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The Enduring Significance of State Sovereignty

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THE ENDURING SIGNIFICANCE OF STATE SOVEREIGNTY

*Brad R. Roth**

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I. INTRODUCTION

Prompted by the advent of new threats to national and human security, Viet Dinh’s article, *Nationalism in the Age of Terror*¹ makes a case for the continued relevance of state sovereignty and patriotism in the twenty-first century. Counter to the recent tendency in some quarters to denounce state sovereignty as an obstacle to international legality, and patriotism as an impediment to universal justice, Professor Dinh reasserts the analytical and normative value of both of these concepts. He is, I believe, quite correct to do so.

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1. Viet D. Dinh, *Nationalism in the Age of Terror*, 56 FLA. L. REV. 867 (2004).

Relevant though they are to many questions, however, sovereignty and patriotism are inherently complex and ambiguous concepts, and their invocation alone has little determinate consequence for legal and political judgments. Professor Dinh's article speaks only in relatively general terms, both about these concepts and about his view of their application to post-September 11, 2001 global realities. It is, clearly, the start of a much more elaborate conversation.

This Commentary follows up on Professor Dinh's article by further exploring the fundamental concepts that he invokes, in an effort to draw out more precisely what is at stake in assessments of their continued relevance. The discussion below rejects the commonplace framing of the issue as "state sovereignty *versus* international law,"² and instead draws on the existing legal prerogatives of states to articulate a unifying account of sovereignty's role *within* the international legal order. That account makes a case for the moral, as well as the practical, significance of sovereignty, with further implications for how patriotic duties relate to the demands of universalist morality.

On the account rendered below, the foundations of the international legal system reflect persistent, though bounded, disagreement within its membership as to what constitutes a just internal public order. While the boundaries of the system's pluralism have narrowed progressively in the course of the United Nations era, accommodation of diversity in modes of internal political organization remains a durable theme of the international order. This accommodation of diversity underlies the international system's commitment to preserve states' territorial integrity and political independence, often at the expense of other values. Sovereignty thus operates as a set of legal limitations on the establishment and enforcement of international norms. Though frequently counterintuitive, these legal limitations are supported by substantial moral and political considerations, and they should be overridden only in a limited range of cases.

II. THE MANY MEANINGS OF SOVEREIGNTY

A. *Different Conversations*

Since the end of the Cold War era, there has been a proliferation of scholarly works devoted to state sovereignty. Most of these either approvingly announce the phenomenon's decline, demise, or transformation,³ or else call into question whether the phenomenon ever

2. See Henry Schermers, *Different Aspects of Sovereignty*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 185, 192 (Gerard Kreijen et al. eds., 2002) ("[U]nder international law the sovereignty of States must be reduced.").

3. See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY:

existed or mattered in the first place.⁴ A countervailing (though much smaller) set of works, presenting the diminution of sovereignty as a threat to important values, proposes policies aimed at bolstering or restoring the phenomenon.⁵

Although this literature appears on its face to address sovereignty as a unitary topic, it encompasses widely variant understandings of the core concept. Often, these variant understandings bear on wholly separate areas of inquiry.

Any definition of sovereignty presupposes a set of practical questions to which the concept is thought to pertain. In general, the term “sovereign” denotes a source of ultimate authority, as opposed to authority that is shared with another institution or subordinated to systemic norms and enforcement mechanisms.⁶ But as applied, sovereignty may refer to a range of distinct phenomena, including, *inter alia*: (1) the source, within a given domestic system of governmental norms, of the last word on public order (and above all, on what counts as the legitimate use of force) in a state’s territory;⁷ (2) the normative attributes of full membership in an international system premised on the “sovereign equality” of states;⁸ (3) a state’s empirical capacity, as measured by the tools of social science, to control its internal affairs, or to determine its own internal or external policies without regard to the preferences of external actors;⁹ or (4) a domestic policymaking imperative to maintain or establish a state’s

COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 27 (1995) (arguing for a reconceptualization of sovereignty as, not freedom to act independently, but standing to participate in international regulatory regimes); FRANCIS M. DENG ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA 32-33 (1996) (arguing that sovereign prerogative can no longer validly be asserted by states delinquent in their fundamental responsibilities to their citizens); Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2045 (2003) (calling for sovereignty to be redefined in terms of “care by government for its citizens” and responsible regulation of “citizens’ interactions with the international community”).

4. See, e.g., STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 40 (1999) (noting that as a result of “the absence of authoritative institutions and power asymmetries,” principles associated with sovereignty are often not reflected in practice); Louis Henkin, *Human Rights and State “Sovereignty,”* 25 GA. J. INT’L & COMP. L. 31, 31 (1995/1996) (asserting that “‘sovereignty’ is a mistake, indeed a mistake built upon mistakes, which has barnacled an unfortunate mythology”).

5. See, e.g., JEREMY RABKIN, WHY SOVEREIGNTY MATTERS (1998) (arguing that the United States has allowed too much national policy to be decided through international channels and proposing a reassertion of American sovereignty).

6. See John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT’L L. 782, 782, 786 (2003).

7. See CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5-15 (George Schwab trans., MIT Press 1985).

8. See U.N. CHARTER, art. 2, para. 1.

9. See CHRISTIAN REUS-SMIT, THE MORAL PURPOSE OF THE STATE 157 (1999).

unilateral control over any given realm of activity.¹⁰ All of these usages pertain to different conversations, and any conflation of them will immediately lead to confusion.

This Commentary is concerned exclusively with the first two usages. These specify juridical relationships foundational to domestic orders and to the international order, respectively.¹¹

B. *Sovereignty and Domestic Legality*

The domestic-juridical sense of “sovereignty” evokes an anti-constitutionalist doctrine, originating in the works of Jean Bodin and Thomas Hobbes, that identifies an uncommanded commander, above the law, as the ultimate source of domestic authority.¹² According to Hobbes, “[T]he sovereign of a commonwealth, be it an assembly or one man, is not subject to the civil laws.”¹³ He further explained:

10. *See* Jackson, *supra* note 6, at 782-89. Further:

[W]hen someone argues that the United States should not accept a treaty because that treaty infringes upon U.S. sovereignty, what the person most often means is that he or she believes a certain set of decisions should be made, as a matter of good governmental policy, at the nation-state (U.S.) level, and not at the international level.

Id. at 790.

11. Juridical doctrines are distinct from both empirical observations and policy considerations. To be sure, law would not long endure if it were utterly disconnected from empirical realities; but rather than automatically capitulating to whatever acts are efficacious in the short run, law imposes standards on the basis of which such acts can be evaluated, and perhaps resisted. These standards, in turn, embody, and therefore must be interpreted in light of, policies. But legal standards reflect long-term policies, imputable to the domestic or international community as a whole, rather than a particular efficacious actor’s policies of the moment.

12. *See* JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH (M. J. Tooley trans., Basil Blackwell 1955) (1576) (characterizing the sovereign as the ruler with an unqualified and absolute right to command); THOMAS HOBBS, LEVIATHAN: PARTS I AND II (Liberal Arts Press 1958) (1651) (characterizing the sovereign as the sole lawmaker, not subject to civil law).

13. HOBBS, *supra* note 12, at 211. Hobbes continued:

For having power to make and repeal laws, he may when he pleases free himself from that subjection by repealing those laws that trouble him and making of new; and consequently he was free before. For he is free that can be free when he will; nor is it possible for any person to be bound to himself, because he that can bind can release, and therefore he that is bound to himself only is not bound.

Id.; *see also* 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 102 (Francis W. Kelsey trans., Clarendon Press 1925) (1625) (“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.”).

It is true that sovereigns are all subject to the laws of nature, because such laws be divine and cannot by any man or commonwealth be abrogated. But to those laws which the sovereign himself—that is, which the commonwealth—makes he is not subject. For to be subject to laws is to be subject to the commonwealth—that is, to the sovereign representative—that is, to himself, which is not subjection but freedom from the laws. Which error, because it sets the laws above the sovereign, sets also a judge above him and a power to punish him, which is to make a new sovereign, and again for the same reason a third to punish the second, and so continually without end to the confusion and dissolution of the commonwealth.¹⁴

This approach regards all separation of powers as anathema, “[f]or what is it to divide the power of a commonwealth but to dissolve it, for powers divided mutually destroy each other.”¹⁵

As originally advocated, the uncommanded-commander doctrine scarcely has any remaining defenders. The alternative doctrine—the outlines of which can be seen as early as the sixteenth century in the writings of Bodin’s ideological opponent, François Hotman¹⁶—regards sovereignty as *constituted* by legal norms, whether embodied in communal traditions or in a foundational document.¹⁷ In this constitutive account (which need not entail liberal or democratic principles), sovereignty belongs to the political community as a whole. One identifies authentic articulations of sovereign will by reference to a legal framework that the community’s efficacious actors widely acknowledge as the touchstone of legitimacy. That framework confers authority on the dictates of specified persons at specified times within specified ranges of competence;¹⁸ being the source of governmental authority, it also serves as a limitation on the

14. HOBBS, *supra* note 12, at 254-55.

15. *Id.* at 255. Hobbes ridiculed the idea of divided powers as “beholding to some of those that, making profession of the laws, endeavor to make them depend upon their own learning and not upon the legislative power.” *Id.*

16. François Hotman, *Francogallia*, reprinted in CONSTITUTIONALISM AND RESISTANCE IN THE SIXTEENTH CENTURY 53, app. at 90-91 (Julian H. Franklin & ed. trans., 1969) (stating that French kings historically had been, and therefore by custom were, “bound by definite laws and compacts”).

17. *See id.*

18. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 603 (1958) (“[N]othing which legislators do makes law unless they comply with fundamental accepted rules specifying the essential lawmaking procedures.”).

legitimate exercise of power. Even a quasi-absolute dynastic monarch cannot stand above the customary law on which his rule is founded.¹⁹

In ordinary times, this latter account of governmental authority dominates the jurisprudential discourse. Nonetheless, perceptions of a grave threat to public order raise questions about ultimate authority that a constitutionalist approach may not satisfactorily resolve. The Constitution, it is often said, is not a “suicide pact”;²⁰ rather, it acknowledges, either explicitly or implicitly, a residuum of discretionary authority, inherent in sovereignty, to suspend constitutional norms in the face of existential threats to the constitutional order itself.²¹ On this theory, even where the Constitution authentically reflects the political community’s will, its static interpretation of that will cannot be a complete guide to action in subsequently arising exigent circumstances, the details of which can never be fully foreseen. As further developed in the Weimar-era work of Carl Schmitt, the insights of Bodin and Hobbes, obscured in normal times, become salient at the moment of “the exception.”²²

Since September 11, 2001, echoes of Schmitt can be heard in arguments for an expanded interpretation of emergency powers. Though predicated on highly questionable assessments of the nature and extent of the current crisis, these arguments do not lack a sound conceptual basis. Schmitt’s analysis of the relationship between sovereignty and constitutionalism, however prone to abuse in its application, remains jurisprudentially formidable.

19. As Carl Schmitt trenchantly observed, modern constitutionalism conceptualizes the state as “nothing else than the legal order itself The highest competence cannot be traceable to a person or to a sociopsychological power complex but only to the sovereign order in the unity of the system of norms.” SCHMITT, *supra* note 7, at 19.

20. This phrase, though surely not all of the uses to which it has been put, can be traced to Justice Jackson’s dissent in *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

21. “[T]he authority to suspend valid law—be it in general or in a specific case—is . . . the actual mark of sovereignty.” SCHMITT, *supra* note 7, at 9.

22. SCHMITT, *supra* note 7, at 5. Schmitt’s ultimate point is that sovereignty can never be fully subsumed within a constitutional order. See GEORGE SCHWAB, *THE CHALLENGE OF THE EXCEPTION: AN INTRODUCTION TO THE POLITICAL IDEAS OF CARL SCHMITT BETWEEN 1921 AND 1936*, at 30-37, 44-49 (2d ed. Greenwood Press 1989). Enemies of the Constitution can, after all, justify its overthrow in the name of a latent *pouvoir constituant*, and their claim will be deemed vindicated if their revolution is efficacious. See *id.* So, too, argues Schmitt, can allies of the Constitution, in the name of their own interpretation of the political community’s latent will (as embodied in the constitutional order as a whole), suspend temporarily those aspects of the constitutional order that impede the fight for its very survival. See *id.*

C. *Sovereignty and International Legality*

The international-juridical sense of “sovereignty” does not depend on the resolution of such controversies about extra-constitutional authority, for it reflects a horizontal rather than a vertical relationship. It refers to the reciprocal terms of the recognition that members of an international legal order confer on one another. Among the term’s primary implications is a presumptive duty, on the part of each of the entities bearing equal juridical status, to respect the outcome of political processes internal to the others.

For the purposes of international law, sovereignty belongs not to any governmental apparatus, but to “the state” in the abstract. Sovereignty is a legal attribute of a territorially bounded political community enjoying full membership in the international system. Recognized exercises of sovereignty are acts legally attributed to the will of the designated territory’s permanent population as a whole. Statehood is conceptualized as consummating the self-determination of a “people.”²³ Competing governmental apparatuses may at a given moment hold significant shares

23. “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 1, 999 U.N.T.S. 171, 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, art. 1, 993 U.N.T.S. 3, 3 [hereinafter ICESCR]; see also G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 67, U.N. Doc. A/4684 (1960) (identifying self-determination with a “right to complete independence”); G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684/Annex (1960) (setting forth the criteria for territorial political communities to which the right applies). The United Nations General Assembly’s authoritative interpretation of the United Nations Charter affirms as an imperative “the territorial integrity [and] political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.” *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8082/Annex (1970) [hereinafter *Friendly Relations Declaration*].

Thus, the system predicates its acknowledgment and protection of state sovereignty on the latter’s presumptive fulfillment of the self-determination of “the whole people belonging to the territory.” *Id.* Conversely, “subjection of peoples to alien subjugation, domination and exploitation . . . is contrary to the Charter.” *Id.* Accordingly, the General Assembly has affirmed that nonintervention norms shall not “prejudice in any manner the right to self-determination, freedom and independence of peoples under colonial domination, foreign occupation or racist regimes.” *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, G.A. Res. 36/103, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/51/Annex (1981). The rights of “peoples,” however, should in no way be confused with the rights of “persons belonging to national or ethnic, religious and linguistic minorities” within recognized territorial boundaries. See, e.g., *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/47/49 (1992) (making no reference to self-determination).

of effective control or popular adherence within the designated territory without affecting the state's juridical unity.

No particular ruler or constitutionally designated body has a guarantee of standing to assert rights, incur obligations, and confer immunities in the name of the underlying sovereign entity. In principle, a sovereign political community has the *inalienable* right to overthrow its political and legal systems *for any reason whatsoever*.²⁴ Although recent denials of international recognition to the outcomes of coups d'état against elected governments might seem to call into question the inalienability of this right, these denials of recognition are better understood as modifying not the sovereign right itself, but the venerable legal presumption that "effective control through internal processes" reflects the sovereign political community's will.²⁵ From international law's external standpoint, sovereignty itself lies not in a given constitutional order (*pouvoir constitué*), but in the underlying constituency (*pouvoir constituant*) whose will to accept or repudiate that order must somehow be discerned.²⁶

24.

No 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.

....

Every State has an *inalienable* right to choose its political, economic, social and cultural systems, without interference in any form by another State.

Friendly Relations Declaration, *supra* note 23, at 123 (emphasis added). This language, of course, parallels the self-determination language of the human rights Covenants quoted in the previous note.

25. This "effective control" doctrine was the upshot of Thomas Jefferson's 1792 statement in regard to revolutionary France: "It accords with our principles to acknowledge any government to be rightful which is formed by the will of the nation, *substantially declared*." H. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 125-26 (1947) (emphasis added). Historically, governments that have maintained the obedience of their populations through internal processes—i.e., by any means, however coercive, other than unlawful foreign intervention—have most often been accepted as passing this test. See BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 136-49, 160-71, 253-354 (1999).

26. For a discussion of Carl Schmitt's "pouvoir constitué" and "pouvoir constituant," see SCHWAB, *supra* note 22, at 32-37.

Even claims for an international-law-based "democratic entitlement" do not intend to call into question a political community's right to organize a government according to its own authentic will. See G.A. Res. 45/150, U.N. GAOR, 45th Sess., Supp. No. 49A, at 254, U.N. Doc. A/45/49 (1990):

[T]he efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State's sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States

Id. They do, however, problematize the standing of a usurping ruling apparatus, manifestly

As states' empirical capacities to exercise unilateral control over many areas of activity have diminished, sovereignty's continued significance has frequently been called into question. In the international-juridical sense, however, sovereignty is not an empirical condition, but a legal status. Moreover, international legal norms—however much they multiply, and even come to bear on states' internal conduct—are a product of, not an abandonment of, state authority. Sovereignty may one day be superseded, but not as a direct consequence of either the diminishing efficacy of unilateral regulation or the proliferation of international legal norms. It signifies not an absence of international legality, but a set of legal premises.

The foundational principle of the international system, according to the United Nations, is the "sovereign equality of all its [m]embers."²⁷ This statement of principle is semantically inept, since it demands a reciprocal renunciation of the same unlimited authority that it nominally invokes. Indeed, in affirming and bolstering only such assertions of state prerogative as are consistent with the international system's animating purposes, that system necessarily qualifies the nature and scope of state prerogative. Thus, within the discourse of international law, "sovereignty" functions metaphorically, as an expressive reminder of certain legal presumptions favoring the independence of the system's units, rather than literally, as an indicator of a status beyond the reach of law.

unrepresentative of popular will, to assert the sovereign political community's rights against foreign interference in its internal affairs. See Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 595 (1992) ("A regime that bases its legitimacy on nothing more than the fact that it holds power exercises no 'sovereign' authority to object to . . . prescriptions" required by the terms of the right to political participation.). Consequently, W. Michael Reisman writes:

Cross-border military actions [that restore a freely elected government can be characterized] as a violation of sovereignty only if one uses the term anachronistically to mean the violation of some mystical survival of a monarchical right that supposedly devolves *jure gentium* on whichever warlord seizes and holds the presidential palace or if the term is used in the jurisprudentially bizarre sense to mean that inanimate territory has political rights that preempt those of its inhabitants.

W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 871 (1990).

27. U.N. CHARTER, art. 2, para. 1. This juridical standard, of course, in no way denies the reality of states' widely varying empirical capacities.

III. SOVEREIGN EQUALITY AND "BOUNDED PLURALISM" IN THE INTERNATIONAL LEGAL ORDER

A. *Sovereignty as a Set of Legal Presumptions for a Pluralist Order*

Respect for sovereignty pervades three aspects of the international legal order's basic structure: (1) the recognized sources of law; (2) the interface between the international and domestic legal systems; and (3) the fundamental stricture against coercive interference in the internal affairs of states. That is to say, sovereignty entails three presumptions: (1) a state is presumed to be obligated only to the extent of its actual or constructive consent; (2) a state's obligations, while fully binding internationally on the state as a corporative entity, are presumed to have direct legal effect within the state only to the extent that domestic law has incorporated them; and (3) the inviolability of a state's territorial integrity and political independence, as against the threat or use of force or "extreme economic or political coercion,"²⁸ is presumed to withstand even the state's violation of international legal norms. All three presumptions are rebuttable, but nonetheless formidable. Sovereignty thus presents hurdles, both to the establishment of new international norms and to the implementation of existing norms.

These hurdles are subject to vigorous jurisprudential debate. If one imputes to international law an inherent purpose to establish a universal justice that transcends the boundaries of territorial communities, the presumed state prerogatives unquestionably impede the global advance of legality. Those who understand the project of international legality in this way, therefore, typically portray sovereignty as the unconquered domain: a realm of lawlessness that must recede for international law to advance.²⁹ An alternative rhetorical move, still in keeping with this "transcendent justice" approach, is a persuasive redefinition of sovereignty that strips it of elements resistant to the grand design. Thus, a state's sovereignty is simply identified with, and reduced to, the state's responsibility to fulfill legal obligations.³⁰

28. *Report of the International Law Commission, Draft Articles on State Responsibility* art. 50(b), 35 U.N. GAOR, Supp. (No. 10) at 59, U.N. Doc. A/35/10 (1980), reprinted in [1980] 2 Y.B. Int'l L. Comm'n 30, U.N. Doc. A/CN.4/SER.A/1996/Add.1 [hereinafter *1996 ILC Articles on State Responsibility*].

29. Critics of the expanding scope and competence of international legal institutions, of course, similarly characterize sovereignty and international legality as rivals. See, e.g., RABKIN, *supra* note 5 (discussing the idea that international agreements threaten the sovereign authority of the United States).

30. See, e.g., CHAYES & CHAYES, *supra* note 3, at 27; DENG ET AL., *supra* note 3, at 32-33;

There is, however, an alternative conception of sovereignty's role in the international legal system. In this conception, the contours of the system reflect persistent and profound, albeit bounded, disagreement within its membership as to what constitutes fundamental justice, especially in regard to modes of internal political organization. To be sure, the boundaries of the system's pluralism have narrowed progressively in the course of the United Nations era, excluding Axis-era fascism from the outset, colonialism and apartheid in the 1960s and '70s, and "ethnic cleansing" and peculiarly unpopular and violent seizures of state power in the 1990s. Nonetheless, the system continues to accommodate a wide-ranging diversity of political moralities. Moreover, international legal processes militate against powerful states' penchant for invoking universal principles to rationalize unilateral (and typically self-serving) impositions upon weak states (and subjugated "peoples"). If the operating principle of international legality is understood to be "bounded pluralism" rather than "transcendent justice," sovereignty-oriented constraints on the establishment and implementation of international norms appear as a fundamental premise of, rather than a mere impediment to, the project of international legality.

B. *The Persistence of "Antiquated" Sovereignty Within International Law*

Seen in this light, even the most seemingly commonsensical disparagements of traditional invocations of sovereignty require qualification. For example, one highly respected commentator, in order to shift the focus of sovereignty discourse to more "modern" usages of the term, seeks to shake free of discredited usages as follows:

Broadly, one could see the "antiquated" definition of "sovereignty" that should be "relegated" as something like the notion of a nation-state's supreme absolute power and authority over its subjects and territory, unfettered by any higher law or rule (except perhaps ethical or religious standards) unless the nation-state consents in an individual and meaningful way. It could be characterized as the nation-state's power to violate virgins, chop off heads, arbitrarily confiscate property, torture citizens, and engage in all sorts of other excessive and inappropriate actions.

Today, no sensible person would agree that this antiquated version of sovereignty exists. A multitude of treaties and customary international law norms impose international legal

constraints (at the least) that circumscribe extreme forms of arbitrary actions even against a sovereign's own citizens.³¹

This statement is unexceptionable, so long as one highlights the generality of the commentator's purpose in offering it. The particulars, however, are less straightforward than they appear. The quoted passage (as I shall refer to it hereafter)³² obscures complexities that pertain to each aspect of the relationship between sovereignty and international legality:

(1) *The recognized sources of law.* The first sentence of the passage suggests that a state is bound by "higher" law even where it does not consent "in an individual and meaningful way."³³ Perhaps this means simply to reaffirm that states can become bound to customary international human rights norms collectively and implicitly, as a result of their acquiescence in (largely rhetorical) patterns of practice. But "higher" may leave the impression that the applicable norms are rooted in something other than, and therefore can be interpreted without regard to, manifestations of the will of the law-making community of states. A norm against violating virgins might be uncontroversially derived from such manifestations (surely, no state has persistently objected that it has such a prerogative), but the same cannot be said of a norm against arbitrarily confiscating property, especially with respect to a common understanding of what counts as arbitrariness in this field.

The burden falls on one who asserts the existence of the legal obligation to adduce the state practice and *opinio juris* that establish the customary norm—or, in the alternative, to survey a cross-section of the world's legal systems to establish a general principle of law recognized by the community of nations.³⁴ Moreover, even a norm discerned by these methods would not bind an outlier state that has persistently objected, except upon an additional showing that "the international community of States as a whole" recognizes the norm as a "peremptory" one (*jus cogens*) "from which no derogation is permitted."³⁵

31. Jackson, *supra* note 6, at 790.

32. Hopefully, Professor Jackson will forgive my exploitation of this quotation. He clearly intended it not as a rigorous account of this subject matter, but as a throw-away reference to a subject other than the one he wished to examine in detail. I have seized on this quotation only because it so well reflects a conventional wisdom that tends to be unquestioningly accepted, but that is misleading as to the details of the relationship between state sovereignty and international legality. Since the critique that follows is not directed against Professor Jackson's main point, the text deliberately avoids associating him by name with the criticized passage.

33. Jackson, *supra* note 6, at 790.

34. See Statute of the International Court of Justice, 1945 I.C.J. Acts & Docs. art. 38(1)(c) (empowering the Court to apply "general principles of law recognized by civilized nations"). The more modern "community of nations" language is found in the ICCPR, *supra* note 23, at art. 15(2).

35. Little about *jus cogens* is uncontroversially established, but this language from the Vienna

In determinations of whether a purported norm counts as international law, sovereignty plays a dual role. In one respect, it is simply a residuum: generally speaking, states are free to the extent that no legal obligation is affirmatively established.³⁶ In the second respect, it represents the considerations that underlie the burden of proof in a law-finding process that inevitably contains a teleological component. The primary methodological problem in ascertaining the existence of a legal norm is not one of “research design,” but of foundational principle: disputes that purport to turn on the strength of the adduced evidence are most frequently, in reality, disputes about the nature and strength of the presumption that states remain juridically free to act as they choose. Thus, a jurist’s conclusion may, in effect, turn on whether he or she ascribes to the project of international legality a telos of “transcendent justice” or of “bounded pluralism.”

(2) *The interface between the international and domestic legal systems.* The earlier-quoted passage goes beyond positing that all states are legally obligated not “to violate virgins, chop off heads, arbitrarily confiscate property, torture citizens, and engage in all sorts of other excessive and inappropriate actions.”³⁷ Rather, it disputes the “nation-state’s supreme absolute power”³⁸—meaning, in this context, its legal authority rather than its empirical capacity—to commit that parade of horrors.

This denial of sovereign authority might be taken to imply that international law contains something akin to the United States Constitution’s Supremacy Clause,³⁹ which legally nullifies all state-level exertions of authority that transgress federal constitutional norms, and which forms part of a structure providing for the justiciability, in both federal and state courts, of the validity of state acts under the federal constitution.⁴⁰ The international legal system, however, contains no such operating principles.

The international system and domestic systems operate on different legal planes, and their interconnections are highly differentiated and complex. It is true that a state “may not invoke the provisions of its internal

Convention on the Law of Treaties indicates that international law, in principle, includes such “super-norms.” Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 53, 1155 U.N.T.S. 331, 352.

36. S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18-19 (Sept. 7). The precise nature of the presumption is actually more complicated and controvertible: as occurred in the *Lotus* case itself, sovereignty as presumed freedom may clash with sovereignty as presumed exclusivity of territorial control. See *Arrest Warrant of 11 April 2000* (Congo v. Belg.), 2002 I.C.J. 1, paras. 13-16 (Feb. 14) (separate opinion of President Guillaume).

37. Jackson, *supra* note 6, at 790.

38. *Id.*

39. U.S. CONST. art. VI, cl. 2.

40. See, e.g., *Gibbons v. Ogden*, 22 U.S. 1, 30-31 (1824).

law as justification for its failure to perform” its international legal obligations.⁴¹ Yet states’ adoption of international obligations does not entail renunciation of the ultimate authority to violate those obligations for the sake of what they deem, unilaterally, to be the national interest, thereby incurring whatever sanctions the international community may duly inflict on the state.⁴² And even within its own plane, international law cannot treat transgressive state acts as simply null and void, for such acts, however wrongful, successfully create certain legal facts that the international system is bound to acknowledge.

For example, even if, as the quoted passage asserts, a state’s “arbitrary confiscation” of a complainant’s real property breaches an international legal obligation, it does not follow that international law recognizes the continued validity of the complainant’s title to that property. Even though the state may owe reparation, it likely has the unilateral authority, as part of its “permanent sovereignty . . . over . . . natural resources,” to determine the ownership of any real property in its territory.⁴³

Far more importantly, where domestic systems authorize, as they frequently do, acts that breach international obligations, individuals—including even the highest officials—who act pursuant to such authorization must be presumed to do so within the scope of the state’s ultimate authority over public order in its territory. These individuals cannot be held personally liable in the international system unless states have renounced—expressly or tacitly, as in the case of the

41. Vienna Convention on the Law of Treaties, *supra* note 35, at art. 27. The provision applies expressly to treaty obligations, but the same principle applies to customary obligations.

42. “International law . . . recognizes the power—though not the right—to break a treaty and abide the international consequences.” LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 168 (1972). This comports with the Bodinian conception of sovereignty: a prince is bound by the covenants he undertakes except when, in his unilateral judgment, “they cease to satisfy the claims of justice.” BODIN, *supra* note 12, at 30. Sovereignty thus does not negate the existence of a legal obligation; rather, as Carl Schmitt puts it, “sovereign is he who decides on the exception.” SCHMITT, *supra* note 7, at 5. Schmitt goes so far as to say that “[i]f individual states no longer have the power to declare the exception, . . . then they no longer enjoy the status of states.” *Id.* at 11.

43. *See, e.g.*, Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974) (approved 120-6-10, over the objection of some capital-exporting states). This issue has some practical significance in regard to United States efforts to penalize persons, of whatever nationality, who may “traffic” in properties confiscated by the Cuban Government. *See* 22 U.S.C. § 6091 (2000) (codifying section 401 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996).

treaty-based and customary law of war crimes⁴⁴—not only the practices themselves, but also the legal capacity to authorize them.⁴⁵

The significance of this principle to the United States and its nationals is manifest. In the domestic law of the United States, any effect of customary international law (under the rubric of “federal common law”)

44. *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT’L L. 172, 221 (1947) (“He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.”).

45. Functional immunity (immunity *ratione materiae*) presumptively bars legal action against foreign individuals for acts committed within their own national territory under their state’s official authority. Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT’L L. 407, 412-13 (2004). Given the state’s presumptive last word on public order in the territory, functional immunity is a personal defense that reflects the operation of the non-retroactivity principle in the criminal context, and of choice-of-law principles in the civil context. Thus, Antonio Cassese construes immunity *ratione materiae* as, not a procedural bar to jurisdiction, but a “substantive defence,” available to “any *de jure* or *de facto* State agent” performing official acts, establishing that the “violation is not legally imputable to [the agent] but to his state.” ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 266 (2003); accord Akande, *supra*, at 412-15; see also Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 168, 175-76 (Stephen Macedo ed., 2004) (stating that breaches of international obligation are ordinarily attributed to the state alone and that *nullum crimen sine lege* can be “read to mean that international law must have prohibited the act as committed by an individual rather than by a state”). Although United States courts in Alien Tort Statute decisions have given little express attention to state agents’ presumptive immunities *ratione materiae*, the Supreme Court’s recent tightening of the standards for such civil suits may effectively satisfy the concern. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2769 (2004) (implying that such suits can prevail against only state policies “so bad that those who enforce them become enemies of the human race”).

On the above rationale, whereas a state can always waive the immunity *ratione personae* of its diplomatic representatives (which shields them from having to answer even for private wrongs so long as they hold their positions), a state can expressly or constructively waive its agents’ immunity *ratione materiae* for specified acts only in advance of their commission. See *Regina v. Bos St. Metro. Stipendiary Magistrate (Pinochet)*, 1 A.C. 147 (H.L. 1999) (U.K.) (finding that the coming into force of the Torture Convention, with its grant of universal jurisdiction over official acts of torture, is what conclusively removes torture from the recognized scope of official authority and permits prosecution of acts occurring from that time forward).

Beyond this, functional immunity serves as a corollary to state immunity, so as not to allow the use of prosecutions and lawsuits against officials to circumvent the immunities attaching to the state itself. This further aspect broadens the scope of the immunity. Thus, as Lord Browne-Wilkinson noted in the final *Pinochet* extradition proceeding before the British House of Lords, “[a]ctions which are criminal under the local law can still have been done officially and therefore give rise to immunity *ratione materiae*.” *Id.* at 203; see also *Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2002 I.C.J. 1, para. 61 (Feb. 14) (stating that a domestic court may try an otherwise immune foreign official only “in respect of acts committed during that period of office in a private capacity”). On the other hand, logic dictates that within this additional range, the immunity belongs solely to the state, which should be able to waive it post hoc. The potential for confusion, and consequent injustice, in this area is substantial.

is displaced by a “controlling executive or legislative act.”⁴⁶ The status of treaties is more complex. Those bearing most centrally on public order, such as the United Nations Charter and the International Covenant on Civil and Political Rights (ICCPR), are considered “non-self-executing”; they bind the United States on the international plane, but they have no direct effect on internal legal obligations.⁴⁷

“Self-executing” treaties have internal legal effects, but subsequent federal legislation prevails over these to the full extent of any contradiction.⁴⁸ Moreover, the treaty interpretations that prevail are those of United States courts, not international or foreign courts, and even express doctrine favors judicial acceptance of Executive Branch interpretations.⁴⁹ In practice, United States courts have, at the Executive’s behest, adopted some notably improbable interpretations of treaty standards. For example, the Supreme Court has held, contrary to virtually all international juridical opinion, that the Drug Enforcement Agency’s abduction of a Mexican national from his country, over Mexico’s objection, to stand trial in the United States did not violate the United States-Mexico extradition treaty,⁵⁰ and that the duty of *non-refoulement*, contained in legislation purporting fully to implement a treaty obligation, did not apply to the return of refugees to the country of their persecution where the refugees were intercepted on the high seas.⁵¹

Thus, the textbook assertion that international law is “part of our law”⁵² is highly misleading. International law’s incorporation into United States law is strictly subordinated to domestic sources of authority.

As a policy matter, one may wish to denounce United States resistance to the direct internal effect of international law as parochial and outmoded. Yet authority and policy are two separate questions. The United States has the sovereign authority to resist that direct effect, regardless of whether it ought to exercise that authority. So, too, does every other state. To the

46. *The Paquete Habana*, 175 U.S. 677, 700 (1900). For an instructive summary of the limited status of international law in United States law, see *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935-39 (D.C. Cir. 1988).

47. See, e.g., *Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001) (stating that even if the ICCPR or the Charter of the Organization of American States “were to ban the imposition of the death penalty, neither is binding on federal courts,” as these treaties are “non-self-executing”); 138 CONG. REC. S4781 (1992) (statement of Sen. Pell) (recounting the Senate’s declaration that the ICCPR’s substantive provisions are non-self-executing).

48. *The Head Money Cases*, 112 U.S. 580, 598-99 (1884).

49. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”).

50. *United States v. Alvarez-Machain*, 504 U.S. 655, 669-70 (1992).

51. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993).

52. The oft-repeated line comes from *The Paquete Habana*, 175 U.S. 677, 700 (1900).

extent that governmental conduct, albeit in breach of international legal obligations, is internally authoritative, an external legal system has a presumptive (albeit paradoxical) duty under international law to acknowledge it as the last word on public order in the territory.

Thus, contrary to the implications of the quoted passage, the nation-state does indeed possess the ultimate authority, even though not the right,⁵³ to “engage in all sorts of . . . excessive and inappropriate actions.”⁵⁴ World federalism may or may not be a worthy policy goal, but it is not the current juridical reality. The open juridical questions concern the scope of exceptions to the basic rule that international law has only such direct internal effects as domestic law establishes, exceptions as to which “transcendent justice” and “bounded pluralist” approaches may generate conflicting answers.

(3) *The fundamental stricture against coercive intervention.* The quoted passage denies the state’s “supreme absolute power and authority over its subjects and territory.”⁵⁵ But apart from the special powers entrusted to the United Nations Security Council under Chapter VII of the Charter, no state or intergovernmental organization has—or even claims—law enforcement

53. The international system does possess mechanisms by which states, and even nonstate actors, may pursue remedies for breaches of international obligations. These mechanisms, however, are limited by the principle of sovereign consent. The doctrine of foreign sovereign immunity reflects the presumption that no self-respecting state will allow its inherently governmental (as opposed to its purely commercial) conduct to be subjected to judgment in the courts of a coequal state. “It has become an established rule that between two equals, one cannot exercise sovereign will or power over the other, ‘*Par in parem non habet imperium*.’” Sompong Sucharitkul, *Immunities of Foreign States Before National Authorities*, in 149 RECUEIL DES COURS 87, 117 (1977). *But see* Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741, 745-65 (2003) (arguing provocatively that this is essentially a rule of comity, rather than of international law, and should therefore give way in respect of “most, if not all, activity that constitutes human rights offenses”).

States do consent to the jurisdiction of international judicial and quasi-judicial bodies, but only selectively, and even then sometimes in a highly qualified manner. Thus, for example, even those states parties to the ICCPR that “recognize[] the competence” of the Human Rights Committee to consider adverse “communications,” either from states under the optional Article 41 procedure or from individuals under the First Optional Protocol, are not legally bound to comply with the Committee’s “views.” *See* ICCPR, *supra* note 23, at arts. 41-42; Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 302. Although it surely does not acknowledge the state as the authoritative interpreter of its own obligations, even with respect to internal public order, the international legal system does not ordinarily obligate the state to yield the last word to a particular institution that it may consider biased against its interests and values. The result is that the power of authoritative interpretation is often diffused throughout the community of states as a whole and is, therefore, difficult to bring cohesively to bear.

54. Jackson, *supra* note 6, at 790.

55. *Id.*

authority within the territory of a foreign state.⁵⁶ The state's monopoly over the authorization of the use of force in its territory, the inner core of sovereignty, withstands its failures to uphold international obligations.⁵⁷

Consequently, although no aspect of state conduct toward its own nationals may now be considered outside the scope of international obligation and scrutiny, implementation of human rights obligations is still subject to the control of sovereign states.⁵⁸ Human rights instruments have not included intrusive implementation mechanisms, and no such mechanisms can be inferred from general international law. At least presumptively, activities within the state, undertaken by foreigners to secure the state's compliance with human rights norms, remain subject to state consent.⁵⁹

Furthermore, absent Chapter VII-based resolutions of the United Nations Security Council, foreign states and intergovernmental organizations may lawfully employ only limited measures to exert pressure on human rights violators. The most straightforward stricture is the

56. "A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(2) (1987); see also 1 OPPENHEIM'S INTERNATIONAL LAW § 119, at 387-88 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) ("It is . . . a breach of international law for a state without permission to send its agents into the territory of another state to apprehend persons accused of having committed a crime.").

57. Max Weber famously spoke of the state as the institution "that (successfully) claims the monopoly of the legitimate use of physical force within a given territory." MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1958). From a juridical standpoint, however, it is more accurate to say that the monopoly pertains to the authorization, not to the actual use, of force. For example, the central authorities may authorize subordinate governmental units or private contractors to exercise policing functions, may allow private persons to use force in circumstances of self-defense or necessity, or may consent to the introduction of foreign forces for specified purposes.

58. It is worthwhile to recall that Bodin himself conceived of sovereignty not as the absence of obligation, but as the absence of any higher authority to impose compliance. See BODIN, *supra* note 12, at 29-31. The fact that states nowadays undertake wide-ranging obligations regarding internal practices in no way dilutes sovereignty, so conceived.

59. See G.A. Res. 46/182, U.N. GAOR, 46th Sess., Supp. No. 49, at 49, U.N. Doc. A/46/49/Annex (1991) (acknowledging that humanitarian operations within a state's territory require the state's consent). Third World states have collectively insisted, at least rhetorically, on maintaining this principle, stressing "that humanitarian assistance should be conducted in full respect of the sovereignty, territorial integrity, and political independence of host countries, and should be initiated in response to a request or with the approval of these States." *Declaration of the South Summit* para. 54, Group of Seventy-Seven at the U.N. (Apr. 10-14, 2000), available at http://www.g77.org/main/docs/Declaration_G77Summit.doc. See generally *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, G.A. Res. 36/103, U.N. GAOR, 36th Sess., Supp. No. 51, at 80, U.N. Doc. A/36/51/Annex (1981) (passed 120-22-6, over the dissenting votes of Western states) (asserting a duty "to refrain from any economic, political or military activity in the territory of another State without its consent").

prohibition on the use of force against the territorial integrity or political independence of states, contained in Article 2(4) of the United Nations Charter.⁶⁰ As the International Court of Justice made clear in the *Nicaragua* case, allegations of human rights abuse cannot be invoked to justify armed efforts, direct or by proxy, to destabilize a government.⁶¹

Economic coercion and political interference directed toward regime change also consistently receive a frosty reception in resolutions of the United Nations General Assembly and other intergovernmental groups,⁶²

60. U.N. CHARTER art. 2, para. 4.

61. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 134-35 (June 27), paras. 267-68. The *Nicaragua* decision confirmed the legal significance of the rhetoric quoted in an earlier note:

No 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.

....

Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

Friendly Relations Declaration, *supra* note 23, at 123.

The 132-member "G-77" bloc of developing countries recently reaffirmed its commitment to this principle in inflexible terms:

We reaffirm that every State has the inalienable right to choose political, economic, social and cultural systems of its own, without interference in any form by other States.

....

We stress the need to maintain a clear distinction between humanitarian assistance and other activities of the United Nations. We reject the so-called "right" of humanitarian intervention; which has no legal basis in the United Nations Charter or in the general principles of international law.

Declaration of the South Summit, *supra* note 59, at paras. 49, 54.

62. "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind." *Friendly Relations Declaration*, *supra* note 23, at 123; *see also* G.A. Res. 58/198, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/198 (2004) (125-1-37) (urging elimination of using "unilateral coercive economic measures against developing countries that are not authorized by relevant organs of the United Nations or are inconsistent with the principles of international law as set forth in the Charter of the United Nations and that contravene the basic principles of the multilateral trading system"); G.A. Res. 45/151, U.N. GAOR, 45th Sess., Supp. No. 49A, at 255, U.N. Doc. A/45/49 (1990) (111-29-11) (appealing to all states "to abstain from financing or providing . . . overt or covert support for political parties or groups"). For expressions of opposition to concrete measures, *see* G.A. Res. 58/7, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/7 (2003) (adopted 179-3-2) (repudiating the United States' secondary boycott against Cuba); *Economic Coercive Measures Against Panama*, Latin Am. Econ. Sys. Doc. No. 271 (Mar. 29, 1988) (repudiating United States economic sanctions imposed following the removal of President Eric Arturo Delvalle), *excerpted in* UNITED STATES

although the rules pertaining to these measures are far less clear. Some unilateral sanctions—such as suspensions of aid and trade and withdrawal of diplomatic relations—fall within the scope of a sanctioning state's own sovereign prerogatives, whereas others, such as secondary boycotts (i.e., coercive interference with the target state's economic relations with third states) and covert funding of opposition political groups, would seem to cross the line into presumptively unlawful intervention.

Opinion appears to be divided on whether such nonforcible coercive acts could be justified as countermeasures—proportionate reprisals against the legal rights of states—in response to violations of human rights obligations owed the international community.⁶³ The lesser developed countries have long feared that licensing such measures would invite neo-colonialism in the guise of human rights enforcement. The 1996 version of the International Law Commission's Draft Articles on State Responsibility included an express prohibition on the use, as a countermeasure, of "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act."⁶⁴ The final version, submitted to the General Assembly for its consideration in 2001,⁶⁵ omitted this clause, but retained restrictions to more or less the same effect.⁶⁶

ECONOMIC MEASURES AGAINST CUBA 286, 286-87 (Michael Krinsky & David Golove eds., 1993).

63. See *Report of the Secretary-General on Economic Measures as a Means of Political or Economic Coercion against Developing Countries*, G.A. Res. 44/125, U.N. GAOR, 44th Sess., Supp. No. 49, at para. 23, U.N. Doc. A/44/510 (1989) (indicating division of opinion on whether any exception could be made for measures in furtherance of human rights compliance); *Declaration of the South Summit*, *supra* note 59, at para. 48 (rejecting all "forms of coercive economic measures, including unilateral sanctions against developing countries," without mentioning any exception for countermeasures against human rights violators). Given the lack of any effort to erect a collective apparatus for determining when such countermeasures would be appropriate and for policing their proportionality, there is ample reason to question whether human rights-based justifications of otherwise unlawful measures have achieved international acceptance.

64. *1996 ILC Articles on State Responsibility*, *supra* note 28, at art. 50(b).

65. *Report of the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001) [hereinafter *2001 ILC Articles on State Responsibility*]. ILC Special Rapporteur James Crawford noted that "either the countermeasures are disproportionate, in which case they are excluded by the principle of proportionality, or they are not, in which case they will necessarily be a response to extreme wrongdoing causing injuries which have not been redressed." David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT'L L. 817, 831 (2002).

66. *2001 ILC Articles on State Responsibility*, *supra* note 65, at art. 49 ("An injured State may only take countermeasures . . . in order to induce [the wrongdoing] State to comply with its obligations . . ."); *id.* at art. 51 ("Countermeasures must be commensurate with the injury suffered . . ."). Moreover, Article 54, in allowing for responses by "[a]ny State other than an injured State" to breaches of those obligations recognized in Article 48 as being "owed to the international community as a whole," mentions only "lawful measures," rather than countermeasures.

Thus, however paradoxically, human rights norms are, as a matter of legal presumption, obligatory but not compulsory. States are, at once, legally bound by obligations and legally protected from the very coercion that may be required to assure their compliance. Human rights norms do not, in and of themselves, vitiate the legal constraints on the application of power across territorial boundaries. Frustrated by such legal constraints, W. Michael Reisman has complained that “[b]ecause rights without remedies are not rights at all, prohibiting the unilateral vindication of clear violations of rights when multilateral possibilities do not obtain is virtually to terminate those rights.”⁶⁷ As Reisman himself acknowledges, however, routine circumvention of those constraints would erode the underpinnings of the system that makes those rights possible.⁶⁸

Thus, sovereignty’s relationship to international law is far more nuanced than is generally supposed. In all three areas surveyed—the recognized sources of law, the interface between the international and domestic legal systems, and the fundamental stricture against coercive intervention—sovereign prerogative amounts to a set of legal presumptions. To say that these are presumptions is to say that any or all of them may be rebuttable; the basic rules admit of many exceptions, some clearly established and others arguable. But even if one aims ultimately for the exception to swallow the rule—the “transcendent justice” approach—it is important for analytical purposes not to misidentify the exception as the rule.

IV. IN DEFENSE OF “BOUNDED PLURALISM” AS THE BASIS OF INTERNATIONAL ORDER

Rather than dismissing sovereignty-oriented presumptions as defects in the international legal order, to be progressively eradicated as the system develops, I wish to suggest a principled defense, albeit qualified, of the barriers that these presumptions pose. This defense has two parts, one pertaining to the foundations of political morality, and the other to the practicalities of international policy.

A. *State Sovereignty and Political Morality*

The moral justification of a pluralist international order rests on the assertion of a collective moral right to self-determination. This assertion

67. Reisman, *supra* note 26, at 875.

68. W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT’L L. 516, 516-17 (2004) (“Our international legal system is scarcely imaginable without” territorial communities having the right to govern themselves “without interference”; “state sovereignty prevails in all but the most egregious instances of widespread human rights violations.”).

is frequently associated with the claim that human beings' very identities are shaped by the communities in which they are "radically situated," and that, consequently, political values can be assessed only within the framework of a given community's distinctive character and traditions.⁶⁹ This claim questionably assumes not only that the individual lacks a cognizable identity independent of relationships that are pre-established and impervious to revision upon rational reflection, but also that the "constitutive" communities being invoked are coextensive with existing *political* communities. A very different argument for the collective right, however, can be made from premises that are fully consistent with ontological individualism, moral universalism, and political rationalism. This argument emphasizes not the individual's embeddedness in a collective past, but the individual's present and future dependence on collective projects that call for distinctively political decisions. On this account, justice remains subject to the boundaries of political community, not for cultural reasons, but for practical ones.

The "transcendent justice" approach to the international legal order is traceable to a tendency in contemporary political thought known as deontological, or neutralist, liberalism.⁷⁰ Deontological liberalism gives categorical priority to the imperative of respect for the human subject as a rational chooser of its own ends.⁷¹ This approach contrasts with teleological approaches to liberal political morality that seek to maximize the realization of criteria of social well-being, whether such criteria reflect aggregated subjective preferences (utilitarianism) or an authoritative conception of the good life (perfectionism).⁷² Deontological liberalism regards human rights as inherent in the human person, whereas utilitarians and perfectionists (as well as those who reject liberalism's individualistic ontological premises) may assert moral grounds on which political

69. MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 21 (1982).

70. The starting point for discussions of "deontology" in contemporary political theory is JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999). The associated issues have been extensively debated. See, e.g., RONALD BEINER, *WHAT'S THE MATTER WITH LIBERALISM?* 36 (1992) (repudiating the deontological distinction between "the right" and "the good," and criticizing liberalism as excluding "a sense of meaningful collective purpose"); WILLIAM A. GALSTON, *LIBERAL PURPOSES* (1991) (questioning Rawls's attempt at constructing a political liberalism that is substantially neutral regarding the human good); SANDEL, *supra* note 69 (criticizing the deontological account of the human subject as implausible); GEORGE SHER, *BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS* (1997) (arguing that a non-neutral state can realize Rawls's goals more effectively than can a neutral state, without compromising liberal values). An excellent summary of the issues is contained in WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 9-99 (1989), which explores the various criticisms of deontological liberalism and examines the resources that are available to meet those criticisms.

71. See RAWLS, *supra* note 70, at 24-36.

72. See *id.*

institutions ought to create liberal legal rights.⁷³ Deontologists derive liberal rights directly from first principles and essentially reduce the moral role of political institutions to the recognition and implementation of these rights.⁷⁴

Deontological liberalism has implications for the appropriate role of politics in social life and thus for the moral status of the state. Deontologists divide the universe of moral issues into two realms: matters of “the right” and matters of “the good.”⁷⁵ “The right” is understood to include questions of justice, in the peculiar sense of fairness in weighing the competing claims of end-choosing human subjects; it is associated with a standard list of liberal rights that are deemed to be universally applicable and neutrally protective of end-choosing subjects.⁷⁶ “The good” is understood to include questions of the nature of the good life and the proper objects of human striving, answers to which must be derived from one of many competing “comprehensive doctrines of human flourishing.”⁷⁷ As these doctrines are deemed to be hopelessly controversial, the conflicting versions of “the good” that they generate are subordinated to a transcendent conception of “the right.”⁷⁸ This line of thought tends to produce a moral absolutism as to “the right” and a moral subjectivism as to “the good.”⁷⁹

From here it is a short step—at least psychologically, if not quite so, philosophically—to the conclusion that politics has no legitimate role in determinations of either the right or the good. Questions of the right are to be decided in a realm above politics, by deduction from first principles, whereas questions of the good are to be decided in a realm below politics, by the independent determinations of individuals, alone or in freely chosen

73. *See id.*

74. *See id.* Although Rawls was a crucial figure in the development of this deontological approach to human rights, his own work after *A Theory of Justice* developed in a divergent direction. The natural law overtones of the early work were replaced by much more contingent formulations, especially as applied expressly to international political morality. *See* John Rawls, *The Law of Peoples*, 20 *CRITICAL INQUIRY* 36 (1993). As a result, Rawls-inspired critics of sovereignty have found themselves sharply at odds with their mentor. *See, e.g.,* Fernando R. Tesón, *The Rawlsian Theory of International Law*, 9 *ETHICS & INT’L AFF.* 79, 98 (1995) (complaining that the later work has “embraced a more relativistic, context-based conception of justice and political morality, in which rights and liberties no longer had a foundation in higher principles or liberal views of human nature”).

75. *See* RAWLS, *supra* note 70, at 24-36.

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.* Deontologists typically deny that this subjectivism is rooted in skepticism, but rather they assert that even objectively valid judgments about the good life can produce “the good” only when the individuals in question voluntarily embrace them. *See* KYMLICKA, *supra* note 70, at 12.

association. Logic does not compel this move. The deontological scheme formally concerns the substantive grounds, not the procedural rules, for determinations about justice and thus may serve solely to inform participants in the political process, rather than to justify imposing authority from outside that process. However, the assertion that “the right” is independent of, rather than dependent upon, a necessarily controversial judgment about “the good” suggests an objectivity and a universality of “the right” that tend to weigh against deference to the political process in this realm. The widespread popularity of judicial review of legislation among deontological liberals confirms this tendency.⁸⁰

If justice is universal, rather than the product of a decision at a particular time and place, and if the good life is purely a matter of individual prerogative, then the enterprise of politics is appropriately confined to a limited and subordinate set of purposes. It follows then that neither the project of the state, nor the positive law that derives from that project, can properly have an independent moral significance.⁸¹

There is good reason, however, to doubt that justice can be specified independent of a collective adoption of a comprehensive doctrine of human flourishing (or of a collective adoption of a particular accommodation among some such doctrines to the exclusion of others), and therefore that universal rights can fully transcend the decisions of particular political communities about the nature of the good society wherein the good life is pursued. By all accounts, individual pursuit of the good life requires the existence of certain nondivisible public goods. The creation of these public goods is burdened by collective action problems (e.g., the temptation to be a free rider), the solution to which frequently requires collective decisions authorizing coercive implementation.⁸² Deontological liberals believe that such collective decisions can be limited to those that can be justified

80. Such a conclusion assumes away, or at least judges unworthy of moral regard, the prevalence of fundamental disagreement about justice. Positive law serves as a working resolution of that disagreement for a particular time and place. See JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999). For an atypical deontological approach that embraces politics (and rejects judicial review), see JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

81. For a noteworthy exposition of such a view, see generally FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (1988).

82. Social life, by its nature, presents myriad coordination problems. However much one may wish to exalt the self-actualizing individual, individual aspirations cannot be realized—or often even conceived—without others’ coordinate actions and forbearances that combine to establish the infrastructure for that realization (just as a career as a cellist presupposes compositions, instruments, orchestras, and orchestra halls, which themselves presuppose complex social institutions, and so on in regression). The coordination of actions and forbearances depends, in turn, on decisions attributable to and binding on some collectivity, backed by a capacity for compulsion that militates against free riders and other spoilers.

“neutrally,” without reference to a contentious conception of “the good.”⁸³ Since human equality entails, from the deontological perspective, an equal prerogative for each individual to pursue his or her own conception of the good life, justice entails freedom from all “non-neutral” compulsion.⁸⁴ But if the fundamental interests of end-choosing human subjects turn out to be rival, one can establish priorities only by comparatively evaluating, in light of preferred conceptions of the good life, the ends that those subjects might choose.⁸⁵

At the core of the current-day human rights movement is the quest to bring about the conditions of a dignified human existence. Human rights thus entail not merely duties to avoid violating human dignity by discrete and direct acts of violence, but further duties to affirmatively protect the right-bearer from violence and from analogous inflictions with similarly dehumanizing effects. Beyond those lie duties to take all necessary measures to secure for all right-bearers (within the limits of what is materially feasible) the conditions that permit human potentialities to be realized. The proliferation of internationally certified human rights—now encompassing “first-generation” civil and political rights well beyond inviolability of the physical integrity of the person, “second-generation” economic and social rights, and “third-generation” collective rights to the minimal conditions of societal flourishing—represents a series of efforts to correct for the manifest inadequacy of simple negative imperatives.⁸⁶

Human rights are typically characterized as a priori constraints on the pursuit of political ends. The more holistically rights claims address human dignity, however, the more inexorably and expansively do they appropriate the space of politics. Invocation of the term “human rights” altogether fails to preempt political contestation because competing views of how to

83. See RAWLS, *supra* note 70, at 24-36.

84. Thus, Jack Donnelly can assert, in a quintessential expression of the “transcendent justice” approach, that universal human rights entail the proposition that “[h]ow one chooses to lead one’s life, subject only to minimum requirements of law and public order, is a private matter—no matter how publicly one leads that life.” Jack Donnelly, *Unfinished Business: Failure of Imagination Preserves Inequality and Jeopardizes the Universality of Human Rights*, 31 PS: POL. SCI. & POL. 530, 533 (1998). This reflects an idiosyncratic understanding of social interaction. Discrete human lives intersect and collectively generate a moral environment that, in turn, conditions the possibilities for individual pursuit of the good life. One can support the goal of Donnelly’s statement—the establishment of gay rights—without predicating it on a claim that is both philosophically dubious and, far from being “universally” embraced, widely rejected even in generally liberal societies.

85. For an elaboration of the argument that liberalism’s core encompasses rival freedoms that cannot be prioritized by deduction, see JOHN GRAY, *TWO FACES OF LIBERALISM* 69-104 (2000).

86. One can, of course, reject this proliferation, and insist that only “first-generation” rights should be considered human rights. See Maurice Cranston, *Are There Any Human Rights?*, *DAEDALUS*, Fall 1983, at 1, 10-17. That insistence, however, has not gained wide acceptance in the contemporary human rights movement.

prioritize and how to accomplish the posited ends constitute the very core of politics.⁸⁷

Sovereignty takes on moral importance, then, not because political communities are in any way “organic,”⁸⁸ but because fundamental human concerns necessitate uniquely political decisions. The state—as opposed to nonterritorial or microterritorial communities rooted in sentimental attachment rather than potential for order-creation, and as opposed to an international community encompassing an unmanageable multiplicity of interests and values—represents the only community in the name of which the ineluctably contentious decisions needed to structure social life can be effectively made and enforced. Liberal imperatives of “equal concern and respect”⁸⁹ presuppose a discrete political community in which members can make reciprocal demands on one another—often quite exacting ones, such as redistributive taxation and military service—on the basis of distinctive decisions ascribable to the whole. A capacity for such political decisions conceptually precedes all talk of democracy: the exercise of sovereignty is what there is to be democratic *about*.

One could go so far as to say that sovereignty, as the consummation of the self-determination of peoples, is not only itself a human right, but indeed—in light of common Article 1 of the human rights Covenants—the *first* human right (in the sense of providing a foundation for, not morally outweighing, other human rights).⁹⁰ Nonetheless, such rhetoric should not be allowed to obscure the inherent limitation. However broad the range of controvertible choices as to political, economic, social, and cultural systems, self-determination cannot justifiably be exercised so as to altogether flout the moral purposes that underlie the collective right itself.

Still, the collective choices that inevitably remain subject to contestation within political communities include the kinds of choices over which civil wars are fought. In socioeconomically or ethnically polarized polities, the stakes may be so consequential that the losing contestants have insufficient motive to remain loyal to the prevailing processes of decision. The potential for such an unmediated clash of social forces augurs decisions, of both government and opposition, to employ harsh means against what appear, by light of their particular projects of public order, as threats to the community’s vital interests.⁹¹

87. For an exploration of the the consequences of this reality for “rights talk,” see BEINER, *supra* note 70, at 80-97.

88. As discussed above, political communities are not “organic” because they are not based on ethnic or cultural ties, and do not presuppose a “radically situated” human subject.

89. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180-83 (1977) (defining liberalism in these terms).

90. See ICCPR, *supra* note 23, at art. 1; ICESCR, *supra* note 23, at art. 1.

91. Some readers may have difficulty believing that advocates of plausible conceptions of

A duty not to intervene in a foreign political community's internal conflict, so far as that duty extends, is a duty to respect patterns of coercion, and even violence, within a collectivity of which one is not a member. It is not akin to a duty to allow individuals peacefully to pursue their own good in their own way. Nor is it a matter of minding one's own business; the human costs of such conflicts are manifestly the business of all humanity. Rather, the duty of outsiders is to appreciate, in their assessment of the propriety of imposing their own will, the unshared collective stake that members of a given political community have in the outcomes of decisions about the fundamental direction of social life in the territory. Outsiders do not have standing to be partisans in another community's conflict; yet, their assessments of distant crises, apart from being prone to sophomoric oversimplification and deliberate manipulation, tend disproportionately to reflect the perspectives of those conflict participants with whom they personally most closely identify. The duty to refrain from coercive interference, while overcome in some class of unambiguously catastrophic cases, properly withstands the strong and wholesome moral intuition to take on others' causes as one's own.⁹²

Thus, even apart from pragmatic considerations, the international order's pluralism should never be confused with the "gorgeous mosaic"⁹³ pluralism of the liberal imagination, in which an overarching unity as to "the right" renders inoffensive, and even enriching, the persistence of differences over "the good." As long as radical disagreement about justice remains part of the human condition, an international pluralism, even in its ideal form, will at moments be a tense and almost unbearably ugly pluralism, an accommodation among political communities dominated by incompatible positions on matters of justice and injustice, freedom and tyranny, and, ultimately, life and death.

"equal concern and respect" can be found on both sides of such confrontations. Yet this is frequently the case, even where key actors on one or both sides might properly be classified as "thugs." For example, the Chilean coup of 1973, the Salvadoran and Nicaraguan internal armed conflicts of the 1980s, and the attempted Venezuelan coup of 2002—all conflicts rooted in socioeconomic polarization divisions—sharply divided the respective societies, including their liberal-democratic elements. Ethnic polarization is, if anything, even more likely to pit sincerely held, but clashing, conceptions of fairness against one another in conflicts that are beyond the capacity of institutions to contain.

92. My position on these matters is partly inspired by Michael Walzer's landmark defense of the principle of nonintervention. See Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 PHIL. & PUB. AFF. 209 (1980). I seek, however, to avoid Walzer's reliance on a culture-based argument for a presumptive "fit" between political communities and their governments. *Id.* at 212.

93. Former New York Governor Mario Cuomo and former New York City Mayor David Dinkins have used this term to describe New York's cultural diversity. Calvin Sims, *To Save Money, City Hall Considers Cutting Parades*, N.Y. TIMES, Apr. 7, 1992, at B5.

B. *State Sovereignty and International Policy*

The boundaries of the international legal order's pluralism are considerably broader than the collective moral right to self-determination alone would dictate. These boundaries additionally reflect both the system's policy goal of constraining cross-border exercises of power by presumptively untrustworthy actors, and its political need for broad-based support in a diverse international community.

In addition to encompassing a multiplicity of values, the international community encompasses a multiplicity of interests. Moreover, poor and weak states—typically natural resource-exporting, dependent on foreign capital, and historically dominated from abroad—have long perceived systematic contradictions between their interests and those of the rich and powerful states. Although many Western observers nowadays dismiss Third World governments' complaints of neo-colonialism and neo-imperialism as willful distractions from more proximate causes of local problems, distrust of the more powerful states' intentions continues to be widely and strongly felt among inhabitants of the weaker states. Thus, there remains substantial popular backing within these states for insistence on maintaining sovereign equality as the bedrock principle of any scheme of international cooperation.

Furthermore, external impositions—affected, as they predictably are, by self-interest and arrogance—cannot lightly be presumed to be salutary. In regard to armed humanitarian intervention, for example, rich and powerful countries are seldom willing to invest substantial blood and treasure for moral objectives alone. At best, armed interventions occur in locations (e.g., in Kosovo rather than in far more devastated African regions)⁹⁴ and in ways (e.g., by aerial bombardment of civilian infrastructure rather than ground-troop confrontation of *génocidaires*)⁹⁵ that reflect political rather than moral priorities. At worst, the interests motivating the external investment may distort the mission's goals (as has been alleged in the case of France's *Opération Turquoise* in Rwanda)⁹⁶ or may call for cut-rate and irresolute methods that leave the situation worse than it was before the intervention (as may have been true of the later phases of the United States mission in Somalia and as may turn out to be true in Afghanistan). Even if too little intervention is now objectively a

94. See Richard B. Bilder, *Kosovo and the "New Interventionism": Promise or Peril?*, 9 J. TRANSNAT'L L. & POL'Y 153 (1999).

95. See, e.g., Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 12 EUR. J. INT'L L. 503 (2001) (criticizing the targeting employed in the North Atlantic Treaty Organization (NATO) bombing campaign against Yugoslavia).

96. See PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 157-61 (1998).

greater overall problem than too much intervention, it does not follow that a broader licensing of intervention would occasion more of the right measures in the right places.

Bounded pluralism thus serves to protect the poor and weak states from the divergent interests, as well as from the overbearing values, of the rich and strong states. It is, and is reasonably, an ordering principle of “the deal” that the international system embodies. The boundaries of the international order’s pluralism nonetheless remain variable, and relative convergences in both values and interests over time have led to the broadening of exceptions to sovereign prerogative, such as *jus cogens*, universal jurisdiction, and humanitarian intervention.⁹⁷

Why should an overwhelmingly strong power, confident in its righteousness, be concerned to keep faith with this “deal”? Why should it respect the sovereign prerogatives of states that hold no moral high ground and that can be effectively manhandled? The question is all the more pressing when the strong power finds itself faced not merely with obstacles to its interests and affronts to its values, but with dire security threats from nonstate actors, heedless of all legal order, whom other states may brazenly refuse to acknowledge as common enemies.

A legal order endures only if it reconciles the long-term policy interests of its participants, strong and weak. Since the strong often have the option to proceed by extortion or direct action rather than by accommodation, whereas the weak are willing to concede much in return for the guaranteed security of what little is left to them, the strong have disproportionate bargaining power in setting the legal rules. At the same time, the strong have reason to prefer orderly processes and clear baselines to the chaos and costliness of ad hoc exertions, and whatever their strength, the strong have much to fear from the desperate and the humiliated among the weak. The strong should thus resist the temptation, once they have negotiated a legal order that provides avenues by which most of their goals can be achieved, to have their cake and eat it too—to insist that the terms of the deal are binding on the weak, but reserve to themselves (and by extension, to all others with the power to get away with it) the prerogative to do as they see

97. I have devoted this commentary to explaining what kinds of lines need to be drawn, without articulating positions on precisely where the lines should be drawn. The latter I have done extensively elsewhere. See Brad R. Roth, *Anti-Sovereignism, Liberal Messianism, and Excesses in the Drive Against Impunity*, 12 FINNISH Y.B. INT’L L. 17 (2003); Brad R. Roth, *Bending the Law, Breaking It, or Developing It? The United States and the Humanitarian Use of Force in the Post-Cold War Era*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 232, 233 (Michael Byers & Georg Nolte eds., 2003); Brad R. Roth, *The Illegality of “Pro-Democratic” Invasion Pacts*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 328, 329 (Gregory H. Fox & Brad R. Roth eds., 2000); Brad R. Roth, *Retrospective Justice or Retroactive Standards?: Human Rights as a Sword in the East German Leaders Case*, 50 WAYNE ST. L. REV. (forthcoming Oct. 2004).

fit. And this is no less true where the strong perceive their cause to be righteous.

In the long run, international peace cannot be predicated on the privilege of the momentarily strong to pursue forcibly their unilateral determinations of what is just in any given instance. Wagers on the continued impotence of others are bad long-term bets.

V. PATRIOTISM AND THE DUTY TO UPHOLD A COMMUNITY'S POLITICAL INDEPENDENCE

When Viet Dinh uses the term "nationalism,"⁹⁸ he is speaking of loyalty to a political community whose membership encompasses the permanent territorial population without distinction (putting aside thorny questions about long-term resident aliens). Just as the international legal system attributes "nationality" to individuals on the basis of connections to a territorial state and predicates sovereign prerogatives on the equal rights of each of the "peoples" that territorial states respectively represent, so too does Dinh speak of a phenomenon rooted in established territorial boundaries.

Today, "nationalism" most frequently refers to something very different: an ethno-nationalism that problematizes the fit between state boundaries and community membership, rooting duties of loyalty in a common race, language, culture, or creed, and asserting privileges accordingly. Even American nationalism, with which Dinh is principally concerned, has not lacked its "nativist" moments. Yet Dinh clearly uses the term not to flirt with ethno-nationalist conceptions, but instead to emphasize that his is an unabashedly robust form of what is more routinely known as "patriotism."

Patriotism, like sovereignty, is open to an array of conflicting interpretations. A typical finesse in confronting the concept is to present two polar versions: the first so sharply provocative as to be patently unreasonable, and the second so harmonized with liberal-universalist political morality as to be denuded of any normative significance. In fact, many commonplace invocations of patriotism are patently unreasonable in that they assign little moral worth to foreigners (or to citizens who show inordinate concern for foreigners).⁹⁹ At the same time, many orthodox

98. Dinh, *supra* note 1.

99. Some such invocations can be seen in the current "war on terrorism" rhetoric. The September 11 attacks inevitably remind us of our common identity and destiny as a people. The victims, after all, were targeted solely for inhabiting buildings that the attackers identified as symbols of America. Yet in our shared outrage, Americans seem divided between those who regard the attacks as an affront primarily to the humanity of the victims (to whom we feel a special bond as Americans) and those who regard the attacks as an affront primarily to the nation. Whereas the former demand only to bring individual perpetrators to justice and to restore safety, and assess

liberal universalists sincerely regard themselves, by virtue of being public-spirited and having a deep emotional connection to their country's history and symbols, as patriots. If, however, patriotism poses any distinctive intellectual challenges, these must emanate from a conception that falls into neither of these categories.

Universalism does not preclude an ethical division of labor. Efficacy considerations alone dictate that individuals concentrate the bulk of their affirmative efforts to enrich the lives of others on those to whom they bear special ties rather than diffusing them impartially across humanity as a whole. Beyond that, efficacious social action requires collectivities that are empowered to decide on and to coordinate social projects; for "us" to take action, there must first be an "us" to whom the decisions pertain and who bear special responsibility for following through on those decisions, irrespective of individual opinions and preferences, because those decisions have been validly taken in the name of the collectivity. Moreover, universalist political morality posits goals that presuppose a determinate scope of application; boundaries are inherent in the effort to secure for all the opportunity to live in a community that treats each member with equal concern and that palpably belongs to all of its members in equal measure. Because distinct communities have moral standing from even a universalist perspective, universalists acknowledge that in the event of irreconcilable conflict between communities, when "no just accommodation of both sides' legitimate interests is possible[,] . . . universal morality would not require [liberals] to abandon or betray their own communities."¹⁰⁰

Insofar as patriotism poses a challenge to liberal-universalist political morality, it does so by asserting that loyalty to a political community's distinctive interests or distinctive values should override, at least to some significant extent, universalist ethical imperatives.¹⁰¹ Such a challenge

proposals for the use of force in light of those ends alone, the latter demand further to reassert a national potency that the attacks, by their sheer audacity, are perceived to have called into question.

Attributing America's vulnerability to its having inspired insufficient fear (a somewhat doubtful assessment of the sociology of suicidal fanaticism), this latter view assigns an independent value to uses of force as demonstrations of might and resolve. Even beyond that, it finds redemption in inflicting retribution on those perceived to have manifested disrespect (even if they have not actually attacked) the United States and in flouting restraints that it associates with a treacherous or feckless solicitude for those manifesting such disrespect. (One is tempted to surmise that certain individuals, forced to endure disrespect in their own lives, derive a vicarious sense of vindication from identifying with an entity, in which they notionally participate, that displays the capacity to extract expressions of respect from the recalcitrant.) This view may qualify as "patriotism" of a sort, but rejecting it can hardly be characterized as "unpatriotic."

100. Stephen Nathanson, *In Defense of "Moderate Patriotism,"* 99 *ETHICS* 535, 541 (1989).

101. Compare *id.* at 535 (elaborating a patriotism consistent with universalist premises), with Alasdair MacIntyre, *Is Patriotism a Virtue?*, in *THEORIZING CITIZENSHIP* 209 (Ronald Beiner ed.,

must assert either (a) that the citizen is bound to side with her own political community in conflicts with others, even (at least to some extent) where it is objectively in the wrong or (b) that the citizen is bound to further a particular conception of justice that reflects the political community's distinctive character or traditions, even (at least to some extent) where a conception of justice foreign to its character or traditions is objectively superior.

The collective moral right to self-determination, as elaborated and defended above, does not entail a general acceptance of either of these assertions (nor does it necessarily reject them). It does suggest, however, that where foreign exertions jeopardize a political community's capacity to defend its interests or to arrive at decisions in keeping with the distinctive values of its members, the imperative to maintain that capacity—inasmuch as this is itself a matter of objective moral right—justifies coming to the defense of that community's sovereign prerogatives, even where those prerogatives have been exercised unjustly. This conclusion is predicated not on a rejection of universalist morality, but on a paradox that arises within universalist morality. It is in the nature of moral rights to demarcate an inviolable space (however limited) within which the right-bearer, whether individual or collective, is free to exercise discretion, even if immorally.¹⁰² "Our country . . . right or wrong," is, in this very limited application, consistent with objective right.¹⁰³

Thus, there may be a patriotic duty to help prevent foreign political communities from improperly dictating to or intervening within one's own community, even where there is a simultaneous duty to work for an internal remedy to the injustice of which the foreigners complain.¹⁰⁴ Similarly, an oppositionist, even if justified in working to install a foreign-inspired system of public order (on the ground that it is morally superior to anything rooted in local traditions), may have a patriotic duty not to

1995) (elaborating a patriotism sharply at odds with universalism).

102. See JEREMY WALDRON, *LIBERAL RIGHTS* 63-64 (1993).

103. Dinh, *supra* note 1, at 877 (quoting Commodore Stephen Decatur, Toast at a Dinner in Norfolk, Virginia (Apr. 1816), in ALEXANDER SLIDELL MACKENZIE, *LIFE OF STEPHEN DECATUR* 295, 295 (1848)).

104. While the United States does not often find its sovereignty genuinely threatened, United States reservations to human rights treaties provide a fittingly mundane illustration. American international lawyers routinely advocate the withdrawal of these reservations on the ground that they license unjust practices. Those same lawyers may nonetheless object to foreign efforts to treat the reservations as nullities (on the strained theory that the reservations are not only inconsistent with the treaties' object and purpose, but also severable from the rest of the ratified instrument). The United States cannot properly be held accountable to obligations, however righteous, from which it has expressly withheld its consent. There is no inconsistency in insisting on respect for treaty reservations that one deems to be unjust. While patriotism has nothing to do with the merits of the point, it does, perhaps, place a special (if relatively trivial) onus on United States lawyers to stand up for the point in international fora.

accept inappropriate kinds or degrees of foreign assistance for these efforts. Once again, however, these duties are only presumptive; where state misconduct is so extreme as to defeat the purposes for which the community's political independence is duly valued, the duties are vitiated. (Of course, it does not follow that even such gross misconduct will suffice to eradicate perceptions of patriotic duty.)

This take on patriotism, like the collective right to self-determination from which it derives, is a matter of peculiar significance to poor and weak states. It speaks to reasons that even tyrannized inhabitants of such states have to resist foreign-initiated projects of "regime change." Whatever moral justification there may be for supporting one's own state's violations of other states' territorial integrity and political independence will have to be sought elsewhere.

VI. CONCLUSION

Viet Dinh's reassertion of the significance of sovereignty and patriotism in the post-September 11 era is provocative and apt, but it is only a start in confronting the multitude of complex and contentious questions associated with these concepts. His reminder of the more benign aspects of the much-reviled Decatur toast, "Our country . . . right or wrong," might prompt us to ask, for example, on what terms we are to relate to others who also bear commitments, both to their countries and to conceptions of right and wrong that we may not share.

Notwithstanding international law's dramatic expansion into areas once considered matters of exclusive domestic jurisdiction, respect for sovereign prerogative continues to be a central feature of the international legal system, limiting both the establishment of binding obligations and the means by which established obligations can be enforced. The inviolability of self-governing political communities stands as a foundational principle of international order. This principle appears inconvenient when the decisions that emerge from these communities seem to be, and perhaps objectively are, unjust ones. Nonetheless, fundamental disagreements about justice are an enduring feature of the human condition, and they necessitate a pluralistic solution. In certain respects and within certain limits, collectivities must be said to have a right to be wrong about justice, and outsiders must be called on to respect collective enterprises of which they are not a part. Moreover, a broad license for powerful states to impose solutions on less powerful ones in the name of universal justice is not an especially promising alternative.

Although exceptions to respect for sovereign prerogative have properly prevailed in many instances, the exceptions should not be permitted to swallow the rule. A respectful and orderly relationship among bearers of conflicting conceptions of just public order provides the only firm basis for

international peace and cooperation. It also provides the basis upon which human beings—situated, as they are, in political communities—have the best chance to accomplish their ends.