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# Globalization and Sovereignty*

Julian Ku** & John Yoo†

## INTRODUCTION

> Globalization represents the reality that we live in a time when the walls of sovereignty are no protection against the movements of capital, labor, information and ideas—nor can they provide effective protection against harm and damage.[1]

This declaration by Judge Rosalyn Higgins, the former President of the International Court of Justice, represents the conventional wisdom about the future of global governance. Many view globalization as a reality that will erode or even eliminate the sovereignty of nation-states.

The typical account points to at least three ways that globalization has affected sovereignty. First, the rise of international trade and capital markets has interfered with the ability of nation-states to control their domestic economies.[2] Second, nation-states have responded by delegating authority to international organizations.[3] Third, a "new" international law, generated in part by these organizations, has placed limitations on the independent conduct of domestic policies.[4]

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1. Roslyn Higgins, *International Law in a Changing International System*, 58 CAMBRIDGE L. J. 78, 82 (1999).

2. *See* DAVID HELD, ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS, AND CULTURE 187 (1999) ("Today, not only tariffs and quota restrictions, but also policies supporting domestic industry and even domestic laws with respect to business competition and safety standards are subject to growing international scrutiny and regulation.").

3. *See* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems With Solutions*, 85 MINN. L. REV 71, 88-113 (2000).

4. *See* JULIAN KU & JOHN YOO, TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER 2-4, 19-25 (2012).

These developments place sovereignty under serious pressure. But the decline of national sovereignty is neither inevitable nor obviously desirable. Nation-states maintain the current world order. Sovereignty allows nations to protect democratic decision-making and individual liberties. Nor does robust respect for sovereignty demand the rejection of globalization or international cooperation.

We offer a new framework for accommodating globalization with sovereignty. Our proposal shifts the focus away from Westphalian sovereignty, which grants nations complete autonomy within their territories, and toward "popular sovereignty"—the right of the American people to govern themselves through the institutions of the Constitution. Article VI's Supremacy Clause creates a hierarchy of federal law that places the Constitution first, followed by "the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States."[5] This establishes the Constitution's superiority over all other authorities, including international laws and norms. As long as the Constitution remains the exclusive source of lawmaking authority within the United States, the regulation of globalization must occur through the political and legal system created by the Constitution.

In this essay, we will first define "globalization." We will then explore its impact on national sovereignty and the rise of international institutions. Finally, we will consider how popular sovereignty can accommodate globalization through the Constitution's separation of powers and division of authority between the federal and state governments.

## I.
## DEFINING GLOBALIZATION

Few terms are more ubiquitous in public affairs than "globalization." Countless journal articles and publications analyze globalization in sociology, political science, international relations, and cultural studies. Despite the breadth of interest, there continues to be a substantial lack of consensus on the meaning of the term. As Peter Spiro has observed, "globalization is so broad a phenomenon that comprehensive description now seems almost futile."[6]

To some, globalization includes the reduction of trade barriers and an accompanying devotion to free markets. In *The Lexus and the Olive Tree*, journalist Thomas Friedman popularized the concept of the "globalization system" as involving the "inexorable integration of markets, nation-states and technologies to a degree never witnessed before."[7] The system results in the

5. U.S. CONST. ART. VI.

6. Peter Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L. J. 649, 660 (2002).

7. THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 8 (2000).

"spread of free market capitalism to virtually every country in the world."[8] Much of the public debate has revolved around the consequences of economic liberalization, the reduction of trade barriers, and the global integration of capital markets.[9]

But globalization has acquired a meaning broader than economic liberalization. Scholars have also equated globalization with the internationalization of societies and economies, the universalization of a "global culture," the Westernization of societies along European or American models, and finally the de-territorialization of geography and social space.[10]

These definitions share some basic elements, such as the acceleration in cross-border activity between governments, businesses, institutions, and individuals. While transnational economics has drawn the most attention, globalization also includes the growth of political cooperation, migration, and communications, as well as sharp reductions in transportation costs and the blending of national societies and cultures.[11] Many see the rise of a global civil society, which represents new opportunities for individuals to participate in social and cultural activities that reach beyond the nation. According to this view, the explosion of cross-border interaction has strengthened international institutions and the development of cosmopolitan legal obligations.[12]

In our view, "globalization" refers to the various processes of economic, social, cultural, and political integration across national borders. Globalization has a profound effect on the concept of physical territory as an organizing principle for social, cultural, economic, or political relations.[13] An individual located in an industrialized nation may just as likely communicate, interact, or work with someone abroad versus at home. Physical territory has become less important in defining an individual's identity, loyalty, or culture. We do not address in this article whether contemporary globalization is fundamentally different from prior periods of high cross-border activity.[14] Nor do we consider which of the various forces—technology, economic exchange, or the end of the Cold War—is the root cause. We believe that all of these forces have contributed to it. For our purposes, it is the consequences, not the causes, of today's globalization that are central to our analysis.

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8. *Id.*

9. *See, e.g.*, DANIEL DREZNER, ALL POLITICS IS LOCAL 10 (2006); JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004); JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002).

10. JAN AART SCHOLTE, GLOBALIZATION: A CRITICAL INTRODUCTION 15-16 (2000).

11. *See* JOHN MICKLETHWAIT & ADRIAN WOOLRIDGE, A FUTURE PERFECT (2000).

12. *See* SCHOLTE, *supra* note 10, at 178-80.

13. DAVID HELD, ET AL., *supra* note 13, at 2-3.

14. For an example of this argument, *see* PAUL HIRST & GRAHAME THOMPSON, GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE (1996).

## II.
## THE RISE OF GLOBAL GOVERNANCE

Most globalization scholarship emphasizes three phenomena that diminish nation-state sovereignty. First, a substantial number of commentators have focused on the impact of the increased levels of trade accompanied by the rise of globalized financial markets. Economic integration has, in the eyes of some, led to the decline of the nation-state as a unit of social organization.[15] Second, globalization has led to an increase in the number and influence of international organizations, which have gained more independence and claimed the power to exercise sovereign powers themselves.[16] Third, globalization has produced a fundamental shift in the nature of international law. The "new international law" purports to create universal, binding obligations regulating a nation-state's treatment of its own citizens. Some scholars have even suggested that this new form of law should receive a new name: "cosmopolitan law" or "world law."[17] This new international law has become an important mechanism for NGOs seeking to influence or limit the ability of nation-states to exercise their sovereign powers. All three of these trends contribute to a growing system of "global governance." We consider each aspect of global governance in turn.

### *A. The Impact of an Increasingly Integrated Global Economy*

Globalization exerts a profound effect on the domestic economy in two main ways. First, the sharp reduction of tariffs and trade barriers since the end of World War II, which has accelerated in the past two decades, has created the free movement of goods and services that is central to globalization. In 1990, the total value of trade in goods was slightly more than 30% of global GDP; by 2009, the value of such trade exceeded 40% of global GDP.[18] In the Eurozone, the value of trade in goods grew from 44% of Eurozone GDP in 1990 to 57% in 2009.[19] For the United States, the overall percentage is lower, but increased from 15% to almost 19% of GDP between 1990 and 2009.[20]

Since the end of the Cold War, international trade has expanded to a much larger group of nations, while its intensity among developed nations has

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15. *See, e.g.*, KENICHI OHMAE, THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES (1995).

16. *See* Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348, 354 (2006) ("NGOs are now often engaged in the review and promotion of state compliance with international obligations.").

17. *See, e.g.,* DAVID J. BEDERMAN, GLOBALIZATION AND INTERNATIONAL LAW 3-54 (2008).

18. WORLD BANK, THE LITTLE DATA BOOK 2 (2011), http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2011/08/16/000333037_20110816012153/Rendered/PDF/638470WDI0Exto00Box0361527B0PUBLIC0.pdf.

19. *Id.* at 15.

20. *Id.* at 220.

deepened. Developing countries have sharply boosted their participation in the world trading system. The lowest-income countries have increased their share of world merchandise trade from about 30% of their GDPs in 1990 to nearly 50% in 2009.[21]

Second, globalization has spurred the cross-border movement of capital, which has outpaced the level of trade in goods. Foreign direct investment, for instance, has grown from about $212 billion in 1990 to over $1.1 trillion in 2009.[22] Nation-states have facilitated this explosion by easing controls on the movement of capital and tariffs on foreign goods and services. As national barriers to cross-border economic activity have fallen, nation-states have become more vulnerable to global market forces.[23] As international trade becomes a larger and more important part of domestic economic output, nation-states that impose significant tariffs or provide large domestic subsidies face the danger of painful retaliation.[24]

Commentators suggest that international capital markets prevent nation-states from pursuing independent macroeconomic policies. Nation-states, for example, cannot fully control the value of their currencies. Private traders forced the United Kingdom to allow movement in the pound, though more authoritarian nations like China have maintained a tighter grip.[25] Currency fluctuation, in turn, has limited the ability of nation-states to pursue macroeconomic policies that fuel growth by expanding the money supply.[26] International markets may impose similar constraints on fiscal policy. Because national governments issue bonds on the international capital markets, they find their ability to set domestic policy constrained by the value of their securities. The international debt markets may penalize nation-states that run up substantial budget deficits.[27] In the aftermath of the 2008 financial crisis, nations like Greece, Ireland, Portugal, and Spain radically changed their fiscal policies under pressure from international capital markets, the European Union, and the International Monetary Fund.[28]

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21. *Id.* at 10.

22. *Id.* at 2.

23. *See e.g.*, Bang Nam Jeon, *From the 1997-8 Asian Financial Crisis to the 2008-9 Global Economic Crisis: Lessons from Korea's Experience*, 5 E. ASIA L. REV. 103, 114-19 (2010) (evaluating South Korea's "ill-prepared" financial liberalization as one of the potential causes of its problems in the 1997 Asian Financial Crisis).

24. *Brazil Threatens Retaliation in Dispute on Cotton Subsidies*, N.Y. TIMES, Mar. 8, 2010, http://www.nytimes.com/2010/03/09/business/global/09trade.html?_r=0 (describing Brazil's threat to impose retaliatory tariffs on U.S. goods).

25. *See* David Litterick, *Billionaire Who Broke the Bank of England*, THE DAILY TELEGRAPH, Dec. 13, 2002, http://www.telegraph.co.uk/finance/2773265/Billionaire-who-broke-the-Bank-of-England.html (describing George Soros's role in forcing the United Kingdom to devalue the pound).

26. *See Set the Money Free*, THE ECONOMIST, Mar. 3, 2012, http://www.economist.com/node/21548943 (describing the Chinese system of capital controls).

27. HELD, *supra* note 2, at 229-30.

28. *See* James Kanter, *European Finance Ministers and I.M.F. Reach Deal on Greek Bailout*

To be sure, this account might overstate the impact of economic globalization on nation-state autonomy. Nation-states, especially those with large domestic economies—like the United States—are far from powerless to set economic policy.[29] Nation-states are unlikely to disappear simply because of higher trade and capital flows. But economic globalization has constrained the ability of nation-states to adopt domestic economic policies freely, though the scope of this restriction remains contested.

### *B. The Rise of International Organizations*

In addition to cross-border trade and capital movements, globalization has prompted the rise of international organizations (IOs) as a key new actor in international relations. International organizations are legal entities established by more than one nation-state pursuant to an international agreement.[30] They have a legal personality, which enables them to exercise rights and fulfil duties on the international plane independently.[31] Recognition of this special status in the years after World War II represents a significant shift from Westphalian sovereignty.

According to one commentator, interstate relations "are increasingly mediated through rationalized institutional processes" rather than the anarchy of the Westphalian system.[32] The role of IOs can be overstated. Nation-states still make the basic decisions of international politics and possess the personnel,

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*Terms*, N.Y. TIMES, Nov. 26, 2012, http://www.nytimes.com/2012/11/27/business/global/euro-finance-ministers-confront-a-standoff-over-greece.html ("[T]he I.M.F. pressed ministers to agree that Greece's debt should be cut by about 20 percent of G.D.P. through methods that include the debt buyback program at discounted prices, lowering interest rates, lengthening the deadlines for debt repayments, and returning profits to Greece made on bonds bought by the European Central Bank."); Stephen Castle and Liz Alderman, *Europe Approves Irish Rescue and New Rules on Bailouts*, N.Y. TIMES, Nov. 28, 2010, http://www.nytimes.com/2010/11/29/business/global/29euro.html ("Dublin has said it would try to cut its budget deficit to 3 percent of gross domestic product by 2014, from 32 percent now . . . ."); Raphael Minder, *Portugal Agrees to a $116 Billion Bailout*, N.Y. TIMES, May 3, 2011, http://www.nytimes.com/2011/05/04/business /global/04portugal.html ("[U]nder the three-year plan, the deficit would need to be lowered to 5.9 percent of gross domestic product this year, 4.5 percent in 2012 and 3 percent in 2013."); Raphael Minder and James Kanter, *Spanish Banks Agree to Layoffs and Other Cuts to Receive Rescue Funds in Return*, N.Y. TIMES, Nov. 28, 2012, http://www.nytimes.com/2012/11/29/business/global/european-commission-approves-bailout-of-four-spanish-banks.html ("The European Commission . . . approved a payment of 37 billion euros, or $48 billion, from the euro zone bailout fund to four Spanish banks on the condition that they lay off thousands of employees and close offices.").

29. *See* DREZNER, *supra* note 9.

30. *See* RESTATMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 221 (1987).

31. *See* Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11) (recognizing the legal personality of the United Nations). *See also*, *Federal Jurisdiction Over International Organizations*, 61 YALE L.J. 111, 111 n.3 (1952) ("The Reparations Case is the first judicial recognition of the legal personality of an international organization.").

32. Spiro, *supra* note 6, at 660.

budgets, and will to pursue policies with real effects in world affairs.[33] But there can be little dispute that independent institutions influence international politics as never before. While a border dispute between two nations once may have produced a bilateral settlement or armed conflict, today global governance regimes might shift the decision to a body like the International Court of Justice.[34] Similarly, a trade dispute that might once have provoked retaliatory tariffs will now be resolved by the WTO.

Although IOs have existed since at least the nineteenth century, their recent proliferation has led at least one provocative study to hail them as the nation-state's successor. As that study describes it, "sovereignty has taken a new form, composed under a series of national and supranational organisms united under a single rule of logic. This new global form of sovereignty is what we call Empire."[35] IOs, however, have yet to reach the power and control to justify such claims. Moreover, too simplistic a characterization may suggest either that all IOs are alike or fit into a single political hierarchy. While some IOs may challenge national sovereignty, others do not, and many, in our opinion, have little impact at all.

IOs bear a substantial diversity in both form and purpose. Some IOs take the form of international tribunals that resolve disputes between nations. The commission established by the 1795 Jay Treaty to settle claims arising out of the Revolutionary War is one example.[36] A modern international tribunal is the ICJ, which the United Nations Charter established to resolve disputes between members.[37] Other IOs take the form of agencies designed to administer and implement policies or technical standards arising from an international legal regime. Classic examples are the Universal Postal Union, which administers rules governing international mail, and the International Telecommunications Union.[38] Still, other IOs function as fora for the discussion of issues and joint policies. An example is the U.N. General Assembly (GA), which guarantees member states' rights to raise and discuss issues of concern. The GA may also pass resolutions and recommendations, but, unlike the U.N. Security Council, it cannot require nations to take action.[39]

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33. For a skeptical view of international institutions, *see* John Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SECURITY 5 (1994).

34. *See, e.g.*, Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), 2002 I.C.J. No. 94 (Oct.10).

35. MICHAEL HARDT & ANTONIO NEGRI, EMPIRE xii (2000).

36. Treaty of Amity, Commerce, and Navigation, U.S.-Eng., art. 5, Nov. 19, 1794, 12 T.S. 13 (Jay Treaty). *See* John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2074-77 (1999).

37. U.N. Charter arts. 92-96. *See* Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 34-41 (2005).

38. Convention on Universal Postal Union, May 23, 1939; Constitution of the International Telecommunications Union, 1932.

39. U.N. Charter arts. 9-22.

IOs pursue a wide variety of purposes. The most basic IO is created by an agreement between two states for a specific purpose. The United States and Great Britain formed a series of boundary commissions between 1794 and 1925 to settle and demarcate the boundary between the United States and Canada.[40] The two countries then established a permanent International Boundary Commission in 1925 to inspect and maintain the boundary line.[41]

At the other end of the power spectrum is the U.N. Security Council. It is composed of five permanent members and ten rotating members authorized to take measures for the "maintenance of international peace and security."[42] Its legal mandate authorizes it to act on any matter affecting international peace and security in the territory of any nation.[43] The veto right of the five permanent members has prevented the U.N. Security Council from exercising this broad power very often.[44]

Most IOs fall somewhere between the Boundary Commission and the U.N. Security Council. While the U.N. represents the largest network of IOs, other IOs may exist outside it. Although almost all members of the WTO are also members of the U.N., for example, the two are institutionally independent and only loosely associated legally.

It is not possible to maintain the view that there is a single "world government" or single IO that threatens U.S. sovereignty. The closest attempt to create a single overarching IO, the U.N., resulted in more of a conglomeration than a single entity. The principal components of the U.N. system often operate independently of the others without any single administrator.[45] Myriad agencies associated with the U.N., such as the World Health Organization or the U.N. International Children's Fund (UNICEF), also operate on a quasi-independent basis and do not directly answer to a common administrator.[46]

But the diffuse, diverse, and nonhierarchical nature of IOs does not mean they cannot affect sovereignty. Two IO characteristics diminish nation-state sovereignty: independence and heightened powers. It seems counterintuitive that IOs would ever limit the sovereignty of nations. Principal-agent theory predicts that nation-states will delegate power to IOs when the latter further the formers'

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40. *See* generally David C. Weiss, *The International Boundary Commission, Treaty Interpretation, and the President's Removal Power*, 41 LOY. U. CHI. L.J. 39 (2009); L.M. BLOOMFIELD & GERALD F. FITZGERALD, BOUNDARY WATER PROBLEMS OF CANADA AND THE UNITED STATES 1 (1958).

41. Treaty of Lake Superior-Lake of the Woods Boundary, U.S.-Eng., Feb. 24, 1925 6 T.S. 7.

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

43. *Id*., arts. 1, 39, 42.

44. *See* Robert Delahunty & John Yoo, *Great Power Security*, 10 CHI. J. INT'L L. 35, 42-44 (2009).

45. For a description of the relationship between the various U.N. agencies and bodies, *see* The United Nations System, http://www.un.org/en/aboutun/structure/pdfs/un-system-chart-color-sm.pdf (last visited Feb. 27, 2013).

46. *See id.*

interests.[47] Nation-states establish IOs to resolve interstate disputes, administer technical standards, create fora to discuss policies, or settle various other issues. But IOs must reflect the interests of more than one member, which means they will not be completely beholden to any nation-state. The willingness of nations to create an IO outside of their direct control—one that might issue decisions contrary to their future interests—sends a signals that the nations intend to live up to the commitments of the IO.

Nations may suffer some short-term setbacks from an independent IO, but they may still benefit from longer-term cooperation with other countries. To be sure, the level of independence will vary. An IO like the ICJ needs more independence to resolve border disputes between nations. Otherwise, the parties could simply negotiate a settlement. On the other hand, the parties to the dispute can establish the range of possible outcomes that they will accept before they bring it to the Court.

IOs can achieve independence in a number of ways. First and foremost, IOs can be staffed and led by individuals who are independent from their member states. Such independence is, we argue, reflected in the appointment and removal of officials. ICJ judges are selected by a vote of the U.N. General Assembly with subsequent approval by the U.N. Security Council, which limits the ability of nation-states to place their nationals on the Court.[48] ICJ judges can be re-elected to nine-year terms and can be removed only by a unanimous vote of the other judges.[49] Although there is some evidence that ICJ judges vote in favor of their home states,[50] the method of selecting the ICJ judges can secure greater independence. For example, the sitting American ICJ judge over the past couple decades has supported ICJ decisions against the United States.[51]

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47. DARREN G. HAWKINS, ET AL., DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 12-17 (2006).

48. Statute of the International Court of Justice, art. 2-12.

49. *Id.*, arts. 13, 18.

50. Eric A Posner & Miguel F.P. de Figueiredo, *Is The International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 624 (2005) (finding that "[ICJ] [j]udges vote for their home states about 90 percent of the time").

51. Indeed, in all four judgments involving the United States over the past couple decades, the sitting American judge on the ICJ has voted against American interests. *See* Request for Interpretation of Judgment of 31 March 2004 in Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2009 I.C.J. 3, 20-21 (Jan. 19) (J. Buergenthal with the majority, finding Mexico's request for interpretation exceeded the scope of the court's judgment, but finding unanimously that the United States "breached" its obligation under the court's July 6, 2008 order regarding José Ernesto Medellín Rojas); Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 70-72 (Mar. 31) (J. Buergenthal with the majority, finding that the United States breached its obligations to Mexico under the Vienna Convention on Consular Relations); Oil Platforms (Iran v. U.S.) 2003 I.C.J. 161, 218-19 (Nov. 6) (J. Buergenthal with the majority, denying the U.S. counter-claim and finding that while "the actions of the United States . . . against Iranian oil platforms . . . cannot be justified as measures necessary to protect the essential security interests of the United States . . . . [the] Court cannot however [find] that those actions constitute a breach of the obligation of the United States"); LaGrand Case (Ger. v. U.S.) 2001 I.C.J. 466, 514-16 (June 27) (J.

At the opposite end of the spectrum, we argue that representatives to the U.N. Security Council neither have nor expect independence. The representatives, usually ambassadors to the U.N.,[52] are appointed and can be removed by their home states for any reason. Under these circumstances, U.N. Security Council representatives will vote according to the wishes of their home states. The U.N. would then likely assume that each ambassador will represent the interests of his or her own country, and according to this view, the GA provides a forum where they can air their interests openly.

Even the most independent IO encounters some limits. The ICJ is funded by GA appropriations, so member states exercise some financial leverage over the ICJ.[53] But even the most dependent IOs, like the U.N. Security Council, can adopt measures that are not supported by some of the member states.[54] While this could not apply to the permanent members because of their veto, rotating members may have to follow a policy that they opposed.[55]

What remains clear is that independence represents a challenge to nation-state sovereignty. In at least some cases, IO decision-makers that are shielded from the control of the nation-states they purportedly represent can impose obligations on nation-states without their consent.[56] This, if true, would increase the likelihood of a real conflict between the IO and the nation-states that formed it.

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Buergenthal with the majority, finding that the United States violated its obligations to Germany under the Vienna Convention on Consular Relations, but dissenting with the majority on a procedural issue).

52. Hans Kelsen, *Organization and Procedure of the Security Council of the United Nations*, 59 HARV. L. REV. 1087, 1087 n.1 (1946) ("The Security Council, like the General Assembly, consists of representatives of the states which are 'members' in the sense of being authorized to be represented by certain individuals. These individuals are appointed by the "member" states, not by the United Nations, as are, for instance, the Secretary-General and the members of the International Court of Justice. They are bound to act in conformity with the instructions given to them by the competent organs of their states."). The list of the current members of the Security Council can be found at http://www.un.org/en/sc/members/. The list of current permanent representatives to the United Nations can be found at http://www.un.int/protocol/documents/HeadsofMissions.pdf.

53. *See* Statute of the International Court of Justice, art. 33 ("The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly."). *See also* Report of the International Court of Justice, Aug. 1, 2011-July 31, 2012, 63, U.N. Doc. A/67/4; GAOR, 67th Sess., Supp. No. 4 (Aug. 1, 2012).

54. *See* U.N. Charter, art. 27(3) ("Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members."); U.N. Charter, art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

55. *See id.*

56. For example, the WTO panel Appellate Body members have an obligation to remain independent from their home countries. Annex 2 of the WTO Agreement, Dispute Settlement Understanding, art. 17 para. 3, http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#17 ("The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government . . . .").

Traditionally, IOs did not directly exercise sovereign powers. Instead, the obligations of states were to be carried out through national domestic legal process. An international arbitral tribunal, such as the U.S.-Mexico Claims Commission, might require a party to pay damages for mistreating citizens of a foreign country.[57] But the nation-state, via its own domestic law processes, has the final word on how and whether to comply with the decision. This fits within the traditional Westphalian principle that a state's consent was necessary to any diminution of its sovereignty.

Recently, however, IOs have begun to acquire sovereign powers previously held by nation-states. Not only does the European Court of Justice (ECJ) have the power to order a nation-state's compliance with the E.U. treaties, its judgments also have direct effect within domestic legal systems.[58] Unlike traditional IOs such as the U.S-Mexican Claims Commission, the ECJ is exercising the sovereign power to interpret and apply treaty obligations within the domestic legal systems of its member nation-states.[59]

In the view of the ECJ, E.U. member states have "limited their sovereign rights" and have created a body of law that binds both individuals and E.U. countries.[60] While there has been some controversy over whether ECJ judgments would trump constitutional obligations, the basic framework has largely gone unchallenged. The ECJ, as well as other institutions of the European Union, have acquired sovereign powers from member states to override significant parts of domestic law.

The United States has also experimented with the transfer of sovereign powers in the North American Free Trade Agreement (NAFTA). Prior to NAFTA, the Commerce Department had the absolute and exclusive power to impose duties on foreign imports that it believed were either unfairly subsidized or "dumped" on the U.S. market.[61] Since the passage of NAFTA in 1994, however, U.S. duties on Canadian or Mexican imports have been challenged in NAFTA arbitration panels.[62] No legal appeal to a U.S. court or U.S. agency is permitted.[63]

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57. Convention for Reciprocal Settlement of Claims, U.S.-Mex., art. I, Sept. 8, 1923, 9 T.S. 935.

58. Case 6-64, Flaminio Costa v. E.N.E.L., 1964 E.C.R. 585 (establishing the supremacy of European Union law over the domestic laws of member states).

59. Posner & Yoo, *supra* note 37, at 57-62.

60. Case 26/62, Van Gend En Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 12.

61. 19 U.S.C.A. Ch. 4 (The "Tariff Act of 1930").

62. *See, e.g.*, In the Matter of Certain Softwood Lumber Products from Canada, Final Affirmative Countervailing Duty Determination, USA-CDA-2002-1904-03 (Dec. 1, 2004) (finding U.S. duties on Canadian softwood lumber to violated the North American Free Trade Agreement (NAFTA)).

63. North American Free Trade Agreement Annex 1904.15, Jan. 1, 1994, T.I.A.S. No. 12,516, 32 I.L.M. 289.

IOs can influence nation-states without directly exercising sovereign powers. The World Bank and the International Monetary Fund have required borrowers to adopt domestic policies such as raising taxes, cutting spending, or lifting controls on financial flows.[64] It is important not to overstate these developments. Transfers of sovereign power are, we argue, in their early stages. The process is furthest along in the European Union, where the member states have, in our opinion, delegated significant authority over a wide variety of matters. Europe itself may not present the clearest picture, because the European Union may signify the creation of what we would describe as a new regional confederation, or even nation, rather, a supranational government. In most areas, IOs still seem to lack their own direct enforcement resources and still seem to rely on nation-states for compliance.[65] But we also see an undeniable trend toward IOs with the legal authority to act directly in areas that used to be the province of nations.[66]

Serious conflicts between an IO and a nation are, we would argue, most likely to occur where that IO both has a meaningful level of independence and exercises sovereign powers. An IO that was independent of a nation-state but did not exercise sovereign powers would not be likely to create any serious conflict. An IO that does exercise sovereign powers but remains completely under the control of a particular nation-state is, according to this argument, also unlikely to create serious problems.

The system of global governance, described by many globalization scholars, reserves an important place for independent IOs.[67] Parallel to the upward shift of power to supranational organizations is a downward shift to subnational governments, nongovernmental organizations, and individuals. A number of scholars have described this phenomenon as the "disaggregation of the nation-state."[68] One aspect of disaggregation poses serious constitutional difficulties. NGOs have, we claim, increasingly used litigation in domestic U.S. courts to build support for international legal norms, and to depart from the policies set by the legislative or executive branches.[69]

Key to this phenomenon is a new kind of international law, which has two qualities. First, international law's emphasis on human rights, we believe, has

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64. HAROLD JAMES, INTERNATIONAL COOPERATION SINCE BRETTON WOODS 323-25 (1996) (explaining how the terms of IMF loans often require the borrowing country engage in trade liberalization and abide by various budgetary and domestic credit restraints).

65. *See, e.g.*, Ku, Delegation of Federal Power, *supra* note 3, at 95-99 (describing WTO power to impose obligations on the United States).

66. *Id.* at 95-114 (describing the role of international organizations in regulating areas such as criminal procedure, domestic chemical production, and trade in wildlife).

67. *See, e.g.*, MICHAEL BARNETT AND MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL GOVERNANCE (2004).

68. *See, e.g.*, Spiro, *supra* note 6, at 657.

69. For a classic statement of the importance of this kind of NGO litigation, *see* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

increasingly focused on cosmopolitan or universalist obligations—by which we mean that they appeal to rights held by all of mankind, rather than by individuals in specific political communities. These values demand greater regulation of a government's treatment of its own citizens, which has traditionally resided exclusively within the sovereignty of the nation-state. Second, influence over the interpretation of international law, which had relied heavily on the practice of nation-states, has shifted toward independent IOs, nongovernmental organizations, and transnational elites.[70]

International law has an ancient pedigree.[71] The classic statement of the traditional approach is found in the *S.S. Lotus* opinion of the Permanent Court of International Justice (PCIJ). "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law."[72] Traditional international law reflects, in many ways, the basic assumptions of the Westphalian system, as we understand it. Its pillar, according to this understanding, is the absolute sovereignty of nation-states, and it binds a state only by consent through formal treaty or practice and custom. No central organization enforces rules on dissenting states. The nation-state is the only actor in this system, as we understand it, because international law applies exclusively to relations between sovereigns.

Private actors are largely excluded from the development of international law. The unlawful detention of an ambassador doesn't violate her rights as an individual; it violates the sovereign's right to the inviolability of its diplomatic personnel. A private individual seeking vindication of his rights against a nation must convince his own government to seek a settlement. This principle is part and parcel of the 1945 ICJ statute,[73] and was affirmed by the ICJ as late as 1970, when it rejected the right of shareholders to seek remedies against a state and required instead diplomatic espousal.[74]

Because traditional international law focused on developing rules for states in their relations with one another, an individual harmed by another nation or its citizens would have to seek relief through her own court system. Nothing in international law itself, however, forbids a domestic court from using international rules as a source of guidance or persuasive authority. U.S. courts

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70. *See*, *e.g.*, Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 YALE L. J. 2599 (1997); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991). For criticism, *see* Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000).

71. *See, e.g.*, COLEMAN PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME (1911); DAVID BEDERMAN, INTERNATIONAL LAW IN ANTIQUITY (2001).

72. The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

73. Statute of International Court of Justice, art. 34, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

74. Barcelona Traction, Light, and Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3, 45, 78 (Feb. 5).

have applied rules of general international law when no other rules of decision, in the form of treaties, statutes, or executive declarations, governed. As the U.S. Supreme Court has explained: "[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations and as evidence of these, to the works of jurists and commentators."[75]

### *C. The New International Law*

Recently, commentators have described the rise of a new kind of international law. They have used different terms, such as "world law," "supranational law," or "cosmopolitan law," to distinguish it from traditional international law.[76] There are two noteworthy features of this new international law that raise serious issues under the U.S. Constitution. First, the new international law is openly concerned with the relationship between a nation and its own citizens or between citizens of different nations. The *Restatement (Second) of the Foreign Relations Law of the United States* (1965) did not take a position on whether international law was limited to state-to-state relations.[77] Twenty-five years later, the *Restatement (Third)* unequivocally stated that international law includes rules and principles governing states' "relations with persons, whether natural or juridical."[78] This represents a significant shift from the ICJ's assertion that individuals "have no remedy in international law."[79] The most prominent example is human rights law, whose most important innovation is its insistence that human rights are universal. Under the traditional conception of international law, as we understand it, if a wrongdoing state was an injured person's own state, then the individual had no remedy under international law.[80] If France, for example, wanted to deprive its citizens of the right to free speech, that would be, under our understanding of the traditional conception, of no interest to the United States, which could not claim any harm to its own citizens.

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75. The Paquete Habana, 175 U.S. 677, 700 (1900).

76. *See* Peter Hay, *Supranational Organizations and United States Constitutional Law*, 6 VA. J. INT'L L. 195, 195-96 (1966); Patrick Tangney, *The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany*, 21 YALE J. INT'L L. 395, 399-404 (1996).

77. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 (1964-65) (defining international law as "those rules of law applicable to a state or international organization that cannot be modified unilaterally by it").

78. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101, n.1 (1986).

79. Barcelona Traction, Light, and Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 45, 78 (Feb. 5) ("The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law.").

80. *Id.* ¶ 78 (describing individual's inability to assert rights under international law).

International human rights law, we think, denies this basic premise. It maintains that harming an individual's international human rights, even by her own government, remains a violation of international law.[81]

This inevitably expands the subject matter of international law. The International Convention on Civil and Political Rights guarantees the individual rights of free expression, political association, property, life, and procedural justice, among others.[82] Similarly, the International Convention on Economic, Social and Cultural Rights guarantees the right to health care, economic well-being, and work.[83] Both agreements operate as a limitation on nations' domestic policies. For instance, during its recent report on its compliance with the ICCPR, the U.S. government responded to concerns raised by the UNHRC about its protection of the right to vote during the 2000 and 2004 presidential elections.[84] NGOs have filed charges with the U.N. alleging widespread violations by the United States of the rights to vote, to a fair trial, to adequate health care, and to adequate housing.[85] Whether or not there is merit to these charges, we think that the U.S. government's acknowledgment that it has international obligations to guarantee individual rights represents a substantial departure from traditional international law's assumption of a state's absolute and exclusive sovereignty within its own territory.

The second hallmark of the new international law is that the processes for creating, interpreting, and enforcing international law have changed. Traditionally, the interpretation and application of international law relied heavily on the practice and opinion of nation-states. A nation-state that refused to follow a custom, or refused to recognize it as a legal rule, could not be bound. With respect to treaties, a nation-state controlled whether or not it signed.

The role of state consent in the new international law has become less important because of the combination of *jus cogens* obligations and international human rights law. *Jus cogens* obligations consist of those clear and well-established international obligations, such as the prohibitions on genocide, torture, and piracy, which bind nation-states even without their consent.[86]

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81. *See*, *e.g.*, Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INTL. L. 237, 241 (2000) ("[Human rights law] asserts that certain humane values, through a process of international dissemination and support, have become binding rules that constrain what states may to do to both their own and other countries' citizens.").

82. International Covenant on Civil and Political Rights, arts. 1, paras. 1-2, 6, para. 1, 14, 19, para. 2, Dec. 16, 1966, 999 U.N.T.S. 171.

83. International Covenant on Economic, Social and Cultural Rights, arts. 6, para. 1, 7(ii), 12, Dec. 16, 1966, 993 U.N.T.S. 3.

84. Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Third Periodic Report of States Parties Due in 2003, United States of America, paras. 397-405.

85. International Human Rights Law & Hurricane Katrina: ICCPR Violations by the United States Government, United Nations Human Rights Committee Hearings of 17 & July 18, 2006, 87th Session, http://www.ohchr.org/english/bodies/hrc/docs/ngos/nba.pdf.

86. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8

International human rights law seeks to expand the scope of norms considered *jus cogens*, which reduces the freedom of nation-states to change, interpret, and apply international law.

Non-state actors have come to influence the content and scope of many different kinds of international law, perhaps most so in the area of customary international law (CIL). Unchained from traditional international law's rigid focus on nation-states, NGOs have become important, sometimes dominant actors in the formation, interpretation, and enforcement of new international law.[87] Traditionally, CIL required long-standing, uniform practice of states resulting from the states' sense of legal obligation (known as "*opinio juris*").[88] NGOs cannot alter the substantive definition of CIL, but they have attempted to change the process by which state practice is identified. In the past, state practice would come to light after decades, if not centuries, of diplomatic conduct by nation-states. NGOs and IOs have sought to accelerate this process by promulgating a new norm of international law, persuading states to adopt it, and then arguing that dissenting states refusing to follow are bound by universal practice.[89] Today, multilateral treaties[90] and even "diplomatic correspondence, treaties, public statements by heads of state, domestic laws"[91] have been accepted as manifestations of CIL, or at least as elements of it. In this way, NGOs outside the control of any nation-state can use their influence to co-opt the process of identifying customary state practice, effectively imposing legal obligations on unwilling nations, further reducing their sovereignty.[92]

The possibilities of this non-state method of developing international law have seized the attention of scholars and advocates. Harold Koh calls for a new method of developing international law; his "transnational legal process" emphasizes the central role that private transnational organizations play in the formation of international law.[93] Lawyers working in concert, often through transnational nongovernmental associations, can, according to Koh's account, persuade domestic courts to recognize an international norm without

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I.L.M. 679 ("[*Jus cogens*] is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."). *See also* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992).

87. *See* Charnovitz, *supra* note 16.

88. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §102(2) (1987).

89. *See generally* Patrick J. Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 499 (2000).

90. Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 161-63 (describing how "[t]he ICJ seems to accept that treaties can serve as evidence of CIL").

91. *Id.* at 125-26 (describing various views on what qualifies as state practice for CIL).

92. For a general description and description of this development, *see* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000).

93. *See* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

intervention or approval by the political branches of a nation's government.[94] While traditional international law focuses on state practice, the new international law can be shaped first by domestic litigation driven by NGOs. NGOs have sought, in at least several instances of U.S. litigation, to establish international law obligations imposing aiding-and-abetting liability on corporations, the right to organize workers, freedom from capital punishment, freedom from pollution, and freedom from arbitrary detention.[95]

The success, or lack thereof, of these litigation strategies is not as important as their goal. Rather than analyzing state practice or seeking diplomatic opinion, the decentralized lawmaking process allows NGOs to set the international lawmaking agenda and win recognition of new international legal norms. This process also allows IOs without any formal sovereign power, such as the UNHRC, to play a significant role in the interpretation and development of international law.

Since the 9/11 terrorist attacks, a combination of transnational NGOs and independent IOs has challenged the legality of various aspects of the U.S. government's war on terrorism.[96] Transnational NGOs, for instance, have participated in domestic litigation to argue that the U.S. government's rendition, detention, interrogation, and trial by military commission of alleged terrorists violates both international human rights law and international humanitarian law.[97] Buttressed by legal opinions from independent IOs like the Council of Europe and the UNHRC, such litigation has had partial success in overturning some U.S. government policies, despite the government's contrary views about the interpretation of the relevant international law norms.[98]

## III.
## RECONCILING GLOBALIZATION AND SOVEREIGNTY

The three aspects of globalization discussed above substantially affect the sovereignty of nation-states. In this section, we distinguish between the most

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94. *See id.* at 197 (discussing how various nongovernmental groups pressured President Clinton to change his policy on the extraterritorial return of Haitian and Cuban refugees in 1994).

95. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

96. *See* Julian G. Ku, *The Third Wave: The War on Terrorism and the Alien Tort Statute*, 19 EMORY INT'L L. REV. 105 (2005).

97. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008).

98. *See, e.g.*, Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702, 723 (D. Md. 2010) (citing such legal opinions to support the proposition that "[t]reaties, conventions, and declarations from around the world further support the global consensus that torture is a violation of the law of nations and is never permitted, even in wartime."), *rev'd*, Al-Quraishi v. L-3 Services, Inc., 657 F.3d 201 (4th Cir. 2011) (reversing the district court's denial of defendants' motion to dismiss on collateral order review grounds), *rev'd*, Al Shimari v. CACI Intern., Inc., 679 F.3d 205 (4th Cir. 2012) (en banc) (ruling that the court did not have jurisdiction over defendants' interlocutory appeals).

widely used conception of sovereignty—Westphalian sovereignty and popular sovereignty.

### *A. Westphalian Sovereignty*

Nation-state sovereignty is often thought to be synonymous with Westphalian sovereignty. Westphalian sovereignty assumes the absolute control of nation-states over all conduct that occurs within their own territories. As described by Chief Justice John Marshall:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.[99]

A nation's sovereignty, then, can be diminished or limited, but any such limitations must be "traced up to the consent of the nation itself. They can flow from no other legitimate source."[100] Within a country's territorial jurisdiction, a nation's sovereignty is "exclusive and absolute."[101] Any limitation on a nation's sovereignty, such as that arising from international law, can only arise with the consent of the sovereign.[102]

To be sure, this definition of sovereignty may not always have prevailed, even among the nation-states themselves.[103] As Stephen Krasner has pointed out, nations have long been willing to discard certain elements of sovereignty when it suited their purposes.[104] But, as Marshall's statement in the *Schooner Exchange* case suggests, absolute state sovereignty was widely accepted as a description of the world's political organization in the aftermath of the Peace of Westphalia in 1648.

While many scholars argue that this version of absolute state sovereignty is eroding, this claim is overstated. Global governance may be more dream than certainty. Westphalian sovereignty may be merely a shibboleth for neo-isolationists, rather than a value worth protecting. As we readily admit, the institutions of global governance are only now emerging from their infancy. Some, such as the U.N. Security Council and the ICJ, have existed since the adoption of the U.N. Charter, but have sought to expand their reach only in the last few decades. Proposals for others, such as the World Trade Organization, took a half-century.[105] A few, such as the International Monetary Fund and the

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99. Schooner Exchange v. McFaddon, 11 U.S. 116, 136 (1812).

100. *Id*.

101. *Id.*

102. *Id.*

103. STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).

104. *Id.* at 7-9.

105. CONGRESSIONAL RESEARCH SERVICE, THE WORLD TRADE ORGANIZATION: BACKGROUND AND ISSUES (2007).

World Bank, have reoriented their missions and become more interventionist in the domestic affairs of nations.[106]

We do not deny that new species of international cooperation have emerged. New multilateral agreements regulate the internal as well as external conduct of nation-states. But what makes the current round of treaties different is their marriage of sweeping, universal rules with independent institutions of enforcement. The latest version of the General Agreement on Tariffs and Trade, for example, not only requires national treatment for foreign imports; it also creates a rulemaking body (the World Trade Organization) to develop amendments to the treaty, and a court system (the Dispute Settlement Understanding) to resolve trade disputes.[107] The Rome Statute not only outlaws war crimes and crimes against humanity; it also creates a prosecutor's office to investigate and prosecute crimes, and a court system to try the defendants.[108] The Law of the Sea Convention both sets out rules for the free navigation of the high seas, and creates an international tribunal for the resolution of disputes.[109] The Chemical Weapons Convention creates a Secretariat that can ban new chemicals and conduct surprise inspections of domestic production sites.[110]

These new forms of multilateral cooperation challenge U.S. sovereignty by transferring lawmaking authority from the Constitution's organs of government to international bodies. International agreements have yet to prompt the United States to hand over any truly serious government function, such as the setting of monetary policy. However, future international agreements may. The formal regulation of chemicals under the Chemical Weapons Convention necessitated the creation of an international agency that exercises the power to ban all use of any chemical and to conduct surprise inspections on any chemical site. In our opinion, a similar IO might be necessary for the successful regulation of climate change.[111] The creation of durable institutions that can enforce international norms within the American legal system would erode Westphalian sovereignty.

Jeremy Rabkin has forcefully argued that these developments undermine the capacity of nation-states to pursue their national interest.[112] Global governance disrupts the relationship between a people and their nation by transferring the locus of legislative and enforcement authority to IOs.[113]

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106. NGAIRE WOODS, THE GLOBALIZERS: THE IMF, THE WORLD BANK, AND THEIR BORROWERS (2006) (reviewing the history and evolution of World Bank and IMF).

107. *See* Posner & Yoo, *supra* note 37, at 44-51.

108. *Id.* at 67-70.

109. *Id.* at 70-72.

110. John Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87 (1998).

111. Julian Ku & John Yoo, *Globalization and Structure*, 53 WM. & MARY L. REV 431, 434 (2011).

112. *See generally* JEREMY RABKIN, LAW WITHOUT NATIONS (2005).

113. *Id.*

Citizens with divided loyalties might be less likely to defend national interests.[114] Rabkin believes that this will cause a decline in global welfare, since only nation-states retain the strength to stop aggression by authoritarian regimes or to halt human rights catastrophes.[115]

If the organs of global governance were all institutions such as the U.N. Security Council or the ICJ, Rabkin's fears would be dispelled. As a permanent member of the U.N. Security Council, the United States maintains a veto. The United States has refused to give ICJ decisions effect in its domestic legal system,[116] and has even taken the position that ICJ judgments can only be enforced against it by a vote of the U.N. Security Council.[117] The United States withdrew from the ICJ's mandatory jurisdiction because of Nicaragua's 1986 suit over the CIA's mining of Managua harbor.[118] More recently, the United States has refused to comply with the ICJ's decisions ordering review and reconsideration of death penalty verdicts against foreign nationals.[119]

But critics of global governance can point to more than the U.N. Charter, the WTO, or the Law of the Sea Treaty. They can point to the evolution of the European Union as the future of global governance. Initially, the Communities began as a free-trade area, but today the European Union is bound together by a Commission that regulates the economy, trade, consumer safety, antitrust law, and environmental activity throughout the Union; a Council that has its own taxing and spending authority; a Court that exercises judicial review over the legislation of member states; and a Bank that administers monetary policy through a common currency. These core institutions of pan-European governance do not undergo regular elections; the only element of popular representation lies in the European Parliament, which does not have the authority to issue Europe-wide directives that override national legislation. The European Union has given birth to a large bureaucracy that seems so distant from the usual mechanisms of electorate accountability that one of us has previously criticized Europe as having a "democracy deficit."[120]

Thus, the danger is not just that the ICJ may try to stop an American execution in the odd case, but that such moves are precursors to a more comprehensive system of global governance. The European Union does not create merely a forum for the resolution of disputes between European nations, as the U.N. Security Council does for the great powers. Rather, the European Union creates an independent international institution that can directly regulate

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114. *Id.*

115. *Id.*

116. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 374, 376-77 (1998).

117. *See* Medellin v. Texas, 552 U.S. 491, 509-10 (2008).

118. *United States: Statement on the U.S. Withdrawal from the Procedings Initiated by Nicaragua in the International Court of Justice*, 24 INT'L LEGAL MATERIALS 246 (1985).

119. *See* Posner & Yoo, *supra* note 37, at 34-41.

120. *Id*. at 54-67.

private individuals and government agencies. It is not dependent on the nation-states to carry out its will. It has no directly elected legislature or executive branch (though there is a European Parliament with limited powers) that exercise the normal powers of a government. It is governed by bureaucrats and judges created by the E.U. treaties. It is, in Rabkin's words, a "postmodern construction."[121] We do not claim that this has happened in the United States. The Supreme Court has refused to carry out ICJ decisions, though on the other hand, the North American Free Trade Agreement has moved the United States, Canada, and Mexico into a tighter economic unit. Our point is that regardless of the origins of an international organization, it may pose a threat to sovereignty once its powers allow it to directly regulate private citizens and their conduct without the mediation of a national government.

New forms of international cooperation clearly follow the European model as they seek to regulate areas such as pollution, arms control, and trade in services. Just as the European nations sought to create supranational forms of governance that would sublimate the nationalist impulses that led to two destructive world wars, the new forms of global governance seek to submerge national interests. A treaty on the prohibition of land mines, for example, does not create a forum for nations to reach accommodation on the use of certain weapons. Rather, it is an effort primarily driven by NGOs and nations that already do not use land mines and do not conduct significant military operations abroad.[122]

The International Criminal Court represents the Europeanization of international law and politics. The ICC does not serve as a forum to arbitrate disputes between nations. It has its own prosecutors who may bring cases against the officials of sovereign states before an independent court, which has the power to sentence and imprison the guilty.[123] Nations that ratified and have domestically implemented the Treaty of Rome have an obligation to hand over individuals wanted by the ICC, but otherwise the Court does not depend on nations to carry out its decisions. It is true that the Rome Statute allows member states to investigate their own citizens first before the ICC can intervene.[124] But this principle of complementarity grants the ICC the ability to decide whether a member state has been unwilling to investigate in good faith—and thus gives the IO the ultimate say on a prosecution.

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121. Jeremy A. Rabkin, *Recalling the Case For Sovereignty*, 5 CHI. J. INT'L L. 435, 453 (2005).

122. Kenneth Anderson, *The Ottawa Convention Banning Landmines: The Role of Non-governmental Organizations and the Idea of an International Civil Society,* 11 EUR. J. INT'L L. 91 (2000).

123. Rome Statute, art. 17 (" . . . the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution . . . ").

124. *Id.*

This fundamental change in the nature of international institutions did not evolve naturally, but had been propelled along by expansive academic theories. Leading international legal scholars, such as Abram and Antonia Chayes, celebrate the arrival of the "new sovereignty."[125] The international order is governed, not by autonomous nation-states that control all affairs within their borders, but by a "tightly woven fabric of international agreements, organizations, and institutions that shape their relations with one another and penetrate deeply into their internal economics and politics."[126] Chayes and Chayes argue that if sovereignty refers to a nation's ability to govern activity within its borders, then it must move upward to international organizations, because globalization means that no individual state can fully control the people and activity on their territory.[127]

One way that the "new sovereignty" operates, according to Anne-Marie Slaughter, is through transnational networks of government officials.[128] Finance ministers meet through organizations like the G-8 and the G-20 to coordinate solutions to international debt crises. Officials of the United States, Canada, and Mexico meet through NAFTA bodies to create a transnational environmental enforcement network. Judges on some national courts increasingly, Slaughter argues, cite precedents from other countries and international tribunals, stitching together, in countries that respect international law, something like a transnational body of law in discrete areas.[129] These networks share information, build trust between nations, and spread best practices, the combination of which allows them to harmonize and enforce a common set of policies and laws. According to Slaughter, transnational networks will eventually "disaggregate sovereignty" because individual agencies will exercise authority in a nation as part of an international network, rather than as part of a nation-state's government.[130]

In this vision, international institutions and international law reverse the traditional understanding of sovereignty. Sovereignty originally meant that a nation-state was free from any other form of governance in its control of activity within its borders.[131] A nation-state would not be subject to the political claims of a supranational entity, such as the Holy Roman Empire, or a higher authority,

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125. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 123 (1997).

126. *Id.* at 26.

127. *Id.* at 26-28.

128. *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

129. *Id*. at 34-35.

130. *Id*.

131. The Schooner Exchange v. McFaddon, 11 U.S. 116 (Cranch) (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.").

such as the Catholic Church. Whether it chose to cooperate with other nations was a matter of its own consent, usually expressed through the form of treaties and long customary practice.[132] According to the theories promulgated by academics and advocates, however, sovereignty is defined not by independence, but by a state's ability to fulfill international obligations.[133]

### *B. Popular Sovereignty*

Broad trends in economic integration and shared global governance are eroding Westphalian sovereignty in powerful ways. But a decline in Westphalian sovereignty does not prevent nation-states from maintaining other forms of sovereignty, or that nation-states will necessarily wither away.

We believe that the American concept of popular sovereignty can help sort out these dilemmas. By "popular sovereignty," we refer to the prevailing theory of sovereignty expressed in the U.S. Constitution. Under this framework, the ultimate sovereign power in the United States is not in the nation's government, but in its people.

This idea was at the ideological heart of the American Revolution. Rejecting the concept that sovereignty was vested in the Crown or in the government, some revolutionaries believed that governments "deriv[ed] their just Powers from the Consent of the Governed," and that when a government abused these powers, "it is the Right of the People to alter or to abolish it, and to institute new Government."[134] Although the true sovereign, according to the political theory of the day, had to possess unlimited, indivisible, and final authority, the American people believed that they could delegate narrower power to the government.

Government officials, however, were not sovereign themselves, but agents of the people.

As James Madison wrote in *Federalist No. 46,* "[t]he federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes."[135] Madison reminded critics of the proposed Constitution "that the ultimate authority, wherever the derivative may be found, resides in the people alone."[136] The government can exercise only the power that the people have delegated to it. Any law that conflicts with the written Constitution is illegal, because it goes beyond the delegation of power from the people to the government.

To be sure, the Supreme Court has not always accepted the exclusivity of popular sovereignty. In *Curtiss-Wright v. United States*, the Court suggested that

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132. *Id.*

133. *See* CHAYES & CHAYES, *supra* note 125, at 26.

134. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

135. JAMES MADISON, THE FEDERALIST NO. 46 239 (Max Beloff ed. 1987).

136. *Id.*

the U.S. government might possess powers, at least with respect to foreign relations, which arise out of America's status as a nation.[137] *Curtiss-Wright* can be understood as an expression of Westphalian sovereignty, but it remains unclear whether it accurately describes the transfer of authority from the people to the government through the Constitution. This aspect of *Curtiss-Wright* has not been developed by subsequent decisions, and scholars have long criticized *Curtiss-Wright* for its extra-constitutional search for sovereignty.[138]

Focusing on popular sovereignty rather than Westphalian sovereignty has a number of consequences. First, analysis of popular sovereignty can draw on U.S. domestic precedent and experience in allocating constitutional powers within the U.S. domestic system. This form of analysis can aid in understanding America's relationships with foreign and international institutions.

Second, popular sovereignty can provide a more flexible baseline for maintaining national sovereignty. Because of the absolutist claims of Westphalian sovereignty, almost any incursion or limitation on nation-states is a diminution. By contrast, popular sovereignty assumes that sovereign powers can be shared, divided, and limited without giving up on the entire system. In other words, popular sovereignty can coexist with elements of global governance in ways that Westphalian sovereignty cannot.

Popular sovereignty is both more and less restrictive than Westphalian sovereignty. If global capital markets restrict America's ability to maintain the value of the dollar, her Westphalian sovereignty has been infringed—a nation's absolute and exclusive power to manage activities within its territory has been restricted. But such a restriction would not create problems for popular sovereignty, because it does not undermine the Constitution's allocation of powers or its guarantees of individual rights. Indeed, popular sovereignty already assumes that the U.S. government operates under substantial and fundamental constraints within its territory. The difference is that the United States cannot fully control external constraints on its sovereignty generated by the international capital markets, but it can restrict legal limits on its sovereignty by IOs and multilateral treaties by withholding its consent to international regimes. On the other hand, if the U.S. government were barred by international agreement or international law from controlling the value of its currency, the allocation of governmental powers set forth by the Constitution could potentially be undermined.

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137. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16, 318 (1936) (arguing that "the powers of external sovereignty did not depend upon the affirmative grants of the Constitution").

138. *See, e.g.,* David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); C. Perry Patterson, *In re The United States v. The Curtiss-Wright Corporation*, 22 TEX. L. REV. 286 (1944); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations,* 85 VA. L. REV. 1, 5 (1999) (describing Curtiss-Wright as a break from enumerated powers doctrine).

## CONCLUSION

Globalization is a sprawling concept with a wide range of definitions. We have focused on globalization's acceleration of the movement of goods and services, people, capital, and information in ways that hamper a state's ability to regulate all activity on its territory—the central definition of national sovereignty. Conduct that crosses state borders gives rise to demands for international cooperation. We argue, however, that efforts to solve globalization's effects by turning automatically to international organizations and law that take precedence over national sovereignty are premature and inconsistent with the continuing power and relevance of nation-states.

Rather than reject international law, or conjure forth the demise of the nation-state, we propose a middle way. Popular sovereignty establishes the Constitution as the authoritative mechanism for the generation and enforcement of national law within the United States. The Constitution's structural provisions, such as the separation of powers and federalism, set the stage for making international law and institutions compatible with American democratic government, and thereby allow the United States to benefit from the gains of international cooperation.