . . . "pending the establishment of a wider system of general security."[477]

This conception of the post-war landscape was driven largely by American visions of what a peaceful world ought to look like.[478] While granting nominal equality to the member-states of the proto-U.N. and allowing equal access to trade and the equal right to traverse the seas, the Atlantic Charter was also sharply aimed at providing the Great Power states with a special position in the post-war order—that of policeman. Peace was to be attained not only through equality of access to resources but also through the existence of a Great Powers-enforced prohibition of certain conduct.[479]

The Atlantic Charter and the subsequent Dumbarton Oaks Proposals envisioned a peaceful order maintained by the division of the hegemonic Great Powers and the Outlaw States, as defined by their perceived threat to the general security.[480] Sovereign equality, as the U.N. Charter system envisioned it, was not so much a process of guaranteeing equality *per se,* but rather a process of the exclusion of those states acting out aggressively within its constraints. Equality in the new organization was even more strongly linked to the legal hegemony of the Great Powers than it was in the League of Nations.[481]

The doctrine of sovereign equality, operating in the same assuaging manner as it had in the League Convention, was a key value in the development of the U.N. Charter System from the earliest stages of its construction.[482] The Moscow Declaration of 1943—in which the United States, the United Kingdom, and Russia first declared their intent to develop an organization dedicated to the maintenance of international peace and security—explicitly exclaimed that the new organization would be "*based upon the sovereign equality of all peace-loving states*."[483]

Although smaller states would be somewhat mollified by the revisions made to the U.N. Charter at the ratifying San Francisco Conference,[484] the structure of sovereign equality was naked at Dumbarton Oaks, as it would eventually be under the Charter. Largely accepting American post-war intentions as embodied in the Atlantic Charter, the Great Powers laid the

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477. Howard, *supra* note 476, at 2 (quoting RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 975 (1958)).

478. *Id.*

479. SIMPSON, *supra* note 287, at 169.

480. *Id.* at 167-78.

481. *Id.*

482. NINČIĆ, *supra* note 15, at 43.

483. *Id.* (quoting Declaration of Four Nations on General Security ann. 1, art. 4, Nov. 1, 1943, 3 Bevans 816).

484. *See* SIMPSON, *supra* note 287, at 179-90.

groundwork for the U.N. Charter in the Dumbarton Oaks Proposals. In those proposals, the Great Powers agreed on prohibitions on the uses of force by states, and on the basic structure and function of the Security Council as the body primarily responsible for the maintenance of international order.[485] The Great Powers' representatives at Dumbarton Oaks also agreed that the Security Council should have the power to muster forcible means to restore peace and security in the event of breach or threat of a breach.[486]

The greatest controversy at Dumbarton Oaks arose with the question of the scope of the Great Powers' veto power.[487] There was no disagreement among the Great Powers regarding the basic question of the veto. All of them agreed that they should enjoy permanent membership on the Security Council, and the ability to prevent any action opposite to their individual or collective interests.[488] Rather, controversy arose regarding the outcome of disputes in which one of the Great Powers might happen to be involved.[489] The United Kingdom proposed, with the agreement of the United States, that the Great Power involved in a dispute should be excluded from Security Council votes regarding the situation.[490] The Soviet Union disagreed, arguing that a Great Power should be able to prevent any action, even when it is an interested party.[491] The United States urged a compromise, but this issue remained unresolved at the end of the Dumbarton Oaks Conference.[492]

Another controversy concerned the role of human rights as a catalyst for action within the organization.[493] A United States proposal allowing the General Assembly to make recommendations "for the promotion of the observance of basic human rights"[494] was considered by the United Kingdom and the Soviet Union to pose an unacceptable potential threat to national sovereignty.[495] In the end, the Great Powers compromised and agreed that the organization would simply "promote respect for human rights and fundamental freedoms."[496] Despite the controversy, the Dumbarton Oaks Conference laid the groundwork for an organizational system with the single, overriding purpose of collective security. Under the umbrella of that interest, human rights were a subsidiary concern, and the codification of the inviolability of national or internal sovereignty—at least in principle—was the

485. MURPHY, *supra* note 474, at 66.
486. *Id.*
487. EVAN LUARD, A HISTORY OF THE UNITED NATIONS: THE YEARS OF WESTERN DOMINATION, 1945-1955, at 29 (1982).
488. *Id.*
489. *Id.*
490. *Id.*
491. *Id.*
492. *Id.*
493. LUARD, *supra* note 487, at 31-32.
494. *Id.* at 31-32.
495. *Id.* at 32.
496. *Id.*

primary means of assuring smaller states that the hegemonic powers of the Great Powers would not extend to violations of smaller states' domestic jurisdiction.[497]

While similar to the language of Article 15(8) of the Covenant of the League of Nations, the Dumbarton Oaks Proposals' preservation of domestic jurisdiction differed in at least one key respect.[498] Because the provision resided under Chapter VIII of the Dumbarton Oaks Proposals, it was specifically keyed to the peaceful settlement of disputes, It did not, however, preclude the Security Council from taking Chapter VIII measures to address threats to the peace in conflicts otherwise precluded by a state's domestic jurisdiction.[499] In contrast with the Covenant of the League of Nations' sister clause, the lack of precision with which Paragraph 7 was drafted in the Dumbarton Oaks Proposals "obviously reflected the political influences which played so great a role in shaping the Charter and which resisted any attempt towards a 'rigid' legal regulation of a subject-matter with so delicate and far-reaching implications."[500]

In other words, the re-authored sovereign equality featured in the new system was subject to the exertions of legalized hegemony by the Great Powers. The finalized veto power would somewhat qualify this tendency, but the literary reality created in the U.N. System was a sovereignty freed from all reference to its former object. Before the lesser powers could have their say at San Francisco, the Great Powers had completed the essential authorship of the new system at Dumbarton Oaks.

B. The Continuing Evolution of the Doctrine of Sovereign Equality Prior to the San Francisco Conference

Preceding San Francisco, the primary concern of the states not party to the Dumbarton Oaks conference was the question of the Great Powers' authorship of "sovereignty" under the new system. In particular, the concern was how any conception of sovereign equality could be married to a codification of the Great Powers' hegemony.[501] This concern manifested in continuing discussions about the extent of the veto power allowed to the Great Powers on the Security Council,[502] the question of which states merited

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497. NINČIĆ, *supra* note 15, at 152-153. Paragraph 7 of Chapter VIII of the Dumbarton Oaks Proposals provides that "[t]he provisions of paragraph 1 to 6 of Section A [which are concerned with the Security Council's maintenance of peace and security] should not apply to situations or disputes arising out of matters which by international law are solely within the domestic jurisdiction of the state concerned." Washington Conversations on International Peace and Security Organization (The Dumbarton Oaks Conference), Aug. 21-Oct. 7, 1944, *Proposals for the Establishment of a General International Organization*, ch. 8, para. 7, available at http://www.ibiblio.org/pha/policy/1944/441007a.html

498. NINČIĆ, *supra* note 15, at 153

499. *Id.*

500. *Id.* at 154.

501. SIMPSON, *supra* note 287, at 168-69.

502. LUARD, *supra* note 487, at 33.

Great Power designation,[503] and the controversy over the continuing evolution of the Four Policemen model for post-war collective security.[504] The Four Policemen model, a proposal that restricted all use of force to the Great Powers, particularly alarmed smaller states concerned that the Dumbarton Oaks Proposals forecasted a system based on the Great Powers' permanent alliance.[505] Wary of asserting this too transparently, the United States argued against voting weighted by states' material power or other voting methods that could be considered "unequal."[506]

Nevertheless, the United States and other Great Powers maintained a concern that too much factual equality between states would be detrimental to collective security.[507] A revision to the Draft Four Power Agreement proposed by the United States to the other Great Powers in 1943 inserted the phrase "sovereign equality" into the text in place of "equality of nations" to preserve an operating language consistent with the protection of the Great Powers' budding legal hegemony.[508] Smaller states chafed at this, but ultimately agreed that at least a certain amount of legalized hegemony would benefit the new system.[509] This agreement demonstrated three generally accepted presumptions:

> [F]irst, sovereign equality was to be a cornerstone of the new international system. Second, departures from the principle or, at least, deviations from the strict implementation of the principle, would be necessary to give the new international security regime some teeth. Third, these departures would have to be justified on the basis either of competing legal principles or by reference to overwhelming political necessity.[510]

Thus, at the initiation of the San Francisco Conference, the accepted structure of the new organization was one of legalized hegemony, in which the Great Powers could continue to wield their influence over the post-war international legal landscape proportionate to their material power at the close of World War II. Without an agreed upon charter, the expression of states' external sovereignty within this new organization had already been realized, as had the resulting international system of "sovereign equality" in which smaller states were not only not equal but also, by most historical definitions, not sovereign.

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503. LUARD, *supra* note 487, at 30.
504. SIMPSON, *supra* note 287, at 176.
505. SIMPSON, *supra* note 287, at 168, 176.
506. *Id.* at 177.
507. *Id.* at 178.
508. *Id.*
509. *Id.* at 178-179.
510. *Id.* at 179.

C. The San Francisco Conference and the Final Authorship of the U.N. Charter System

Unsurprisingly, the primary issue at the concluding San Francisco Conference was the extent to which the principle of sovereign equality, as an expression of true equality between participating states, would be attenuated or regulated as implemented in the previously accepted hegemonic framework of the Great Powers.[511] The new organization, as planned at Dumbarton Oaks, was to be structured to maintain the Great Powers' weighty executive control, and it was this structure that the smaller states took issue with in San Francisco.[512] The smaller states advanced various counterproposals in an attempt to offset the Great Powers' structural hegemony. The counterproposals supported four basic strategies for this offset: (1) weakening of the Security Council's permanent members' ("P-5") veto power; (2) reducing the effect of hegemony within the Security Council; (3) constraining of the Security Council's freedom of action; and (4) bolstering the General Assembly's own powers.[513]

As to the first two strategies, the Great Powers were largely successful in maintaining their legal dominance.[514] As to the third, the smaller states were successful to the extent that they managed to require that the General Assembly be apprised of any questions dealt with by the Security Council; otherwise, the preservation of elite power remained a hallmark of the new organization's interpretation of sovereign equality.[515] As to the fourth strategy, the smaller states achieved slightly more success in attempting to expand the General Assembly's own powers.[516] The General Assembly thus evolved to include representation of all members with no special prominence for Great Powers, as well as reporting requirements and budgetary approval power, which allowed it to more effectively serve as the basis for authority over sub-organs.[517]

The concern of the smaller states for protection from the Great Powers' intrusion further manifested in continuing discussions regarding the maintenance of protections of states' domestic jurisdiction.[518] The small states' proposed amendments to the domestic jurisdiction language in Paragraph 7 of Chapter VIII of the Dumbarton Oaks Proposals aimed to eliminate the ambiguity of "who was to decide whether a matter did nor did not enter into the domestic jurisdiction of a state."[519] In the end, the nature of domestic jurisdiction was transformed from that elaborated at Dumbarton Oaks.[520] The fuel behind this transformation was not so much the unease of

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511. SIMPSON, *supra* note 287, at 180.
512. *Id.*
513. *Id.*
514. *Id.* at 180-84.
515. *Id.* at 185 (citing U.N. Charter art. 12, para. 2).
516. *Id.* at 189.
517. SIMPSON, *supra* note 287, at 188-90.
518. NINČIĆ, *supra* note 15, at 154.
519. *Id.*
520. *Id.*

the smaller states but the interest of the Great Powers in not having their freedom of action restrained in any way.[521] Article 2(7) of the Charter specifically excepted Security Council enforcement actions from the inviolability of domestic jurisdiction under its Chapter VII authority.[522] Amendments to the protection of domestic jurisdiction drafted under the Dumbarton Oaks Proposals included: (1) the relegation of the provision on domestic jurisdiction from the framework of the Charter to the section regarding the peaceful settlement of disputes;[523] (2) the removal of a reference to international law as an objective criterion of delimitation;[524] (3) the applicability of the provision only to matters "essentially" within the domestic jurisdiction of states rather than "solely" within that jurisdiction (as in the Covenant of the League of Nations and the Dumbarton Oaks Proposals);[525] and (4) the insertion of the term "to intervene" into Article 2(7).[526]

The Dumbarton Oaks Proposals further made no mention, as the Covenant of the League of Nations had, of the question of who was to decide the application of the domestic jurisdiction clause.[527] At the San Francisco Conference, the omission of this old question of *Kompetenz-Kompetenz* was viewed as unfortunate because the objective criterion of international law had been removed from Article 2(7).[528] Amendments proposing that such questions be referred compulsorily to the International Court of Justice or to the competent United Nations bodies were defeated by the United States.[529] It was finally decided that such questions of interpretation were coextensive with application and were to be decided by the organs before which the questions arose.[530]

In the context of the Security Council's Chapter VII powers, the effect of these modifications was a United Nations Charter that defined sovereignty through the delimitation of domestic jurisdiction protections by the potentially extensive Chapter VII powers of the Security Council. The effect of the San

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521. NINČIĆ, *supra* note 15, at 154.

522. *Id.* at 154 & n.7. Article 2(7)of the U.N. Charter reads:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. Charter art. 2, para. 7.

523. NINČIĆ, *supra* note 15, at 154, 155-57.

524. *Id.* at 154-55, 158-59.

525. *Id.* at 155, 159-61.

526. *Id.* at 155, 161-70.

527. *Id.* at 180-81.

528. *Id.* at 181.

529. NINČIĆ, *supra* note 15, at 181-82.

530. *Id.* at 182.

Francisco Conference was the transformation of domestic jurisdiction—sovereignty—from a formerly political legal concept back to a strictly political one.[531]

D. The Structure and Text of the U.N. Charter

The tension between legalized hegemony and sovereign equality at Dumbarton Oaks and San Francisco manifested in the textually schizophrenic nature of the U.N. Charter itself. To a certain extent, it is fair to say that this textual schizophrenia is responsible for the arguments over the primacy of sovereign equality and human rights norms protective of individual rights. However, as we have seen, this textual schizophrenia is simply a manifestation of sovereignty's conceptual and literary ebb and flow over the past 500 years. Sovereignty's current definition and manifestation as the principle of sovereign equality codified in the U.N. Charter is a product of subsequent practice within the U.N. system and of geopolitical realities since the U.N.'s inception.[532]

Aside from the language in Article 2(1) of the U.N. Charter, sovereign equality is principally preserved in the Charter's prohibitions on the use of force. Article 2(4) states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[533] Thus, the Charter prohibits war and any other form of self-help that might involve the use of force, including the threat of such use.[534] Although the extent and scope of the language of Article 2(4) are open to interpretation, the terms "territorial integrity" and "political independence" specifically link the Charter's prohibition on the use of force to the values of sovereign equality.[535] These terms are "the essential constitutive elements of sovereign equality" as defined by the Charter.[536] Therefore, the Charter excludes the right to engage in a just war, which is a quality of "absolute" sovereignty.[537] Sovereignty under the Charter exclusively encompasses states' territorial integrity and the right of states' peoples to self-determination, emphasizing political as opposed to economic or other forms of independence.[538]

In addition, Article 2(7)[539] gives with one hand and takes with the other. As noted above, Article 2(7) preserves the domestic jurisdiction of U.N. member -states, but it does so only through the assertion of Great Power hegemony—

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531. NINČIĆ, *supra* note 15, at 183.

532. Brad R. Roth, Sovereignty and Space for Moral Disagreement in a Pluralistic Global Order 1 (Sept. 2, 2005) (unpublished manuscript, on file with author).

533. U.N. Charter art. 2, para. 4.

534. MURPHY, *supra* note 474, at 70-71.

535. NINČIĆ, *supra* note 15, at 72.

536. *Id.*

537. *Id.* at 73.

538. *Id.*

539. U.N. Charter art. 2, para. 7.

by excepting the Security Council's Chapter VII powers. Domestic jurisdiction will be inviolable under the U.N. Charter, notwithstanding measures taken by the Security Council under Chapter VII. In other words, Article 2(7) typifies the tension between sovereign equality and legalized hegemony in the text of the Charter.

The only exception to the prohibition of force is codified in Article 51:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[540]

The caveats to uses of force not sanctioned by the Security Council under its Chapter VII authority are numerous. First, it is clear that this Article subjects all claims of self-defense to Security Council authority.[541] A state's action may only persist until the Security Council takes measures of its own to maintain peace and security. Collective self-defense actions have further requirements, such as a request for aid from the victim, as ruled by the ICJ in the *Nicaragua* Case.[542] Second, self-defense under Article 51 must be in response to an *armed attack*.[543] In short, Article 51 is a very limited exception to the prohibition of use of force contained in Article 2(4), and is circumscribed by the explicit powers of the Security Council and by its own ambiguity.

Legalized hegemony further emerges in the U.N. Charter through the provisions preserving the original collective security ambitions of the Great Powers. Article 24 of the Charter requires member states to confer "primary responsibility for the maintenance of international peace and security" upon the Security Council.[544] In other words, the responsibility for collective security—the primary function for which the United Nations was established—is given to a single, membership-restricted organ.[545] Thus, the

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540. U.N. Charter art. 51.

541. Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 459 (1991).

542. Military and Paramilitary Activities (Nicar. v. US), 1986 I.C.J. 14, 105 (June 27).

543. The definition of this phrase is contentious and has been held by the ICJ to include actions by irregulars but not including the provision of weapons or support. *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 96-97 (2000) (citing Military and Paramilitary Activities (Nicar. v. US), 1986 I.C.J. 14, 103 (June 27)).

544. U.N. Charter art. 24, para. 1.

545. NINČIĆ, *supra* note 15, at 88.

balance between the more and less powerful organs established in the League of Nations is excised from the U.N. System.[546]

According to Article 39, the first article within Chapter VII, the primary responsibility of the Security Council is the determination of threats to or breaches of the peace and the measures to be taken in response to those threats or breaches.[547] Chapter VII does not define a threat to or breach of the peace, but the Security Council may, under this Article, make recommendations to conflicting parties, member-states, U.N. organs and sub-organs, and international organizations.[548] Under Article 41, the Security Council may decide what non-force measures may be taken in cases of threats to or breaches of the peace, including economic and other measures.[549] Articles 42 through 48 of the Charter require the Security Council to provide military forces and other necessities for the purposes of taking measures against threats to or breaches of the peace, and to organize a military staff committee for the purpose of advising and assisting the Security Council during military operations. These Articles have not been followed, and nearly all recommendations and measures taken by the Security Council in the fulfillment of its primary responsibility have been taken under Article 39, including peacekeeping operations.[550]

E. The Subsequent Practice of the United Nations

Although it is of interest as a matter of prescriptive authorship, the text of the U.N. Charter alone did not generate the current juridical conception of sovereignty under the U.N. System. The practice of the organization has elaborated upon the initial balance between legalized hegemony and sovereign equality struck in the Charter. General Assembly Resolutions, treaties, and ICJ decisions have greatly contributed both to the balance of hegemony and equality and to the confusion about the substance of sovereignty itself under the U.N. System. To illustrate these contributions, this Section discusses some of the primary resolutions and decisions employed in the sovereignty debate to argue that the general character of the United Nations requires emphasis on either sovereign equality or human rights.

The central purpose of the doctrine of sovereign equality is noted by some to be the protection of the right to self-determination.[551] As expressed in Article 1(2) of the U.N. Charter, however, self-determination is not linked to the Charter's avowal of sovereign equality in Article 2(1). Furthermore, the

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546. NINČIĆ, *supra* note 15, at 88.

547. U.N. Charter art. 39.

548. MURPHY, *supra* note 474, at 79-80.

549. U.N. Charter art. 41. As noted above, sovereign equality in the U.N. System, as defined in scope by Article 2(4), includes the right to political integrity but not necessarily the right to economic integrity. Economic sanctions have been repeatedly utilized by the Security Council under its Chapter VII authority without ever resulting in violation of member-states' sovereignty as defined by the Article 2(4).

550. MURPHY, *supra* note 474, at 80.

551. Roth, *supra* note 532, at 9.

right of self-determination is not conceptually linked to the historical basis of either the United Nations as an organization or sovereign equality as a Westphalian myth and work of authorship by Vattel. In any case, the specific right to self-determination listed as a purpose of the United Nations in Article 1 of the U.N. Charter, has not always been coherently elaborated through United Nations instruments.[552]

The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples ("the 1960 Declaration") states that all peoples have the right to self-determination, by virtue of which they may freely pursue their political status and economic, social and cultural development.[553] With regard to sovereignty and its relation to the right of self-determination, the 1960 Declaration is textually incoherent.[554] Its incoherence results from the 1960 Declaration's statement that "all peoples have an inalienable right to complete freedom" and the right to demand "immediate implementation" of that freedom, which is in tension with the 1960 Declaration's limitation of this right to countries that have not yet attained independence.[555] The freedoms alluded to are further restrained by a rule against any "attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country."[556] This incoherence, however, has not prevented the 1960 Declaration from being presented for the rhetorical effect of its summary assertion of the right to self-determination.[557]

The most authoritative U.N. resolution[558] on the subject of non-intervention in states' domestic jurisdiction is the 1970 General Assembly resolution known as the Friendly Relations Declaration.[559] This resolution

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552. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 745-46 (1988).

553. G.A. Res. 1514, at 66, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 14, 1960).

554. Franck, *supra* note 552, at 745-46 (citing G.A. Res. 1514, *supra* note 553).

555. *Id.* (quoting G.A. Res. 1514, *supra* note 553).

556. *Id.* (quoting G.A. Res. 1514, *supra* note 553, at ¶ 6).

557. *See* Roth, *supra* note 532, at 9.

558. According to Oscar Schachter:

> [T]he Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations was adopted by consensus in 1970, after a decade of debate and negotiation. While its language is quite general, it elaborates the major principles of international law in the UN Charter, particularly on use of force, dispute settlement, nonintervention in domestic affairs, self-determination, duties of cooperation and observance of obligations, and "sovereign equality. " . . . [I]t has become the international lawyer's favorite example of an authoritative UN resolution.

Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1, 3 (1994) (footnote omitted).

559. Friendly Relations Declaration, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082 (Oct. 24, 1970).

emphasizes the right to self-determination, expanding the concept beyond the organization's post-World War II anti-colonialist aims.[560] The document bars other states from interfering with *any* form of representation established by a people, provided that political status is freely determined, because the emergence of such a status is an implementation of self-determination.[561] In particular, it says that

> [n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[562]

The document further states that "[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."[563] Thus, it is argued that the declaration "transforms the language of the right of peoples to self-determination into the right of states to non-intervention."[564]

The 1981 Declaration on the Inadmissibility and Interference in the Internal Affairs of States ("the 1981 Declaration") further qualifies the right to self-determination as a basis for sovereign equality in the U.N. System, limiting the expression of self-determination to non-secessionist activity.[565] The 1981 Declaration reaffirms the propriety of non-intervention as a guiding principle of the doctrine of sovereign equality, stating that "full observance of the principle of non-intervention and non-interference in the internal and external affairs of States . . . is of the greatest importance for the fulfillment of the purposes and principles of the Charter."[566] The external intervention with which the 1981 Declaration is concerned is the promotion and encouragement of "rebellious or secessionist activities within other States, under any pretext whatsoever, or any action which seeks to disrupt the unity or to undermine or subvert the political order of other States."[567] Thus, this declaration notably preserves sovereign equality in terms of non-military interference as well as military interference, even including the exploitation and distortion of "human rights issues as a means of interference in the internal affairs of States, of

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560. Frederic L. Kirgis, Jr., Editorial Comment, *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304, 305 (1994).

561. *Id.*

562. G.A. Res. 2625, *supra* note 559, at 124.

563. *Id.* at 123.

564. Roth, *supra* note 532, at 11-13.

565. *Id.* (citing G.A. Res. 36/103, at 78, U.N. Doc. A/RES/36/103 (Dec. 9, 1981)).

566. G.A. Res. 36/103, *supra* note 565, at Annex.

567. *Id.*

exerting pressure on other States or creating distrust and disorder within and among States or groups of States."[568]

The General Assembly's 1974 Definition of Aggression further reinforces the value of territorial integrity in the U.N. System with regard to external interference.[569] The Annex to this resolution stipulates that the value enforced by the resolution is collective security, rather than the preservation of rights of self-determination. Thus, this resolution better fits the conception of sovereign equality originally elaborated by the U.N. Charter than do the above resolutions.

The documents generated by the U.N. General Assembly specifically pertaining to human rights are far too numerous to describe in any detail. However, all discussion of human rights in the U.N. System must begin with the Universal Declaration on Human Rights ("the Universal Declaration").[570] Drafted in 1948, the Universal Declaration and its broadly stated emphasis on individual rights within an allegedly state-centered international legal system is virtually concurrent with the founding of the U.N. itself. It has been called "the most important document [in the United Nations System], excepting only the [U.N.] Charter."[571] In whole or in part, the Universal Declaration is considered by many to be declaratory of customary international law, with a legal reach well beyond its operative power as a non-binding General Assembly Resolution.[572]

Article 21(3) of the Universal Declaration provides that the will of peoples be the basis for government, as determined through free and fair elections.[573] According to W. Michael Reisman, the significance of this statement is that it "dethrones" the sovereign once and for all through the application of international law and exterior obligation.[574] Whether this is an accurate assessment of the state of sovereignty depends upon whether one views sovereignty as negated whenever it is subjected to an external or hierarchically superior legal authority (i.e., "absolute" sovereignty as described by Bodin and Hobbes), as well as upon one's view of the force of the Universal Declaration as binding customary international law. In any case, Reisman's statement typifies the human rights-oriented reaction to the literary effect of the historical iterations of "absolute" sovereignty and to the use of U.N.

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568. Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 BROOK. J. INT'L L. 417, 425-26 (2000) (quoting G.A. Res. 36/103, *supra* note 565, at ¶ 2(II)(l)).

569. G.A. Res. 3314, art. 1, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974).

570. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

571. Henkin, *supra* note 7, at 40 n.31.

572. Reisman, *supra* note 4, at 867.

573. G.A. Res. 217, *supra* note 570.

574. Reisman, *supra* note 4, at 868.

documents to color the character of the United Nations as an organization aimed at protecting human rights and international law at large.[575]

The International Covenant on Civil and Political Rights[576] and the International Covenant on Economic, Social, and Cultural Rights,[577] like all substantive international codifications of specific human rights, are important U.N. documents insofar as they shift legal personality from the states onto individuals.[578] The U.N. has also propagated numerous other conventions and treaties designed to protect human rights. Although the U.N. Charter was authored as a measure of collective security, it has been progressively re-authored with an emphasis on human rights since the release of the Universal Declaration in 1948.[579]

Most recently, the General Assembly passed Resolution A/60/L.48,[580] which was a response to the dissatisfaction expressed over the U.N. Human Right Commission. The Resolution abolishes the Commission in favor of a new Human Rights Council and confirms human rights as a foundational premise of the U.N. System, inextricable from the other bases of collective security.[581] Further, to the extent that General Assembly resolutions may

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575. Assertions of *jus cogens* norms protective of human rights overriding norms of sovereign equality are similar arguments. *See* Shelton, *supra* note 9.

576. International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

577. International Covenant for Economic, Social, and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

578. *See* Winston P. Nagan & Craig Hammer, *The Changing Character of Sovereignty in International Law and International Relations*, 43 COLUM. J. TRANSNAT'L L. 141, 165 (2004).

579. *See* Richard B. Bilder, *An Overview of International Human Rights Law*, *in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 5 (Hurst Hannum ed., 2d ed. 1992). Other than the previously mentioned instruments, other U.N. human rights instruments include: the 1948 Genocide Convention; the 1952 Convention on the Political Rights of Women; the 1957 Standard Minimum Rules for the Treatment of Prisoners; the 1967 Protocol relating to the Status of Refugees; the 1979 Convention on the Elimination of All Forms of Discrimination against Women; the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the 1989 Convention on the Rights of the Child; and the 1990 Convention on Migrant workers, to name but a few. *Id.*

580. G.A. Res. A/60/L.48 U.N. Doc. A/60/L.48 (Mar. 14, 2006).

581. *Id.* Pertinent provisions of the resolution describe its purpose as follows:

> *Reaffirming* the purposes and principles contained in the Charter of the United Nations, including developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, . . .
>
> . . .
>
> *Reaffirming* that . . . all States, regardless of their political, economic and cultural systems, have the *duty* to promote and protect all human rights and fundamental freedoms,
>
> *Emphasizing* the *responsibilities* of all States, in conformity with the Charter, to respect human rights and fundamental freedoms for all, . . .
>
> *Acknowledging* that peace and security, development and *human rights* are the pillars of the United Nations system and that the foundations for collective security and well-being, and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing.

become binding,[582] the Resolution appears to lay a duty upon states by holding them responsible for the collective, international protection of human rights.

Finally, the decisions of the ICJ, if examined in the aggregate, have confused the issue of sovereignty within the organizational context, just as the decisions of the PCIJ—which remain salient and are often cited despite a lack of formal *stare decisis* in international law—generated confused concepts of sovereignty within the organizational context of the League of Nations.

In the *Right of Passage* Case,[583] a case about a dispute between India and Portugal concerning Portugal's movement of persons and military goods from a colony on the Indian coast to its enclaves within Indian territory, the Indian and Portuguese judges on the ICJ proposed mirroring definitions of sovereignty.[584] The Portuguese judge, who favored a right of access, argued that

> [s]overeignty over any territory implies the capacity to exercise public authority in that territory. It implies the right and the obligation to maintain order there . . . how would that authority, that right and obligation and those duties be exercised if a right of access as to the enclaves were not recognized . . . ?[585]

India, in turn, argued that the "alleged rights of passage must evidently impinge upon and derogate from India's sovereign rights over the territory concerned."[586] In the end, despite the obvious definitional conflict, the ICJ ruled in favor of Portugal. The ICJ stated that Portugal's right of passage was effective only to the extent of its sovereignty over its enclaves and that India retained control over the territory.[587] Given that the decision left no certain definition of sovereignty in its wake, Koskenniemi suggests that characterizing the decision as an example of the legal approach of bundling and unbundling individual sovereign prerogatives is helpful to explain it.[588] On the whole, however, the case does not present a generally useful definition.

Likewise, in the *Nuclear Tests* Cases,[589] the parties made mirroring sovereignty-based claims regarding France's testing of nuclear weapons in the

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Id. (emphasis added in part).

582. *See* Samuel A. Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444, 445 (1969).

583. Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6 (Apr. 12).

584. KOSKENNIEMI, *supra* note 14, at 208.

585. *Id.* (quoting Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 121, 122 (Apr. 12) (dissenting opinion of Judge Fernandes)).

586. *Id.* (quoting Countermemorial of India, Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. Pleadings II, at 103 (June 15, 1956)).

587. Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6, 43 (Apr. 12).

588. KOSKENNIEMI, *supra* note 14, at 212.

589. Nuclear Tests (Austl. v. Fr.; N.Z. v. Fr.) 1974 I.C.J. 253, 457 (Dec. 20).

vicinity of Australia and New Zealand.[590] Despite the arguments made, the ICJ avoided discussing the nature of sovereignty and relied upon other elements of customary international law to render its decision, as it previously did in the *Asylum* Case in 1950.[591] In these cases and others, disputes that appeared to rest on issues of sovereignty were construed by the ICJ to revolve around individual issues of liberty and competency.[592]

Similarly, ICJ cases involving issues of sovereignty which resulted in decisions more akin to the *Lotus* Principle or Koskenniemi's "pure fact" approach,[593] are also less than helpful in locating a coherent institutional elaboration of sovereignty. In the *Anglo-Norwegian Fisheries* Case,[594] as in the *Lotus* Case, the ICJ assumed that Norway had the competence to draw its maritime baseline in the manner that it had by virtue of its sovereignty and in the absence of a prohibiting rule.[595] The ICJ made a similar ruling in the *North Sea Continental Shelf* Case.[596]

As with all of the definitions and theories of sovereignty described thus far, it is clear that the U.N. has not generated a definitive guideline to the actual, workable scope of sovereignty under international law. For the member-states of the U.N., the Charter represents a set of voluntary restrictions on freedom of action, which may or may not be limiting action that can be classified as a sovereign prerogative in the historical or contemporary customary sense.

Conclusion

In concluding this Section, the question of what sovereignty *is* under the U.N. Charter System remains. This Section has examined the history of the United Nations for the sake of culling the prescriptive desires of the Charter's authors out of the historical background. It examined the structure of the system erected through the Charter and explored the practice of the institution *as an author* of sovereignty. The fact that none of this examination has resulted in either a firm conception or a firm application of "sovereignty" suggests that the United Nations as an institution has not authored one. In other words, there is no "current juridical reality" of sovereign equality that can be asserted as *the* version of sovereignty upheld by the U.N. Charter System. Where the Great Power drafters of the U.N. Charter wished to placate less powerful states, sovereign equality was emphasized with all of the connotations handed down from Vattel, regardless of the reality of legalized hegemony. Where the ICJ wished to avoid addressing the substantive legality of the use of nuclear

590. KOSKENNIEMI, *supra* note 14, at 213.
591. *Id.*
592. *Id.*
593. *Id.* at 220-23.
594. Anglo-Norwegian Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 143 (Dec. 18).
595. KOSKENNIEMI, *supra* note 14, at 221-22.
596. *Id.* at 222 (citing North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1968 I.C.J. 3 (Feb. 20)).

weapons for political purposes,[597] it rendered a decision based on vague theoretical references to sovereignty without actually describing sovereignty.

Within the context of the United Nations, "sovereignty" remains a thrall to the author of the moment. Sovereignty is a term of *poetic* literary language that conveys no Sartrian appeal to the implementation of change and eradicates the object it represents with every use.

V. SARTRE, BLANCHOT, AND SOVEREIGNTY'S LITERARY OPERATION IN INTERNATIONAL LAW

The question that arises from sovereignty's checkered past is why, given the concept's historical definitional variation, sovereignty is still discussed in terms of being an obstacle to the progressive evolution of international legal norms. In other words, why do debates concerning the nature of sovereignty persist despite the hopeless prospect that a definition agreeable to all will be formulated? Without such a definition, the specific arguments comprising the debate between sovereignty and human rights will never conclude in a mutually satisfactory manner; every law review article arguing a side of the sovereignty equation will always be followed by an opposing article. The details of each argument will be parsed, examined, disagreed with, and finally cited in yet another law review article, which will be subsequently cited, and so on. The arguments will pad one *curriculum vitae* after another, but the argument and the substance beneath it will never be concluded.

This is, if nothing else, a literary process. That is, it is a process by which a *literature* is developed, and, in this case, it is the literature of a single, *formerly political* concept. Other than the occupation of the authors involved, there is nothing *legal* about the process of propagating both the debate and the underlying confusion regarding sovereignty's definition, scope, and nature. Therefore, to further explain this process as a means of better understanding sovereignty's operation in international law, it must be examined as the literary process that it is.

World War II provided the catalyst for the international law as it is currently understood under the U.N. Charter System. It also, however, provided an unfortunate basis for the examination of the role of literature in politics and literature *as* politics. That basis was, of course, the Holocaust, out of which emerged writers such as Elie Wiesel, Primo Levi, Marguerite Duras, Paul Celan, and others. These authors were as concerned with the scale of the atrocities they had experienced or witnessed as were the international legal scholars who likewise emerged to shape the current international legal system. Within that general literary context, a specific debate concerning the power of literature to politically engage its audience arose among the French writers

597. KOSKENNIEMI, *supra* note 14, at 222.

who had lived and worked and, in some cases, collaborated in the Vichy occupation of France during the war.[598]

For these writers, the question was not merely academic. In post-war France, writers and intellectuals suspected of having supported the Vichy and Nazi occupation of France were prosecuted with other suspected collaborators in what has come to be known as the *purges*.[599] In these purges, writers were put on trial pursuant to the Liberation authorities' policy of "striking at the head"—eliminating intellectuals as well as political leaders—to clense the Vichy taint from France.[600] So ardently was the intellectual head pursued that, for example, Robert Brasillach, former editor of the collaborationist periodical *Je suis partout*, was tried and executed even before Marshal Philippe Pétain, leader of the Vichy government (who was himself only sentenced to life imprisonment).[601] This purge was not limited to legal proceedings, however; its process of accusation and judgment striated the postwar literature.[602] Key among the writers developing this literature of the purge were Jean-Paul Sartre and Maurice Blanchot.[603]

A. Jean-Paul Sartre and Literature as a Call to Action

It was against this backdrop that Sartre developed his theory of *littérature engagée*. This theory is best illustrated in his essay *What is Writing*?,[604] "in which he argues in favor of politically committed prose."[605]

In *What is Writing?*, Sartre begins by defining what *writing* is.[606] He excludes poetry from his definition, as poets are men who "refuse to *utilize* language."[607] The poetic attitude, Sartre says, considers words as *things* rather than as *signs*, "[f]or the ambiguity of the sign implies that one can penetrate it at will like a pane of glass and pursue the thing signified, or turn his gaze toward its *reality* and consider it as an object."[608] Language is, for the poet, the structure of the external world, not the internal, which he occupies; the poet exists *outside of language*.[609] Sartre's exclusion of poetry from the politically committed language he is concerned with in *What is Writing?* is therefore a negative definition of language itself. Language is prose, not poetry. It considers words as signs, implying that the sign can be penetrated "like a pane of glass" to examine the external, worldly object that it signifies.

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598. *See generally* PHILIP WATTS, ALLEGORIES OF THE PURGE: HOW LITERATURE RESPONDED TO THE POSTWAR TRIALS OF WRITERS AND INTELLECTUALS IN FRANCE (1998).
599. *Id.* at 3.
600. *Id.*
601. *Id.* at 3-4.
602. *Id.* at 8.
603. *Id.* at 8.
604. SARTRE, *supra* note 1, at 7-37.
605. WATTS, *supra* note 598, at 69.
606. SARTRE, *supra* note 1, at 7.
607. *Id.* at 12.
608. *Id.* at 12-13.
609. *Id.* at 13-14.

> The writer is a *speaker*; he designates, demonstrates, orders, refuses, interpolates, begs, insults, persuades, insinuates. . . .
>
> The art of prose is employed in *discourse*; its substance is by nature significative; that is, the words are first of all not objects but designations for objects; it is not first of all a matter of knowing whether they please or displease in themselves, but whether they *correctly indicate a certain thing or a certain notion*.[610]

The writer as a "speaker" is not *merely* speaking but *acting* to indicate through his words the object signified by his words. "To speak is to act," Sartre says, "anything which one names is already no longer not quite the same; it has lost its innocence."[611] In its naming, an object is revealed, and, "[t]hus, the prose-writer is a man who has chosen a certain method of secondary action which we may call action by disclosure."[612] *Engaged* writers are those who are aware of this and realize that to reveal is to *change*.[613] According to Sartre, a work of art has value because it is an appeal to change:[614] "To write is to make an appeal to the reader that he lead into objective existence the revelation which [the writer has] undertaken by means of language."[615]

B. Maurice Blanchot and the Space of Sovereignty

In his essay *Literature and the Right to Death*, Maurice Blanchot responded to Sartre by distinguishing between two "slopes": first, "everyday" or "common" language; and second, the "literary" language of poetry and prose.[616] The purpose of this differentiation is to rescue poetry from Sartre's excision and to combat the idea of an engaged literature.[617] According to Blanchot, a politically engaged literature is not possible.

Blanchot distinguishes these forms of language primarily with regard to denomination, which he thought to be an act of murder.[618]

> Literature is bound to language. . . . When we speak, we gain control over things with satisfying ease. I say, 'This woman,' and she is immediately available to me,

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610. SARTRE, *supra* note 1, at 19-20 (emphasis added in part).
611. *Id.* at 22.
612. *Id.* at 23.
613. *Id.*
614. *Id.* at 49.
615. *Id.* at 46.
616. BLANCHOT, *supra* note 2, at 385-88.
617. Kevin S. Fitzgerald, "The Question of Literature and Engagement," The Negative Eschatology of Maurice Blanchot (May 2001) (unpublished M.A. thesis, New College of California) (on file with author), *available at* http://www.studiocleo.com/librarie/blanchot/kf/.
618. James Swenson, *Revolutionary Sentences*, 93 YALE FRENCH STUD. 11, 17 (1998). For Blanchot, "[t]he word—the name—kills the thing it names." *Id.*

> I push her away, I bring her close, she is everything I want her to be, she becomes the place in which the most surprising sorts of transformations occur and actions unfold: speech is life's ease and security. We can't do anything with an object that has no name. . . .
>
> . . . A word may give me its meaning, but first it suppresses it. For me to be able to say, " This woman" I must somehow take her flesh and blood reality away from her, cause her to be absent, annihilate her. The word gives me the being, but it gives it to me deprived of being. The word is the absence of that being, its nothingness, what is left of it when it has lost being—the very fact that it does not exist.[619]

That is, the word is detached from the object it represents. This "death," however, is only the beginning for Blanchot. The difference between "everyday" and "literary" language is that the "everyday" language accepts that, once the nonexistence of an object passes into the word, the object itself returns to life as its *idea* and its *meaning*, and the word restores to the object "all the certainty it had on the level of existence."[620] "Literary" language is contradictory in that, on one hand, it is only interested in the meaning of the object, "its absence, and it would like to attain this absence absolutely in itself and for itself, to grasp in its entirety the infinite movement of comprehension."[621] On the other hand, "literary language" observes that the word is not only the nonexistence of the object but also a "nonexistence made *word*, that is, a completely determined and objective reality."[622] Literary language transposes the unreality of the object into the reality of language. What is created is an image that does not designate the object directly but that designates what the object is *not*.[623] Literary language is negation, which "cannot be created out of anything but the reality of what it is negating; [it] derives its value and its pride from the fact that it is the achievement of this negation."[624]

Thus, the "everyday" slope pursues meaningful prose and has as its goal the expression of objects in a language that "designates things according to what they mean."[625] This is the manner in which people *speak*, and many people write in that same manner.[626] Even so, Blanchot argues, in seeking to preserve *art* from the political prescription that Sartre wishes language to embody, there comes a moment when art requires the abandonment of everyday speech because it is dishonest and meaningless: "art feels it is madness to think that in each word some [object] is completely present through the absence that

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619. BLANCHOT, *supra* note 2, at 378-79.
620. *Id.* at 381.
621. *Id.* at 382.
622. *Id.*
623. *Id.*
624. *Id.* at 383.
625. BLANCHOT, *supra* note 2, at 388.
626. *Id.*

determines it, and so art sets off in quest of a language that can recapture this absence itself and represent the endless movement of comprehension."[627]

In other words, literary language is art. Art requires the abandonment of the meaningless attempts at signification that "everyday" language pursues. Blanchot considers any attempt at circumscribing the meaning of the literary word futile because it cannot be expressed without ambiguity, and because the political use of a literary word is such a futile attempt.[628] When a literary word is used as a model for the political world's laws, only a weak version of a negation is enacted.[629] To avoid this, the literary work should remain at a "distance from the world."[630] Literary language pursues the goal of *art*, which is to remain "an object of *contemplation*, not of *use*, which, moreover, will be sufficient to itself, will rest in itself, refer to nothing else, and be its own end."[631]

IV. CONCLUSION

Sovereignty, with its varied meanings, connotations, and implications, perfectly fills the literary space described by Blanchot and operates exactly as he describes literary language as operating. The lengthy history of the prescriptive use of "sovereignty" has rendered it referentially ambiguous, indicative of no single political or legal concept, and incapable, as Koskenniemi has stated, of raising a determinate consequence declaring whether a state in a particular relationship is "free" through simple reference.[632] Sovereignty fails to qualify as "writing" according to Sartre's strict definition. Its lack of external signification and its failure to "correctly indicate a certain thing or notion," which may be interpreted as a call to action, excludes sovereignty and its attendant ambiguity. Instead, it sounds much more like Sartre's description of *poetry*, of language incapable of calling readers out of a passive state to the action of implementation. For Sartre, this is a problem. If true, it renders any of the journal articles debating sovereignty versus human rights devoid of political value, and thus incapable of providing a conclusion to the debate.

For Blanchot, this is not a problem because he does not believe that this should be the goal of language in the first place, particularly with regard to literary and *poetic* language. It is not a problem because "sovereignty" as it has developed from the Roman *imperium* through the mythology of Westphalia, the subsequent work of Vattel, and the organizational authors—the League of

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627. BLANCHOT, *supra* note 2, at 388.

628. Fitzgerald, *supra* note 617.

629. *Id.*

630. *Id.*

631. MAURICE BLANCHOT, THE SPACE OF LITERATURE 212 (Ann Smock trans., Univ. of Nebraska Press 1982) (1955) (emphasis added).

632. KOSKENNIEMI, *supra* note 14, at 212.

Nations and the U.N.—into international law, is clearly a literary word. Each use has been a negation. Each use has resulted in the death of the object it was intended to signify and created a reality that does not fulfill the goal of the "everyday" slope: to designate something according to its meaning. Rather, "sovereignty" fulfills the literary goal of *art*, of being an object of contemplation and not at all of any practical use.

When an academic drafts an article arguing one side of the sovereignty debate, the interest of the author is in obtaining the meaning of both the object and its absence—its death—and in containing that meaning within the work being prepared. The ambiguity of "sovereignty" demands this. Sovereignty exists as the negation of what it is not: it is *not* anything outside the dimension of that article. Every article now dealing with sovereignty says, in essence, that every other meaning—every myriad interpretation, every historical iteration, every external-internal demarcation—ceases to exist in favor of the reality created within that article. The reality of that article, the reality of *that* sovereignty, is the striving for the absolute attainment of the entirety of sovereignty "in and for itself." It is not only the nonexistence of sovereignty but also the nonexistence of sovereignty captured in the word "sovereignty." There is no reality present but the reality of language.

The "literary effect" of sovereignty is simply the successful fulfillment of literature's goal; sovereignty has become an object of contemplation and not of use. It has become its own end. The contemplation may continue in the form of the ongoing debate, but the evolution of legal norms will continue around it, unswayed. Human rights will continue to progress if individual rights asserted merit progression. Academics from certain schools of thought will continue to argue to greater or lesser extents that sovereignty somehow constrains this progression, but the normative band will play on. "Sovereignty," the object of contemplation, will continue to refer only to its own negation.