

# ARE THE STATES SOVEREIGN?

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*A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.*<sup>1</sup>

I. INTRODUCTION

“Sovereignty” is something of a mythical concept.<sup>2</sup> For all the volumes that have been written about it, the concept remains somewhat elusive.<sup>3</sup> Yet sovereignty remains a significant aspect of statehood, statecraft, and, domestically, of constitutional federalism. The concept performs a variety of functions, domestically and abroad.<sup>4</sup> Sovereignty channels legal and political arguments regarding power and authority. It provides “a recognized legal and political hierarchy,” thereby contributing to stability “by creating expectations of how political entities are to behave.”<sup>5</sup> Sovereignty regulates the movement of goods and people. It contributes to order by “creating a class of political entities that are expected to be

1. *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.).

2. Bardo Fassbender, *Sovereignty and Constitutionalism in International Law*, in *SOVEREIGNTY IN TRANSITION* 115 (Neil Walker ed., 2003) (sovereignty has “acquired an almost mythical quality”).

3. Recent treatments of the concept of sovereignty include: JENS BARTELSON, *A GENEALOGY OF SOVEREIGNTY* (1995); JOSEPH A. CAMILLERI & JIM FALK, *THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD* (1992); ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); MICHAEL R. FOWLER & JULIE M. BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY* (1995); F.H. HINSLEY, *SOVEREIGNTY* (2d ed. 1986); ALAN JAMES, *SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY* (1986); NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH* (1999); *SOVEREIGNTY IN TRANSITION*, *supra* note 2; *STATE SOVEREIGNTY AS SOCIAL CONSTRUCT* (Thomas J. Biersteker & Cynthia Weber eds., 1996); CYNTHIA WEBER, *SIMULATING SOVEREIGNTY: INTERVENTION, THE STATE, AND SYMBOLIC EXCHANGE* (1995).

4. *See generally* FOWLER & BUNCK, *supra* note 3.

5. *Id.* at 141.

permanent fixtures” in domestic and international contexts.<sup>6</sup> Sovereignty levels the playing field by insisting on equality. It “promote[s] the self-determination of political communities.”<sup>7</sup>

In its classical sixteenth century formulation, “sovereignty” connoted unlimited and absolute power within a jurisdiction.<sup>8</sup> Recent events, however, particularly the formation of the European Union, have called this conception of sovereignty into doubt. Members of the EU have joined or “pooled” their sovereignty, an act which seemingly disqualifies them as “sovereign,” at least in the classical sense. International lawyers and theorists have questioned whether international relations, in which nations and nation-states are increasingly interconnected and exclusive power is a fiction, have moved beyond the traditional Westphalian system of “sovereign states.”<sup>9</sup> At the least, some believe it may be time to re-assess and update the centuries-old idea of the sovereign state.<sup>10</sup> With all of these changes, however, the ordering concepts of statehood and sovereignty refuse to disappear.<sup>11</sup> “Sovereignty” has purportedly been transferred to Iraq.<sup>12</sup> Nations, and territories seeking to become nations, continue to advance claims to “state sovereignty.”<sup>13</sup> On the world stage, it appears as if the idea of “state sovereignty” will not be eradicated any time soon. Indeed, if anything, the concept appears to be prospering.

6. *Id.* at 142.

7. *Id.* at 145.

8. See HINSLEY, *supra* note 3, at 26 (noting that “at the beginning, at any rate, the idea of sovereignty was the idea that there is a final and absolute political authority in the political community”).

9. See, e.g., CAMILLERI & FALK, *supra* note 3, at 3 n.7 (discussing challenges to state sovereignty in light of modern conditions). The Westphalian system of states followed the Peace of Westphalia in 1648, which ended the Thirty Years’ War. See Neil Walker, *Late Sovereignty in the European Union*, in SOVEREIGNTY IN TRANSITION, *supra* note 2, at 9. For an argument that international relations has reached a “post-sovereign” stage, see Richard Bellamy, *Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Rights Within the EU*, in SOVEREIGNTY IN TRANSITION, *supra* note 2, at 167 (“the established pattern of sovereign states faces practical and normative challenges”).

10. See CAMILLERI & FALK, *supra* note 3, at 3.

11. *Id.* at 11 (“Sovereignty in both theory and practice is aimed at establishing order and clarity in an otherwise turbulent and incoherent world.”).

12. See G.A. Res. 1546, U.N. SCOR, 4987th mtg. at 1 (2004) (“Reaffirming the independence, sovereignty, unity, and territorial integrity of Iraq”) (emphasis omitted); see also Steven R. Weisman, *Congress Seeking to Clarify Iraqis’ Role Under Self-Rule*, N.Y. TIMES, May 14, 2004, at A12; Steven R. Weisman, *The New Government Faces Bargaining Over Its Power*, N.Y. TIMES, June 2, 2004, at A9 (reporting that Iraq’s caretaker government would assume “full sovereignty” after June 30, 2004).

13. Quebecois, Basque nationalists, Palestinians, and Scots all continue to plead for sovereignty. See Michael Keating, *Sovereignty and Plurinational Democracy: Problems in Political Science*, in SOVEREIGNTY IN TRANSITION, *supra* note 2, at 203–04 (2003) (noting the “paradox, that sovereignty is said to be ebbing away, but new sovereignty claims are being made all the time”).

Much closer to home, the concept of “state sovereignty” also stubbornly persists and prospers. The framers of the Constitution imported the concepts of “state” and “sovereignty” from Europe. They then proceeded to alter the concepts, first by binding states together in union, and then substantially limiting not only their powers, but those of the central government as well. The Constitution mentions “States” at several points, so it seems at least certain that the states are intended to be a permanent part of the governance structure.<sup>14</sup> Unlike the Articles of Confederation, which expressly reserved the “sovereignty” of the states,<sup>15</sup> the Constitution does not even mention “sovereignty.” Yet state claims to sovereignty persist and are routinely recognized. The Supreme Court has recently stated that the Constitution “preserves the sovereign status of the States” by “reserv[ing] to them *a substantial portion* of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status.”<sup>16</sup> The idea of “dual sovereignty”<sup>17</sup>—that whatever they may have ceded, the states retain “a residuary and inviolable sovereignty”—has provided the basis for recent Court rulings that “laws conscripting state officers violate state sovereignty.”<sup>18</sup> Indeed, it has provided the basis for the recent “revival” in constitutional federalism.

Faced with persistent claims of “state sovereignty” the world over, scholars have essentially been asking the same question: Are the states sovereign? Yet surprisingly, to date no effort has been made by American constitutional scholars to incorporate any part of the far more rigorous thinking about state sovereignty done by international relations scholars. This is curious for two reasons. First, as noted, the framers borrowed the concepts of “state” and “sovereignty” from Europe. It would seem, then, that we might benefit from knowing something about what has happened to these concepts in Europe and elsewhere since the framing. Second, as we shall see, the debates concerning the viability and substance of sovereignty in the international relations and domestic constitutional arenas have been remarkably similar. Scholars in both fields have variously defended the concept of state sovereignty, denied its existence

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14. See John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 28–29 (1998) (“[T]he framers recognized that the states were to be a permanent feature of the national political landscape.”).

15. See ARTICLES OF CONFEDERATION, art. II (“Each state retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated” to Congress.).

16. *Alden v. Maine*, 527 U.S. 706, 714 (1999) (emphasis added).

17. THE FEDERALIST No. 39, at 258 (James Madison) (Isaac Kramnick ed., 1987).

18. *Printz v. United States*, 521 U.S. 898, 925 (1997).

except in its original classical form, and derided it as a “myth” or polemical tool.

This Article is the first effort to bridge the scholarly divide by means of a conceptual comparison of state sovereignty here and abroad. To be clear, this Article does not claim that the *substance* of state sovereignty is the same in all respects for states as it is for nations.<sup>19</sup> The states and nation-states are obviously vastly different creatures, with vastly different powers and rights. However, their claims to sovereignty, the manner in which these claims are made, and the implications of states’ success in making such claims, are indeed similar and thus worth comparing. This Article will draw upon certain insights of international scholars in addressing whether the American states are “sovereign,” and if so in what sense. Based upon an examination of the evolution of the concept of sovereignty, this Article concludes that the states are indeed meaningfully sovereign.

Part II briefly introduces the concept of sovereignty. The literature and critical analysis regarding sovereignty are voluminous and it would be impossible to provide a general survey of the topic in this space. Part II provides only a very brief introduction to the concept, focusing specifically on its formal, classical iteration.

Part III describes and critiques various domestic discourses regarding state sovereignty. The framers intimated that the states were “sovereign” but failed to explain why or in what respect this is so; they thus bequeathed to future generations “our oldest question of constitutional law.”<sup>20</sup> The Supreme Court has waffled famously on the issue, leading us through eras that this Article labels “pre-sovereignty,” “quasi-classical sovereignty,” “shared sovereignty,” and, finally, “late sovereignty.” The modern era is characterized principally by bald Court pronouncements that the states are indeed truly “sovereign.” Scholars, in turn, have responded to the Court’s invocations of state sovereignty by denying that the states are or can be sovereign. They have generally advanced three theories for their argument, which this Article labels “Classicist,” “Republican,” and “Skeptic.” The Classicist fixates on the narrow, classical version of sovereignty, which requires absolute and exclusive authority.<sup>21</sup> The Republican invokes the idea that under the Constitution, it is *the people*,

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19. Unless otherwise indicated by the context, this Article generally refers to nations as such, or as “nation-states,” and to the American states as “the States.”

20. *New York v. United States*, 505 U.S. 144, 149 (1992).

21. See Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601, 1604 (2002) (arguing that true sovereignty is exclusive and final within a sphere).

and only the people, who are ultimately “sovereign.”<sup>22</sup> Finally, the Skeptic asserts that the notion of “sovereignty” makes no sense at all, and persists merely as a rhetorical plea.<sup>23</sup>

The framers and other proponents of state sovereignty, including a majority of the current Supreme Court, have not presented any coherent concept of state sovereignty. As a result, critics exploit state sovereignty as a rather easy target. If *exclusive* dominion and control is in fact the sole basis for claims to sovereignty, then states surely cannot be deemed sovereign today. The Classicist assumes that the concepts of statehood and sovereignty are static, forever frozen in time.<sup>24</sup> “Federalism,” however, does not mean the same thing today as it did at the framing. Neither, for that matter, do concepts like “privacy,” “liberty,” or “equality.” So why ossify sovereignty? If, as the Republicans insist, only “the people” can be truly sovereign under the Constitution, then indeed there is little point in discussing the sovereignty of *states* at all. Without disputing the fundamental, Republican truth that “the people” are ultimately sovereign, however, it is an inescapable fact that states exercise “sovereign” powers and possess certain “sovereign” rights.<sup>25</sup> Finally, the Skeptic, who would banish “sovereignty,” must be convinced that sovereignty persists for legitimate reasons and has an identifiable core. Much of the analysis that follows seeks to respond to the Skeptic’s concern that sovereignty is essentially meaningless.

Part IV seeks to advance beyond these ultimately unhelpful approaches and to expand domestic constitutional discourse regarding state sovereignty by drawing upon some of the broad aspects of the global reconsideration of the concept. The first thing to note is that state sovereignty has always been a concept in transition. In international spheres, sovereignty did not retain its classical form, which has always clashed with pragmatic realities, for very long. In truth, sovereignty has

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22. See Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1150 (2001) (“It was ‘We the People’ who ordained and established the Constitution, not ‘We the States.’”).

23. See Jack N. Rakove, *Making a Hash of Sovereignty, Part II*, 3 GREEN BAG 2D 51, 59 (1999) [hereinafter *Hash II*] (chiding the Court and others for making a “hash” of sovereignty, a concept “too vague and anachronistic . . . to allow us to reason about anything more than our propensity to keep using it”). There are, as well, some who doubt the utility of maintaining a system that includes purportedly “sovereign” states. See generally Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (arguing that decentralization would be a far more efficient system than dual sovereignty).

24. See generally BARTELSON, *supra* note 3 (providing a detailed conceptual history of the concept of “sovereignty”).

25. See Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental ‘States’ Rights*, 46 WM. & MARY L. REV. 213 (2004) (discussing the constitutional rights of states).

never really been the all-or-nothing, zero-sum proposition early classicists theorized. Part IV examines some of the various post-classical meanings that have been attributed to sovereignty, including the idea that sovereignty involves *de facto* control over a domain, recognition of authority within a territory, and the effective exercise of a state's "bundle of competences."<sup>26</sup> It touches as well upon some theoretical developments regarding theories of the *locus* and *origins* of sovereignty.

To place sovereignty in a modern and doctrinal perspective, Part IV then focuses on recent challenges to nation-state sovereignty. In Europe, the cradle of the concepts of "state" and "sovereignty," changes to governance structures and the state system, especially but by no means exclusively the ongoing experiment of the European Union, have necessitated serious and sustained thinking about state sovereignty. Although nation-states, unlike the American states, are of course not subordinate sovereigns by constitutional edict, neither are they the exclusive, free, and independent actors they once were thought to be. Functions once reserved exclusively to the nation-state, such as national defense and the coining of money, have been delegated in whole or in part to supra-national institutions. Interventions in the internal affairs of nations, in particular those stemming from concerns regarding human rights, are now routine—a circumstance that substantially diminishes a nation's "internal" sovereignty. These and other developments have led some theorists to posit that a "new sovereignty" has taken shape, one that is necessarily partial, incomplete, and divided.<sup>27</sup> Sovereignty today is not based upon the classical notion of a nation's ability to dictate outcomes to others, or to act as an exclusive and final authority. Rather, according to some theorists, sovereignty has taken the form of a *bargaining resource* utilized by nations on behalf of their citizens.<sup>28</sup> Sovereignty is a *status* gained as a result of state practices, including the exercise of the "bundle of competences" at a state's disposal.

In addition to undertaking to redefine and refocus sovereignty, some international theorists have applied principles of social construction theory to explain the apparent anomaly of diminishing nation-state power and prospering sovereignty.<sup>29</sup> The final section of Part IV specifically

26. HANS BLIX, SOVEREIGNTY, AGGRESSION, AND NEUTRALITY 11–12 (1970).

27. CHAYES & CHAYES, *supra* note 3, at 27 (1995).

28. *See id.* ("Sovereignty, in the end, is status—the vindication of the state's existence as a member of the international system.").

29. *See, e.g.*, STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 3; ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999); Tanja E. Aalberts, *The Future of Sovereignty in Multilevel Governance Europe—A Constructivist Reading*, 42 J. COMMON MKT. STUD. 23 (2004).

examines social construction as an approach to the concept of state sovereignty. One of the important insights produced by a social constructionist approach to statehood and sovereignty is that these concepts are not “brute” or inherent facts. The “state,” for example, is made up of territory, population, and government. But these material facts do not define the “state” in its relevant international or domestic contexts. Nor is “sovereignty” something inherent to statehood. It is, rather, what social construction theorists refer to as an “institutional fact,” one which is deemed to exist by human agreement. International social constructionists argue that rather than simply consider “sovereignty” either as an inherent status or an obsolete or mythical construct, we must focus on what states do and how they are represented to, and perceived by, the world and each other. They suggest that state practices, along with justifications for state sovereignty by jurists, theorists, and other officials, combine to construct agreements that states are “sovereign,” that they are, for example, in control of a domain or entitled to recognition and deference. Ultimately, then, it is not considered productive to ask whether states are “really” sovereign, for “the reality of sovereignty consists in its use and acceptance.”<sup>30</sup> In the end, sovereignty will not fade away because relevant actors and communities have come to accept it as a necessary ordering principle.

Part V draws upon these various developments in the theory and practice of state sovereignty to advance toward a reconceptualization of domestic state sovereignty. This reconceptualization takes into account conceptual evolution and responds to the critiques of Classicists, Republicans, and Skeptics. As a general response to state sovereignty’s detractors, Part V argues that state sovereignty can indeed, as the framers posited, be partial, limited, delegated, and relational. It can be lodged (on a representative basis of course) in the states. Thus, based upon the post-classical and post-modern developments discussed in Part IV, this Article departs from the classical conception of domestic state sovereignty, which required exclusive and final authority within a given sphere, enclave, or territory. The remainder of Part V seeks principally to respond to the Skeptics’ arguments that state sovereignty serves no useful purpose and has no meaning.

Following the work of social constructionists, Part V conceptualizes domestic state sovereignty as a dynamic construct. The Article utilizes

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30. W. G. Werner & J. H. de Wilde, *The Endurance of Sovereignty*, 7 EUR. J. INT’L. REL. 283, 304 (2001).

social construction theory to demonstrate that American statehood and state sovereignty are “institutional facts” that have been legally, politically, and socially constructed over time.<sup>31</sup> The goal, in terms utilized by a leading social construction theorist, is to understand the circumstances (*C*) in which the state (*X*) “counts as” sovereign (*Y*).<sup>32</sup> The Constitution sets the baseline by assigning states a prominent place in the governmental structure. The remainder of the constructive process is revealed through the lens of the variety of symbols or metaphors that have been invoked to represent statehood and to sharpen state claims to sovereignty over time. Eight symbols have been utilized to impose functions and statuses upon the states. States have been likened to the following: *trustees*, *agents*, *communities*, *laboratories*, *corporations*, *market participants*, *nations*, and *persons*. These symbols represent the principal claims or justifications for state sovereignty.

Social construction theory counsels close attention to this sort of symbolism. As noted, however, a constructivist approach emphasizes that “the reality of sovereignty consists in its use and acceptance.”<sup>33</sup> Accordingly, Part V examines state justifications, political and theoretical discourses, and the practices of state and federal actors in order to understand how it is that claims to state sovereignty persist, and often succeed, despite the significant material and constitutional disadvantages under which the states operate. This is a complex process which can only be sketched here. It is also an ongoing process, as the states’ sovereignty is always, in a sense, “at stake.” Part V makes this point by examining some recent issues that substantially implicate state sovereignty, including gay marriage; educational, environmental, and welfare policies; the death penalty; and fundamental rights doctrine. And, of course, it also takes account of the recent federalism revival in the work of the Supreme Court.

This Article concludes that there are actually “two sovereignties.” On one hand, the states are deemed “sovereign” insofar as they possess and exercise a bundle of competences. States legislate, innovate, interpose, negotiate, and function as independent communities. This will be referred to as “competence sovereignty.” This version of state sovereignty is similar to the “new sovereignty” of nation-states, which eschews classical

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31. I do not argue that the process of social construction of sovereignty is the same in the global and domestic contexts. It obviously varies given, among other things, the fact that unlike putatively “equal” nations, the states and the federal government do not operate on a level playing field. This Article taps the principles of social construction—the basic idea—in an effort to explicate domestic state sovereignty.

32. JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 46–47 (1995).

33. Werner & de Wilde, *supra* note 30, at 304.

notions of brute power and focuses on the results and recognition states achieve in exercising their competences. On the other hand, sometimes the states are recognized as sovereign, or such recognition is withheld, based solely upon their status. The states are sovereign insofar as they resemble or are “like” some other sovereign, such as a nation or person. Under this “status sovereignty,” states are deemed to be *inherently* entitled to sovereign rights like autonomy and equality, and to possess sovereign characteristics like “dignity,” “respect,” and “esteem.”

The distinction between competence and status sovereignty is an important one. If, as this Article suggests, state sovereignty is a dynamic construct, then status sovereignty is not likely to survive as a meaningful concept. Part IV advances several reasons why, particularly from the States’ perspectives, competence sovereignty is conceptually preferable to status sovereignty in going forward.

Part V concludes with a brief discussion of the implications of the proposed reconceptualization of state sovereignty for states, scholars, and courts. States must realize that their sovereignty is constantly at stake. They must act with the knowledge that their exercise of sovereign functions defines their sovereignty. Scholars should be looking at state sovereignty not as a formal, dollars-and-personnel concept, but rather as a dynamic, always changing and relative concept. Finally, courts should be aware that status sovereignty is an inherently flawed conception. If the states are to be pronounced “sovereign,” it must be because they are serving sovereign functions or furthering the values of federalism, not because of some inherent status.

Finally, Part VI anticipates the argument that state sovereignty, even as reconceptualized, ought to be banished from our constitutional discourse. Viewed as the product of a dynamic process, rather than a status imposed by judicial decree, domestic state sovereignty can serve many of the same useful purposes that have been assigned to international sovereignty. Perhaps above all, a *shared understanding* that states are “sovereign”—that they exercise sovereign competences, are in a substantial sense in charge of a domain, represent distinct communities, and are equal relative to one another—contributes to the maintenance of order in a system of overlapping and competing governance structures. Putting states on notice that they have to earn their sovereignty will help to sustain a balance of power. Putting federal authorities on notice that the states retain their sovereignty will also contribute to the ordering of relations among governments that share and pool their sovereignties.

## II. CLASSICAL SOVEREIGNTY—A BRIEF INTRODUCTION

“Sovereignty” is an immense topic with a four century-plus history.<sup>34</sup> In this brief introduction, the modest goal is to comment upon the origins of the concept and to describe its formal, classical iteration. The focus is purposeful. As we shall see, classical sovereignty has been the version of the concept which has most influenced domestic constitutional discourses regarding the states’ claims to sovereignty.

Discussions of “sovereignty” generally acknowledge that the concept was invented in Europe in the sixteenth century.<sup>35</sup> The French thinker Jean Bodin, who advanced the first comprehensive concept of “sovereignty,” defined it as the “absolute and perpetual power within a state.”<sup>36</sup> Bodin’s conception of sovereignty emerged from a period of tumult and civil war in France. To deal with this turmoil, the concept of sovereignty originally reinforced the power of the king.<sup>37</sup> Bodin’s thesis was that a unitary central authority should wield unlimited power over citizens and subjects, essentially unconstrained by law (except, perhaps, the laws of God and nature).<sup>38</sup> The unitary sovereign’s authority was divinely, rather than democratically, bestowed. As Bodin declared: “We see the principal point of sovereign majesty and absolute power to consist in giving laws to subjects in general, without their consent.”<sup>39</sup>

The principal marks of sovereignty for Bodin were “the power of lawmaking, the power to declare war and make peace, the power to establish offices of state, the ultimate right of judgment, the power to pardon, the right of taxation, and the power to coin money.”<sup>40</sup> A true sovereign could delegate some of these powers to subordinates, but could not permanently transfer any of them without losing its sovereignty. The

34. The word “sovereignty” is taken from the French “souverain,” which means “a supreme ruler not accountable to anyone, except perhaps to God.” FOWLER & BUNCK, *supra* note 3, at 4.

35. See CAMILLERI & FALK, *supra* note 3, at 15–16 (noting that European philosophers developed the theory of sovereignty in the sixteenth to the eighteenth centuries).

36. JEAN BODIN, ON SOVEREIGNTY 1–4 (Julia Franklin ed., 1992).

37. See FOWLER & BUNCK, *supra* note 3, at 4–5 (“On the heels of the dynastic and imperial struggles of the Middle Ages, monarchs in early modern Europe advanced the notion of sovereignty to strengthen their grip on the reins of the state and to counter feudal claims by the nobility and religious claims by the papacy.”) (footnotes omitted).

38. CAMILLERI & FALK, *supra* note 3, at 18; see also Richard Bellamy, *Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Rights within the EU*, in SOVEREIGNTY IN TRANSITION, *supra* note 2, at 171 (“The sovereign is the agent or agency where the buck stops and a final decision gets made.”).

39. NANNERL O. KEOHANE, PHILOSOPHY AND THE STATE IN FRANCE: THE RENAISSANCE TO THE ENLIGHTENMENT 71 (1980) (translating JEAN BODIN, LES SIX LIVRES DE LA REPUBLIQUE (1577)).

40. SOVEREIGNTY IN TRANSITION, *supra* note 2, at 64.

ultimate authority in the state, according to Bodin, had to reside in only one place. By definition, then, classical sovereignty could not be divided or shared.

In *Leviathan*,<sup>41</sup> Thomas Hobbes, who also wrote against the backdrop of war, constructed an “omnipotent sovereign” as the only alternative to the anarchy of the “state of nature.”<sup>42</sup> By covenant, Hobbes posited that men conferred all of their powers and strength upon one man or one assembly of men. Like Bodin’s, Hobbes’s “sovereign” also wielded absolute, unitary authority. With Hobbes, however, sovereignty became “absolute” in a radical sense; “unlike Bodin he swept aside all limitations on sovereignty by doing away with every right of the people.”<sup>43</sup> The result was a “Multitude so united in one Person,” called a “Commonwealth,” a “Leviathan.”<sup>44</sup> The sovereign could not be subjected to any criticism or limitation. “No authority outside the state can sit in judgment on the state, not even religious or moral conscience, or any criterion of justice.”<sup>45</sup>

The classical version of sovereignty that washed ashore as the Framers were taking up the task of drafting the Constitution posited that in all forms of government, there is and must be a “final and absolute political authority in the political community.”<sup>46</sup> William Blackstone, for example, whose thinking was influential in the founding era, “defined ‘sovereign power’ as ‘the making of laws,’ possession of which obliges ‘all others [to] conform to, and be directed by it.’”<sup>47</sup>

For these and other early thinkers, “sovereignty” was simply a fact; it was an inherent attribute of the monarchy and, later, the state. Sovereignty could not be contested. Nor could it be divided, shared, diminished, or limited. Classical sovereignty was legal; absolute; unitary; and, as a result of these characteristics, necessarily indivisible.<sup>48</sup> As one scholar explained, sovereignty in its classical sense is like marital status—one either possesses it or one does not.<sup>49</sup>

41. THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., Cambridge Univ. Press, 1996).

42. *Id.* at 149–52; see CAMILLERI & FALK, *supra* note 3, at 19–20 (discussing Hobbes’s theory of sovereignty).

43. CAMILLERI & FALK, *supra* note 3, at 19.

44. THOMAS HOBBS, *LEVIATHAN* 227 (C.B. Macpherson ed., 1968).

45. CAMILLERI & FALK, *supra* note 3, at 20.

46. HINSLEY, *supra* note 3, at 26.

47. H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 986 (1993) (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA* 49 (1803)).

48. JAMES, *supra* note 3, at 50.

49. See Georg Sorenson, *Sovereignty: Change and Continuity in a Fundamental Institution*, in *SOVEREIGNTY AT THE MILLENNIUM* (Robert Jackson ed., 1999).

### III. DOMESTIC SOVEREIGNTY DISCOURSES

In domestic constitutional circles, the debate over “state sovereignty” has moved but little from the concept’s classical formulation. The Framers, who were most likely forced by circumstances to be deliberately vague about state sovereignty, did little more than pose the question of the states’ “sovereign” status. Judicial discourse has ultimately done little to answer the question posed, routing through periods this Article calls “pre-sovereignty,” “classical sovereignty,” “shared sovereignty,” and a “modern” era characterized by bare, and essentially opportunistic, reminders that states are truly “sovereign.” Finally, academic constitutional and historical discourse has largely dismissed the idea of state sovereignty, effectively splitting into “Classicist,” “Republican,” and “Skeptical” camps.

#### A. *The Framers*

As the Constitution’s structure demonstrates, the Framers of the United States Constitution expressly rejected the classical sovereignty of thinkers like Bodin, Hobbes, and Blackstone. Indeed, they purported to do precisely what these thinkers said could *never* be done, namely to divide and limit sovereignty.<sup>50</sup> They did so both horizontally, among levels of the federal government, and vertically, reposing authority, power, and control in the central government with a residual authority in the several states. The Framers rejected the idea of a unitary sovereign, lodged significant rights and powers both in the state and central institutions of government, and then proceeded to divide authority further among these institutions.

In debates over the plan of the proposed Constitution, the Framers were less than clear regarding the “sovereign” status of the states. At times the states were referred to as “partial” sovereigns, while at other times the Framers opined that sovereignty resided exclusively with “the people.”<sup>51</sup> Thus, Hamilton observed in *Federalist No. 32* that “the State governments would clearly retain all the rights of sovereignty which they before had, and which were not . . . *exclusively* delegated to the United States.”<sup>52</sup> Madison said that “the States will retain under the proposed Constitution a

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50. See Peter S. Onuf, *State Sovereignty and the Making of the Constitution*, in *CONCEPTUAL CHANGE AND THE CONSTITUTION* 78–98 (Terence Ball & J.G.A. Pocock eds., 1988) (discussing conceptual change relating to “state sovereignty” at the framing).

51. See Powell, *supra* note 47, at 985–87 (discussing early thinking with regard to the locus of sovereignty under the Constitution).

52. *THE FEDERALIST* No. 32, at 220 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

very extensive portion of active sovereignty.”<sup>53</sup> Similarly, in *Federalist No. 39*, Madison declared that the federal government’s “jurisdiction extends to certain enumerated objects only,” while the states continued to possess “a residuary and inviolable sovereignty over all other objects.”<sup>54</sup> But there were others, including Madison, who also touted strong republican principles. Hence Madison’s statement in *Federalist No. 46*: “[T]he ultimate authority, wherever the derivative may be found, resides in the people alone . . . .”<sup>55</sup>

When it came time to draft the language of the Constitution, the Framers avoided the term “sovereignty” altogether. This was, one may assume, a deliberate break from the troublesome Articles of Confederation, which had expressly provided that each state “retains its sovereignty, freedom and independence.”<sup>56</sup> The drafters of the Constitution chose to express and preserve state authority and state status in a different fashion.

Where, exactly, the omission of “sovereignty” left the states has been a matter of controversy since the framing. Indeed, it was thus that the “sovereign” status of the states became “our oldest question of constitutional law.”<sup>57</sup> The Framers were so evasive in terms of state sovereignty that there has been continual disagreement even as to the origins of consent to the Constitution. Some view the Constitution as a “compact among sovereign states,”<sup>58</sup> while others have insisted that it is not “an inter-sovereign compact or treaty, but a supreme statute deriving from the supreme sovereign legislature—the People of the nation.”<sup>59</sup> This

53. THE FEDERALIST No. 45, at 293–94 (James Madison) (Isaac Kramnick ed., 1987).

54. THE FEDERALIST No. 39, at 258 (James Madison) (Isaac Kramnick ed., 1987); *see also* THE FEDERALIST No. 62, at 365 (James Madison) (Isaac Kramnick ed., 1987) (“[T]he equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty”); THE FEDERALIST No. 49, at 262 (James Madison) (Isaac Kramnick ed., 1987) (“[I]n the new government, as in the old, the general powers are limited; . . . the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.”).

55. THE FEDERALIST No. 46, at 297 (James Madison) (Isaac Kramnick ed., 1987).

56. ARTICLES OF CONFEDERATION, art. II.

57. *New York v. United States*, 505 U.S. 144, 149 (1992).

58. SAMUEL H. BIER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 2 (1993).

59. Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1452 (1987); *see* THE FEDERALIST No. 39, at 257 (James Madison) (Isaac Kramnick ed., 1987) (“Each State, in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act.”). The disagreement has not been entirely quelled by the Supreme Court’s narrow determination, in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), that the states are not at liberty to add to the qualifications for membership in the national legislature. The Court in making this determination purported to resolve the debate over the origins of constitutional authority by vesting

is a constitutional debate not likely ever to be settled to everyone's agreement or satisfaction.

The Framers thus bequeathed our "oldest question of constitutional law." Unfortunately, they did not provide an answer to it. Indeed, they offered conflicting answers. As Professor Powell has noted: "The term [sovereignty] was both central to the founding era's political grammar and essentially ambiguous."<sup>60</sup>

### *B. The Supreme Court*

It is fair to say that the Supreme Court has, over time, been all over the map when it comes to the concept of state sovereignty. Its various approaches to the "oldest question" can be helpfully, if somewhat roughly, distilled into four "eras" of sovereignty: *Pre-sovereignty*, *quasi-classical* sovereignty, *shared* sovereignty, and *late* sovereignty.

In the *pre-sovereignty* period, the Court essentially refused to recognize the sovereignty of the states. The Marshall Court was, of course, too concerned with building a strong national government to recognize broad claims of "state sovereignty." Thus, for example, the separate opinions in *Chisholm v. Georgia*<sup>61</sup> all flatly rejected the state's claim to sovereignty. Justice Randolph, among others, adopted the republican view that *the people* possessed ultimate sovereignty under the Constitution; the states, he said, were nothing more than "assemblages of these individuals who are liable to process."<sup>62</sup> In *Martin v. Hunter's Lessee*,<sup>63</sup> the Court observed that the Constitution is "crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives."<sup>64</sup> Finally, in *Gibbons v. Ogden*,<sup>65</sup> the Court pointed out that when the states joined the Union, "the whole character in which the States appear, underwent a change . . . ."<sup>66</sup>

In time, concerns over sustaining the national government subsided, and an era of *quasi-classical* sovereignty dawned. In this era, the Court not only recognized, but at times aggressively enforced, state sovereignty.

original consent in "the People."

60. Powell, *supra* note 47, at 987.

61. 2 U.S. (2 Dall.) 419 (1793).

62. *Id.* at 423; *see id.* at 471 (opinion of Jay, C.J.) ("No such ideas obtain here; at the Revolution, the sovereignty devolved on the people. . . .").

63. 14 U.S. (4 Wheat.) 316 (1819).

64. *Id.* at 325.

65. 22 U.S. (9 Wheat.) 1 (1824).

66. *Id.* at 187.

Early notions of state sovereignty were based roughly upon the formal, classical model described in Part II. Thus, in the late nineteenth and early twentieth centuries, the Court sought to carve out separate “enclaves” for distinct state and central sovereigns, each the final and exclusive authority in their respective domains. Note that sovereignty here was exclusive, yet divided. It was in this era that the Court infamously purported to, as the Court recently put it, distinguish between “truly national” and “truly local” concerns.<sup>67</sup> “Manufacture,” for example, was considered an exclusive state concern, while “commerce” was held to constitute an exclusively national matter.<sup>68</sup> Many decisions of the 1930s stressed the “local” character of various activities and conditions.<sup>69</sup> Federal regulation of manufacture or mining, for example, was deemed to trespass on the sovereign authority of the states to deal, again exclusively and finally, with local evils.<sup>70</sup>

As events leading up to the constitutional crisis of 1933–1936 demonstrated, the quasi-classical era’s seemingly firm concept of “dual sovereignty” was in fact quite vulnerable to outside forces. The Court’s formalism with regard to sovereignty could not be sustained in the face of the social and political realities of the Great Depression. “Dual sovereignty” of this classical character ultimately succumbed to those realities, and national authority expanded into areas once considered to be exclusively matters of state concern.<sup>71</sup>

The demise of quasi-classical sovereignty led to an extended period of *shared* sovereignty. In the post-crisis era, which ran from the Court’s famous “switch” in commerce doctrine up to the “new federalism” of the past two decades or so, “sovereignty” was a concept rarely spoken by name. With the exception of a very brief experiment involving the revival of the early, quasi-classical form of sovereignty,<sup>72</sup> state and federal

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67. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

68. *See United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *Kidd v. Pearson*, 128 U.S. 1 (1888).

69. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (“the local character of mining, of manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products”).

70. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935); *Carter*, 298 U.S. at 293; *see also id.* at 295 (“[I]t is no longer open to question that the general government, unlike the states, possesses no *inherent* power in respect to the internal affairs of the states”).

71. *See Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (upholding regulation of intrastate wheat production); *United States v. Darby*, 312 U.S. 100, 123–25 (1941) (upholding federal regulation of intrastate wages and hours); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (overruling prior precedents and accepting that Congress may regulate even intrastate activities that have a substantial effect on interstate commerce).

72. *See National League of Cities v. Usery*, 426 U.S. 833, 845 (1976) (“[O]ne undoubted attribute of state sovereignty is the States’ power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will

authorities during this extended era were deemed to be engaged in a mostly “cooperative” endeavor.<sup>73</sup> In the era of *shared* sovereignty, there was less talk of authoritative exclusivity and far more of teamwork and cooperation, of a “cooperative federalism” in which Congress primarily acted and the states essentially filled gaps. Thus, states were free to exercise concurrent authority within the ellipses of federal regulatory schemes. Of course, one may speak in terms of “cooperation,” but the doctrinal upshot of the intermediate era was a massive expansion of federal authority. As one indication of this seismic shift, the Tenth Amendment, the supposed repository of state sovereignty, was essentially treated as nothing more than a “truism that all is retained which has not been surrendered.”<sup>74</sup>

In the *late* sovereignty era, however, state sovereignty has managed a steady return to prominence in federalism cases. There has been some judicial flirtation in the late era with a revival of the quasi-classical version of state sovereignty and separate enclaves.<sup>75</sup> But by far the more common course in the late era has been for the Court to flatly proclaim that the states are “sovereign,” based solely upon their status *as states*. This, indeed, has been a major pillar of the Court’s recent, and much commented upon, Anti-Federalist “revival.”

In many recent federalism decisions, the Court begins with the premise that the Constitution recognizes the “essential sovereignty of the States.”<sup>76</sup> The Court has repeatedly affirmed that the states entered the Union “with

work, and what compensation will be provided where these employees may be called upon to work overtime”), *overruled by* *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985) (abandoning the *National League of Cities* approach as “not only unworkable but . . . also inconsistent with established principles of federalism”).

73. See *F.E.R.C. v. Mississippi*, 456 U.S. 742, 767 (1982) (describing Public Utility Regulatory Policies Act as an instance of “cooperative federalism”); *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 289 (1981) (“[T]he most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, within the limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs”); *King v. Smith*, 392 U.S. 309, 316 (1968) (noting that AFDC program was an example of “cooperative federalism”).

74. *Darby*, 312 U.S. at 124.

75. Depending upon how one interprets them, in the two now-famous Commerce Clause opinions of the modern era, *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Court may be signaling an interest in protecting exclusive state sovereign enclaves like crime and marriage. Or the cases may simply suggest that there are limits to Congress’s commerce power. One of those limits is that Congress is empowered under the Constitution to regulate “commerce,” and neither gun possession near a school nor violent crime constitutes “commerce” in the constitutional sense. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 97–98 (2001) (opining that *Lopez* and *Morrison* are modest efforts to police the boundaries of Congress’s commerce power).

76. *Alden v. Maine*, 527 U.S. 706, 750 (1999).

their sovereignty intact.”<sup>77</sup> It has stressed in no uncertain terms that the Constitution “preserves the sovereign status of the States” by “reserv[ing] to them *a substantial portion* of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status.”<sup>78</sup>

The Court has recently described state sovereignty as a “fundamental postulate[] implicit in the constitutional design.”<sup>79</sup> It has relied upon that “postulate” in an array of cases in which the states have been granted “sovereign immunity” from citizen lawsuits. “The preeminent purpose of state sovereign immunity,” the Court has said, “is to accord States the dignity that is consistent with their status as sovereign entities.”<sup>80</sup> State “dignity” has been a common theme in these cases; this value has been repeatedly invoked but never elaborated upon. In any event, immunity’s “primary function,” according to the Court, is “to afford the States the dignity and respect due sovereign entities.”<sup>81</sup>

Late state sovereignty is not limited to immunity from lawsuits. In addition to protecting states from private suits, the Court has also held that “laws conscripting state officers violate state sovereignty.”<sup>82</sup> It has treated federal civil rights statutes that seek to empower citizens to sue states as genuine threats to state sovereignty, and subjected these measures to heightened judicial scrutiny.<sup>83</sup>

In sum, the Court has varied its regard for state sovereignty over time. In the late or modern era, the Court has shown more than the usual regard for state autonomy, immunity, and other “rights” in its federalism doctrine.<sup>84</sup> Indeed, the modern Court has substantially revived the Madisonian notion that the states retain “a residuary and inviolable sovereignty.”<sup>85</sup> But the Court’s proclamations of state sovereignty raise far more questions than they answer. What is the nature of the states’ sovereignty? What is its origin or source? Its scope? How, ultimately, is it to be enforced and protected?

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77. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).

78. *Alden*, 527 U.S. at 714 (emphasis added).

79. *Id.* at 729.

80. *Fed. Maritime Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002).

81. *Id.* at 769.

82. *Printz v. United States*, 521 U.S. 898, 925 (1997).

83. *See, e.g., Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2000) (invalidating the citizen suit provisions of the Americans With Disabilities Act); *Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 89 (2000) (invalidating citizen suit provisions of the Age Discrimination in Employment Act).

84. *See Zick, supra* note 25, at 219 (discussing newly discovered “fundamental” rights of states).

85. *THE FEDERALIST* No. 39, at 258 (James Madison) (Isaac Kramnick ed., 1987).

### C. *Scholars*

Scholarly commentary on the judicial revival of the “sovereign state” in the late or modern era has been mostly disapproving. To be sure, there are scholars who support the ideal of state sovereignty. But the sovereignty they support either tracks closely the quasi-classical notion that the Framers set aside explicit enclaves for states,<sup>86</sup> or focuses primarily on how the states are faring in the judicially administered distributional calculus commonly referred to as “federalism.”<sup>87</sup> However, “federalism” and “sovereignty” are not the same thing; sovereignty, as this Article will explain, is a much more complex concept than federalism, which has to do mostly with the division of material power.<sup>88</sup> This section focuses primarily on the detractors of state sovereignty, who appear to be far greater in number in any event than its supporters. For some scholars, the Court’s recent invocations of state sovereignty are nonsensical, rhetorical, even downright alarming. Three general approaches or theories have developed, which this Article labels “Classicist,” “Republican,” and “Skeptical.” Each approach is briefly considered.<sup>89</sup>

#### 1. *Classicists*

One school of thought measures state sovereignty according to the classical yardstick advanced by thinkers like Bodin, Hobbes, and Blackstone. By this measure, “Classicists” maintain that the Supreme Court’s references to state “sovereignty” are an unfortunate and misguided misnomer. In a recent article, for example, Professor Steven Gey asserts that the country “is in the midst of a constitutional revolution.”<sup>90</sup> Professor Gey states that the Court “has used a broad conception of state sovereignty to expand the power of state government . . . in virtually every area in which the two governments operate.”<sup>91</sup> Professor Gey does not consider sovereignty to be a background or insignificant principle in these instances. Rather, he contends that the Court has relied substantially on

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86. See, e.g., Yoo, *supra* note 14, at 29–32 (discussing state sovereignty in terms of jurisdiction of state and national governments).

87. See, e.g., Baker & Young, *supra* note 75.

88. See Gey, *supra* note 21, at 1623 (“the real debate over the relationship between the national and state governments involves the issue of sovereignty, not federalism”).

89. The discussion here, as elsewhere in this Article, focuses on the *concept* of sovereignty each approach embraces, rather than the Court’s specific usage of the concept in any particular case, or a scholar’s critique of the doctrinal effects of its use.

90. Gey, *supra* note 21, at 1601.

91. *Id.*

“state sovereignty” in cases broadening the states’ sovereign immunity; protecting states from federal “commandeering”; restricting federal court equitable authority; and invalidating recent Commerce Clause enactments.<sup>92</sup>

For the Classicists, the Court’s late conception of state sovereignty “is presently an incoherent and largely mythical concept that makes it difficult for the federal government to operate.”<sup>93</sup> The reason the Court’s conception of sovereignty is considered to be “mythical” is quite simple; it does not ultimately “stand in the way of federal primacy.”<sup>94</sup> The putatively “sovereign” states are only granted certain partial protections from federal encroachments. They can still be sued, coerced, and subjected to federal court jurisdiction. In the end, the only claim to “sovereignty” that Classicists will accept as valid is one that hews to the formal definition of sovereignty set forth by Bodin, Hobbes, and Austin and described in Part II.<sup>95</sup> “Accordingly,” Professor Gey asserts, “a government entity can only be deemed ‘sovereign’ . . . if that government’s power to adopt policies in a given area is *exclusive*, if those policies are *final*, and if the government has the *authority to enforce* the policies (in Austin’s phrase) ‘with evil or pain [or] through fear of that evil.’”<sup>96</sup> Because the states cannot claim to have exclusive and final authority, or full enforcement autonomy, the Classicist maintains that no state can claim to be “truly sovereign.”<sup>97</sup>

The Classicist sees sovereignty in black and white, as a brute fact or an inherent quality of a specific form of government. For Classicists, sovereignty is ultimately about material power—power that is exclusive, final, and enforceable. It has nothing whatever to do with how local governments function; “the debate concerns the location of ultimate authority over policy, not the existence and usefulness of local government *per se*.”<sup>98</sup> Whatever benefits a federal system might provide, Classicists maintain that the existence of sovereign states is not necessary to provide them.<sup>99</sup>

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92. *Id.* at 1602.

93. *Id.* at 1601.

94. *Id.* at 1603.

95. *See* Gey, *supra* note 21, at 1629 (discussing Bodin and Austin).

96. *Id.* at 1631 (quoting JOHN AUSTIN, PROVINCE OF JURISPRUDENCE DETERMINED 15 (1861)).

97. *Id.* at 1631.

98. *Id.* at 1623.

99. *See id.* at 1671 (“realization of those benefits does not require a system of judicially protected state sovereignty”). *See generally* Rubin & Feeley, *supra* note 23 (arguing that a system of sovereign states actually *decreases* the likelihood that benefits will be experienced).

In sum, the Classicist adopts the formal conception of sovereignty wholesale. Classical sovereignty cannot be limited, partitioned, or delegated. For the Classicist, “sovereignty is a mutually exclusive concept: if one government has it, then the other does not.”<sup>100</sup> Sovereignty is thus a “zero-sum game.”<sup>101</sup> Insofar as the Court’s recent decisions fail to afford the states less than absolute, exclusive power—in the regulation of particular items or areas of commerce, for example, or in terms of their immunity from lawsuits—then the Classicist maintains that the states are not properly deemed “sovereign.”<sup>102</sup>

## 2. *Republicans*

A second academic response to the Court’s recent invocations of state sovereignty flatly denies that the states can be considered “sovereign” under *any* theory, approach, or circumstance. As James Madison stated in *Federalist No. 46*: “[T]he ultimate authority, wherever the derivative may be found, resides in *the people* alone.”<sup>103</sup> This is the “Republican” theory of sovereignty. For those at the founding who rejected “sovereignty talk” as too confusing or misleading, as well as those who wished to avoid the Anti-Federalist charge that the proposed plan of government would lead to a “consolidation” or “annihilation” of the states, this was a very popular argument.<sup>104</sup> For those who today are troubled by the idea that the states are in any way “sovereign,” the argument retains great force.<sup>105</sup>

In its recent federalism cases, the Court has indicated on occasion that the states retained the “sovereignty” they were expressly granted under the Articles of Confederation when they ratified the Constitution.<sup>106</sup> Republican theorists like Louise Weinberg dismiss this “theory of the

100. Gey, *supra* note 21, at 1632–33.

101. *Id.* at 1631.

102. *See id.* at 1632 (“Any attempt to subdivide a territory’s governance of different subjects between two separate sovereign entities requires a clear, easily identifiable line between the respective governments’ areas of sovereign authority.”); *see also id.* at 1641 (“In the end, a coherent theory of state sovereignty must mean that states possess the authority to make final policy decisions with regard to some function, and the federal government can do nothing about it.”).

103. THE FEDERALIST No. 46, at 297 (James Madison) (Isaac Kramnick ed., 1987).

104. *See Powell, supra* note 47, at 985–87 (discussing early statements that “the People” are truly sovereign).

105. *See, e.g.,* Evan H. Caminker, *Judicial Solicitude For State Dignity*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 86 (2001) (“[T]he notion that states are organically bestowed with a dignity incident to all sovereigns rests in tension with the notion that states are mere creatures of and subservient to the truly sovereign people.”).

106. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (states entered the Union “with their sovereignty intact”).

preexisting state” as both “mythical” and “ahistorical.”<sup>107</sup> Congress, the theory posits, “preceded the states, and the Union preceded both.”<sup>108</sup> Moreover, the Constitution, the Republican is quick to point out, does not contain the word “sovereignty,” and the Tenth Amendment reserves only “powers” to the states, not “sovereignty.”<sup>109</sup>

As noted in the brief remarks regarding the Framers’ own debate on sovereignty, this “ultimate locus of authority” debate—whether the Constitution is a compact among quasi-sovereign states or is based instead upon the consent of the whole people of the Nation—has never been settled definitively, and likely for some never will be.<sup>110</sup> There is ample historical support for both positions.

In any event, as Michael McConnell has observed: “The important question is not the locus of sovereignty *prior to* the Constitution, but *under* the Constitution.”<sup>111</sup> Republicans have an answer to this question as well. In addition to rejecting as mythical the “pre-existing state,” Republicans also maintain that the states can make no valid claim to sovereignty *under* the Constitution. Professor Weinberg, for example, criticizes the Court’s state sovereignty opinions for being based upon yet another “mythical” theory, that of “state sovereignty.”<sup>112</sup> The flaw is not, as Classicists hold, that the states fail to meet the classical definition of “sovereign.” Rather, the point is that the states cannot make *any* claim to “sovereignty” because “We the People” are the only recognized sovereign authority under the Constitution.<sup>113</sup> This, the Republican claims, is “the Constitution’s own theory of sovereignty.”<sup>114</sup> The central assertion of the Republican theory boils down to this: “It was ‘We the People’ who ordained and established the Constitution, not ‘We the States.’”<sup>115</sup>

It should be noted that not all Republicans take so stark a view of state sovereignty. Others, like Akhil Amar, accept that state governments have

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107. Weinberg, *supra* note 22, at 1151.

108. *See id.*

109. *Id.*

110. *Compare id.* at 846 (Thomas, J., dissenting) (“The ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the nation as a whole.”) with *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995) (concluding that ultimate constitutional authority resides in the people of the Nation as a whole) and *Blatchford*, 501 U.S. at 779 (stating that states entered the Union “with their sovereignty intact”).

111. Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1489 (1987) (emphasis added).

112. Weinberg, *supra* note 22, at 1117.

113. *Id.* at 1149–50.

114. *Id.* at 1149.

115. *Id.* at 1150.

“sovereign” powers.<sup>116</sup> But even these more moderate theorists ultimately fall back upon the Republican principle of popular sovereignty. Professor Amar, for example, has described the Court’s conception of state sovereignty as “oppressive,” by which he means that the concept has been utilized to defeat remedial claims brought on behalf of “the people.” The government’s “sovereignty,” he asserts, does not extend to alleged *ultra vires* acts.<sup>117</sup> Professor Amar, like other Republican theorists, seeks in the context of immunity “to counter the Supreme Court’s version of federalism and sovereignty with the framers’ version—to replace ‘Our Federalism’ with their federalism, and government sovereignty with popular sovereignty.”<sup>118</sup>

In sum, Republican theorists insist that “sovereignty” ultimately lies in the people alone, since only their say is final. For some theorists, this renders *state* sovereignty a “myth” or “legend.” For others, it colors the manner in which judicial federalism doctrine ought to evolve and develop. But uniformly, Republicans believe that the Framers themselves instituted *popular* sovereignty, not *government* sovereignty.

### 3. *Skeptics*

Finally, there are scholars who take the position that “sovereignty” is an altogether meaningless construct, one which has caused so much confusion that it would be better if we simply abandoned it altogether. Domestically, the historian Jack Rakove is the ablest spokesperson for this theory. Professor Rakove has argued that courts, commentators, and others have made a “hash” of sovereignty.<sup>119</sup> Unlike other sovereignty theorists, however, he has offered some provocative thoughts as to why, in light of the obvious failure of the states to meet the formal, classical definition of sovereignty, state claims to sovereignty persist.

Professor Rakove begins his attack on sovereignty where the Classicists end theirs—by pointing out that from the beginning, “our practice and theory have made a hash of the traditional concept of

116. See Amar, *supra* note 59, at 1426 (noting that the Constitution delegates “limited ‘sovereign’ powers to various organs of government”).

117. See *id.* at 1427 (“‘We the People of the United States,’ through the Constitution, have delegated limited ‘sovereign’ powers to various organs of government; but whenever a government entity transgresses the limits of its delegation by acting *ultra vires*, it ceases to act in the name of the sovereign, and surrenders any derivative ‘sovereign’ immunity it might otherwise possess.”).

118. See Amar, *supra* note 59, at 1426–27; see also *Younger v. Harris*, 401 U.S. 37, 44 (1971) (referring to “Our Federalism”).

119. See Jack N. Rakove, *Making a Hash of Sovereignty, Part I*, 2 GREEN BAG 2D 35 (1998) [hereinafter *Hash I*]; Rakove, *Hash II*, *supra* note 23.

sovereignty that the colonists inherited from European theorists.”<sup>120</sup> He notes that while this traditional conception of sovereignty “emphasized sovereignty’s unitary and absolute nature, ours parcels sovereignty out in bits and pieces that are scattered throughout our system of governance, yet somehow mystically reunited in the ineffable concept of an all-sovereign American people.”<sup>121</sup>

Like the Classicists, Professor Rakove argues that the original conception of sovereignty which we imported from Europe did not quite “fit” our system from the beginning. Bodinian, Hobbesian, and Blackstonian sovereignty, Professor Rakove notes, all were premised on a unitary, absolute power that simply does not comport with our constitutional structure.<sup>122</sup> Under the Constitution, by design, “sovereignty itself would remain diffused—which is to say, it would exist everywhere and nowhere.”<sup>123</sup> Nor, however, does Professor Rakove accept that sovereignty can regain its coherence by resorting to the “ineffable concept” of “popular” sovereignty.<sup>124</sup> This is as much a “myth” for Professor Rakove as the idea that states are “sovereign” in the traditional sense. “Popular sovereignty may express a noble idea,” he says, “but as an analytical principle, it is vacuous.”<sup>125</sup>

Professor Rakove thus has “proposed that Americans should long since have banished the word sovereignty from their political vocabulary.”<sup>126</sup> Why, then, does sovereignty talk persist with regard to the states in our legal and political discourse? As Professor Rakove frames the question: “Why should sovereignty, a word which outlived its usefulness long ago, have instead discovered the marvelous recuperative and self-inflating powers that keep it alive today?”<sup>127</sup>

Professor Rakove offers four reflections on this query. First, he suggests that sovereignty, particularly “popular” sovereignty, has been a “useful fiction” in explaining and justifying representative government.<sup>128</sup> It was, first and foremost, useful to Federalists who sought to escape Anti-Federalist assertions that the Constitution would effect a complete

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120. Rakove, *Hash I*, *supra* note 119, at 35. Professor Rakove limits his attack to domestic governance; he does not contend that the term is inappropriate as applied to the United States as a nation. Rakove, *Hash II*, *supra* note 23, at 51.

121. Rakove, *Hash I*, *supra* note 119, at 35.

122. *Id.* at 36–37.

123. *Id.* at 41.

124. *Id.* at 35.

125. Rakove, *Hash II*, *supra* note 23, at 51.

126. *Id.*

127. *Id.* at 52.

128. *Id.*

consolidation and annihilation of the states.<sup>129</sup> This defensive conception of sovereignty would, according to Professor Rakove, ultimately “rob the concept of its substance while preserving only the name.”<sup>130</sup> The Federalists had their absolute, unitary sovereign (“the People”), but this version of sovereignty was “a fiction that had little descriptive power.”<sup>131</sup>

Second, Professor Rakove posits that perhaps sovereignty has survived because it has taken on a “new meaning which somehow fit the distinctive oddities of American federalism.”<sup>132</sup> In contrast to the classical meaning of sovereignty, which positively determined where supreme authority resided, this new meaning appears to have arisen for the opposite purpose—“to deny some other locus of authority . . . that power.”<sup>133</sup> Professor Rakove suggests that the American concept of sovereignty “has always had a profoundly negative, defensive, reactive character.”<sup>134</sup> Thus, he says, sovereignty survives today “not because it accurately enables us to map the active sources of legal and political power, but because it ironically expresses the dominant anti-statist currents that have swirled through our political culture since the eighteenth century.”<sup>135</sup> Thus, Professor Rakove suggests, “[s]overeignty now lay much closer to a theory of resistance than of command” in which the states “would act as an unchecked checker, the court of last resort in determining when an exercise of national supremacy had gone a measure or two too far.”<sup>136</sup> In sum, then, sovereignty has been effectively inverted; it is the nullification of someone else’s power, not the affirmative exercise of power.

Third, Professor Rakove suggests that sovereignty has cropped up as a convenient shorthand for the complex and unique division of powers which the Constitution effects. He emphasizes that James Madison, in setting forth the principles of divided authority in *Federalist 39*, makes reference to “sovereignty” only once.<sup>137</sup> According to Rakove, “Madison asks good-faith readers to think of the problem in other terms: as an exercise requiring an explicit, empirical, and pragmatic mapping of the actual distribution of power, not an appeal to the heavy artillery of a killer

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129. *Id.* at 53.

130. *Id.*

131. Rakove, *Hash II*, *supra* note 23, at 53.

132. *Id.* at 54.

133. *Id.*

134. *Id.*

135. *Id.*

136. Rakove, *Hash II*, *supra* note 23, at 55.

137. *See id.* at 56 (discussing Madison’s views).

definition.”<sup>138</sup> But as Professor Rakove recognizes, not every political or legal thinker is a Madison; thus, “reasoning from a simplistic principle like sovereignty was much easier than doing the heavy if prosaic lifting of making federalism work by avoiding the allure of extreme formulations.”<sup>139</sup>

Finally, Professor Rakove ascribes the resilience of “sovereignty” to what he calls “linguistic creep.”<sup>140</sup> Sovereignty, he says, “is one of those terms that is inherently inflationary.”<sup>141</sup> It is a concept that “begs to be borrowed and assigned new and surprising uses, beckoning would-be consumers to take it down from the shelf and put it to work.”<sup>142</sup> Like “rights talk,” which places individual claims of right above all else, “sovereignty talk” is absolutist and preemptive.<sup>143</sup> Ultimately, sovereignty is invoked because “the term offers a measure of rhetorical or polemical advantage.”<sup>144</sup> Under this profoundly “skeptical” theory, “sovereignty survived in American usage not because it retained any analytical or descriptive power, but rather because it promised rhetorical and political advantage to those who sought to use it.”<sup>145</sup>

In sum, the Skeptic adheres to the classical definition of “sovereignty,” which holds that there must be one final authority with exclusive power. With the Classicist, the Skeptic notes that the states cannot be “sovereign” in this sense. What makes the Skeptic’s approach unique is that it is dismissive of the very concept of “sovereignty,” including the “popular sovereignty” of the Republicans. The Skeptic surmises that the persistence of “sovereignty talk” stems from one or more of the following: (1) the need for a “useful fiction”; (2) a new, negative redefinition of sovereignty as a limit on central power; (3) a desire to avoid the serious work of grappling with federalism’s complexity; and (4) “linguistic creep.” The point, regardless of which surmise or reflection one accepts, is that the concept of sovereignty is essentially devoid of real content and should be “banished” from our political and constitutional discourse.

The trouble with the domestic discourses regarding state sovereignty is that they do not lead us anywhere. The Framers bequeathed the concept

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138. *Id.*

139. *Id.* at 57.

140. *Id.*

141. Rakove, *Hash II*, *supra* note 23, at 57.

142. *Id.*

143. *Id.* at 58. For a critique of rights-centric argumentation, see generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

144. Rakove, *Hash II*, *supra* note 23, at 58.

145. *Id.*

and question of state sovereignty. Defenders of state sovereignty, including the Supreme Court, do not elaborate on what they mean by “sovereignty.” They seem to conflate “sovereignty” and “federalism,” two related but distinct constitutional principles. Federalism, the division of power between state and federal levels of government, is *indicative* of state sovereignty; it does not *define* it. Classicists end their examination with the observation that states do not possess formal sovereignty. Republicans cannot accept that state governments are “sovereign,” since only “the people” can make this claim. Finally, Skeptics are both trapped in the Classicist fixation on formal sovereignty and stymied by their own skepticism. They have given up on sovereignty altogether.

#### IV. SOVEREIGNTY AND THE POST-MODERN STATE

The Framers of the United States Constitution imported the ideas of statehood and state sovereignty from Europe. Yet no effort has been made in any of the domestic constitutional discourses to ascertain what has happened to these concepts in the last two centuries. Indeed, as Part III demonstrated, most domestic sovereignty discourses still generally treat the sixteenth century classical conception of state sovereignty as their primary benchmark. This is so despite the rather obvious fact that the states cannot meet the Classical model’s requirements, a fact that the Framers no doubt well appreciated. This Part looks beyond our borders for assistance in understanding state sovereignty. The point of examining international events and thinking is not to suggest that state sovereignty in the domestic constitutional context necessarily means the same thing as state sovereignty in international law and politics. Rather, the hope is that an examination of serious scholarly treatments of international state sovereignty might breathe new life into the mostly stale debate regarding whether the American states are “really” or “truly” sovereign.

Given the expanse of sovereignty’s conceptual history, the discussion that follows is necessarily selective. I have in mind in this Part the “sketchier sort of conceptual history—an outline that imposes coherence at sacrifice to detail while marking more closely the moments of conceptual change.”<sup>146</sup> The first section of this Part examines what has happened, in the most general terms, to the concept of state sovereignty since the framing of the Constitution. Sovereignty has not been an idle or static concept. In particular, the classical concept of state sovereignty upon

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146. Nicholas G. Onuf, *Sovereignty: Outline of a Conceptual History*, 16 *ALTERNATIVES* 425, 428 (1991).

which much of domestic sovereignty discourse is fixated was long ago abandoned by international theorists, as well as practitioners of statecraft, as unrealistic and contrary to fact. In its place, various indicia and meanings of “sovereignty” have been proposed over time. International relations theorists appreciate that we cannot fix the meaning of state sovereignty for all times and purposes. But we can, as they have, come to a general understanding of its core attributes. These include things like *de facto* control of a domain, legitimacy, equality, and recognition. We can also learn to think more deeply and flexibly about sovereignty’s locus and origins.

The next section demonstrates that new challenges to state sovereignty continue to necessitate critical thinking about the concept. One such ongoing challenge is the formation and operation of the European Union (“EU”).<sup>147</sup> The EU is, in essence, a refutation of the classical model of sovereignty. EU members have delegated or “pooled” their sovereignty in the interest of an unprecedented degree of unification. As a result of this transition, and other social and political forces around the globe, the inquiry at the heart of this Article—whether the states are sovereign—is not in any sense unique to American statehood and domestic constitutional debate. Developments in the EU and elsewhere have caused some theorists to posit that a “new sovereignty” has been forged, one that is based far less on the dictation of outcomes or classical exclusivity and more on bargaining, negotiation, cooperation, and earned recognition as a member of the international community.<sup>148</sup>

Serious and sustained challenges to nation-state authority notwithstanding, most international relations scholars would probably agree that the concept of state sovereignty persists, and even prospers.<sup>149</sup> Nation-states routinely claim the mantle of “sovereignty” whenever their interests or prerogatives are threatened. Sovereignty thus remains a powerful speech claim. This is no mere rhetoric. As recent events regarding Iraqi “sovereignty” demonstrate, diplomacy, social discourse,

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147. For discussions of the recent changes in European governance, see generally NICK BERNARD, *MULTILEVEL GOVERNANCE IN THE EUROPEAN UNION* (2002); *BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION* (Gene M. Lyons et al. eds., 1995).

148. See CHAYES & CHAYES, *supra* note 3, at 27 (“Sovereignty, in the end, is status—the vindication of the state’s existence as a member of the international system.”).

149. See, e.g., Louis Henkin, *That “S” Word: Sovereignty, And Globalization, And Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1, 5 (1999) (“In general, I fear sovereignty as we have known it is alive and well.”).

and even the course of world events are deeply affected by the invocation and recognition of state sovereignty, whatever form it takes.<sup>150</sup>

Redefining sovereignty can help to explain the seemingly anomalous prospering of state sovereignty in light of diminishing state power and authority. Another way to explain this anomaly is to focus on how it is that “state sovereignty” is generated, practiced, and sustained over time. “Social construction” is one *non-skeptical, post-classical* theory that seeks to do this. International social constructionists have treated state sovereignty as a variable, flexible construct rather than, as in the formal, classical model, an inherent aspect of statehood and a “brute” material fact. Social construction theorists interpret statehood and sovereignty as dynamic constructs, as “institutional facts” generated over time through such things as state functions, practices, public discourses, and statuses. The final section of this Part describes both the general principles of social construction and the specific manner in which this theory has been applied to the concepts of statehood and sovereignty. Looking ahead, Part V will draw upon the lessons of this Part in re-examining domestic state sovereignty.

#### A. *Post-Classical Sovereignty*

It ought to be beyond debate that whatever “sovereignty” the American states may possess, it is not the classical sovereignty of Bodin, Austin, and Hobbes, which looked to a unitary, exclusive, and final source of authority. Indeed, the Constitution does not lodge this form of sovereignty in *any* source. It is, however, error to end debate in domestic constitutional discourses with this truism. Far from being a fixed or static concept, state sovereignty has always been an institution in process. Specifically, international relations scholars have given substantial attention to three matters, highlighted in this section, which have some bearing on general discussions of state sovereignty: (1) sovereignty’s indicia and meanings, (2) its locus in various forms of governance, and (3) the origins of sovereignty in civil society. To begin the process of reconditioning our thinking about state sovereignty, some of these observations are highlighted in the discussion that follows.

The *indicia and meaning* of sovereignty have, in fact, been constantly evolving since Bodin offered the first comprehensive conceptualization in the sixteenth century. As noted in Part II, Bodin, followed by Hobbes,

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150. See sources cited *supra* note 12.

proffered a concept of political absolutism. But as international relations theorists have pointed out, even these theorists acknowledged limits, such as the precepts of natural law, on sovereignty authority.<sup>151</sup> Later theorists like John Locke posited still other limits, including the idea of “popular” sovereignty.<sup>152</sup>

Internationally, after the Middle Ages, claims to sovereignty were of the classical sort, “ringing assertion[s] of absolute political power at home.”<sup>153</sup> After the creation of an international society, however, scholars have noted that “the implications of sovereignty did not remain fixed.”<sup>154</sup> Claims to “sovereignty,” previously thought to be unitary and indivisible, separated into two general spheres, with nation-states claiming not only domestic (“internal”) sovereignty, but also independence among other states (“external” sovereignty).<sup>155</sup> Generally speaking, internal sovereignty has come to be regarded as “supremacy over all other potential authorities *within that state’s boundaries*.”<sup>156</sup> External sovereignty, by contrast, is “actual independence of outside authority, not the supremacy of one state over others but the independence of one state from its peers.”<sup>157</sup>

States in the seventeenth through the twentieth centuries were generally able to limit interference by other states in their internal affairs, and to insist upon external equality when dealing with other nations in the international arena.<sup>158</sup> Sovereignty also enabled nation-states to maintain classic prerogatives, such as coining money and maintaining military force. It implied as well the ability to negotiate and ratify treaties which could legally bind states. The state thus remained effectively “supreme” over a given territory and population, and asserted unconstrained authority except where it had consented to limitations.<sup>159</sup>

Both internal and external sovereignty have, however, been far more constrained and limited in reality than their ideal articulations would suggest.<sup>160</sup> Internal sovereignty, for example, has been characterized as

151. See JAMES, *supra* note 3, at 4.

152. *Id.*

153. FOWLER & BUNCK, *supra* note 3, at 5.

154. *Id.*

155. *Id.*; see also HINSLEY, *supra* note 3, at 107, 122–32 (discussing distinctions between “internal” and “external” sovereignty).

156. FOWLER & BUNCK, *supra* note 3, at 5 (emphasis added).

157. *Id.* at 37; see JAMES, *supra* note 3, at 20 (arguing that states must not only claim their independence from outside authorities; they must be able to assert their independence in practice).

158. See Robert O. Keohane, *Ironies of Sovereignty: The European Union and the United States*, 40 J. OF COMMON MKT. STUD. 743 (2002).

159. See *id.*

160. As Hans Morgenthau stated: “At the root of the perplexities which attend the problem of the loss of sovereignty there is the divorce, in contemporary legal and political theory, of the concept of

involving *varying* degrees of control over domestic affairs. It has been described by scholars as “the situation of being in charge of a domain”;<sup>161</sup> the “supreme power of deciding in a case of crisis”;<sup>162</sup> and as belonging “to the authority that is both *legitimate* and *supreme*.”<sup>163</sup> Scholars have noted that history is replete with examples of states being *recognized* by the international community as “sovereign” even though they lack absolute and final authority with respect to certain portions of their territories.<sup>164</sup> As commentators have suggested, “[h]ere, as elsewhere, the actual behavior of states helps to shape the meaning of sovereignty.”<sup>165</sup> Moreover, insofar as it requires absolute domestic supremacy, classical sovereignty is seen by many as an indicator of dictatorships and totalitarian regimes, “an evil to be avoided rather than . . . an ideal to be pursued.”<sup>166</sup> This too has led scholars and diplomats to relax the requirements of *absolute* and *exclusive* control when assessing state claims to sovereignty.<sup>167</sup>

Similarly, in “external” affairs, the classical notion of arbitrary and absolute sovereignty was never really a feasible standard in practice. After all, the states had to conduct relations with one another. Thus, limitations on sovereignty began to appear in the form of institutions like “diplomatic immunity” and the creation of embassy compounds, “islands of alien sovereignty.”<sup>168</sup> Again, to separate ideal theory from messy reality, the fact is that “[t]he only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system.”<sup>169</sup> States have even gone so far as to

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sovereignty from the political reality to which the concept of sovereignty is supposed to give legal expression.” HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 249 (1948); see also FOWLER & BUNCK, *supra* note 3, at 38 (“In our view such declarations seem overstated—evidence of scholars turning conditional thoughts into absolute standards.”).

161. CHARLES B. MARSHALL, *THE EXERCISE OF SOVEREIGNTY: PAPERS ON FOREIGN POLICY* 4 (1965).

162. RAYMOND ARON, *PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS* 746 (Richard A. Howard et al. trans., 1967).

163. *Id.* at 739.

164. See FOWLER & BUNCK, *supra* note 3, at 41–42 (citing as examples the governments of Peru, Cyprus, Lebanon, Afghanistan, and Somalia).

165. *Id.* at 42.

166. *Id.* at 43.

167. See JAMES, *supra* note 3, at 179 (noting that “the day of completely autonomous decision-making does seem, for most states on many issues, to be past.”).

168. See Keohane, *supra* note 158, at 747.

169. CHAYES & CHAYES, *supra* note 3, at 27; see FOWLER & BUNCK, *supra* note 3, at 49 (noting that “the international system is routinely described as a place of cooperation and competition”). As discussed below, this has only become more true as global governance and other societal changes arise and affect international relations. See *infra* notes 199–218 and accompanying text.

do something that a classical conception of sovereignty would not permit under any circumstance, namely to *delegate* powers over the state to an external authority.<sup>170</sup> This has been the dominant trend with regard to international organizations—the World Bank and International Monetary Fund, for example—since World War II.<sup>171</sup> “Should external independence of action ever have approached absolute qualities, it has now been seriously eroded.”<sup>172</sup> In sum, “external” sovereignty, like “internal” sovereignty, is “a matter of degree, not of bright lines.”<sup>173</sup>

In addition to its evolving indicia, the *meaning* of “sovereignty” has also varied across time and circumstances. It would be impossible to acknowledge each of the specific definitions and permutations that have been proposed.<sup>174</sup> But generally speaking, as the society of nations and nation-states crystallized, “the concept of sovereignty moved beyond declarations of the rights of a sovereign to encompass novel ideas of legitimacy, responsibility, and international recognition.”<sup>175</sup> Over time, sovereignty has denoted things like superiority within a territory; the “capacity to make and give effect to public decisions”; and, as already noted, “being in charge of a domain.”<sup>176</sup> Some theorists have identified the “core” aspects of sovereignty, such as “supreme political authority and monopoly over the legitimate use of force within [a] territory,” the capacity to regulate movements across borders, the ability to make foreign

170. See generally STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999). “[T]he classic conception of sovereignty prohibits a government from agreeing to rules defining a process over which it does not have a veto, that can confer obligations not specifically provided for in the original agreement.” Keohane, *supra* note 158, at 748.

171. Keohane, *supra* note 158, at 748.

172. FOWLER & BUNCK, *supra* note 3, at 49.

173. *Id.*

174. For example, theorists have drawn distinctions between “legal” and “political” sovereignty. Legal sovereignty, very simply stated, is the power to enact enforceable laws. MACCORMICK, *supra* note 3, at 127. Political sovereignty, by contrast, is “the capacity of the people to overcome divisions and establish a political unity”; it exists where the will of the state is ultimately obeyed by the citizens of the state. *Id.* Political sovereignty depends to a large extent on the strengthening of bonds between the rulers and the ruled, the state and society. See Richard Bellamy, *Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Rights Within the EU*, in *SOVEREIGNTY IN TRANSITION*, *supra* note 2, at 171–72 (discussing distinction between political and legal sovereignty). It is “interpersonal power over the conditions of life in a human community or society . . . [and] the ability to take effective decisions on whatever concerns the common well-being of the members, and on whatever affects the distribution of the economic resources available to them.” MACCORMICK, *supra* note 3, at 127.

175. *Id.* at 6.

176. JAMES, *supra* note 3, at 19 (quoting CHARLES B. MARSHALL, *THE EXERCISE OF SOVEREIGNTY* 3 (1965)); see also K.N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 96 (1979) (linking sovereignty to the capacity of a state to “decide[] for itself how it will cope with its internal and external problems”).

policy choices independently, and recognition by other governments “as an independent entity entitled to freedom from external intervention.”<sup>177</sup> Some theorists have described sovereignty in *de facto* terms, such as effective control over a domain, others in *de jure* terms, as for example, constitutional independence.<sup>178</sup> Still others have focused on sovereignty’s traditional components—“rulers, allegiance, common history, the taking of effective decisions, and the undertaking and implementing of obligations.”<sup>179</sup> Some scholars, taking a functional approach, have used “sovereignty” to “denote the collection of functions exercised by a state.”<sup>180</sup> Similarly, sovereignty has been characterized as a “bundle of competences,” in the same manner that possession of property bestows a “bundle of rights.”<sup>181</sup>

Some scholars have specifically focused upon the distinction between *de jure* and *de facto* state sovereignty.<sup>182</sup> States thus might be said to possess both “legal” and “behavioral” sovereignty.<sup>183</sup> All states might be said to be legally sovereign. They possess a “set of attributes that constitutes the legal personality of a state.”<sup>184</sup> These include such things as legal competence to participate in the international system on an equal footing with other states, consent to treaty obligations, the right to exclude other states from interfering with internal matters, and control of their borders.<sup>185</sup> Although all states possess these traits or competences, states can and do differ in the extent to which they are able to exercise them. Thus, we must look as well at the “behavioral sovereignty” of states, of how they conduct themselves in the world. When we do so, we can see that not all states have the capacity to fully exercise their sovereign powers and rights. State sovereignty on this view is variable; indeed, “some states are more sovereign than others.”<sup>186</sup>

The flexibility of the concept of sovereignty is its signature post-classical feature. This variability does not, however, demonstrate that

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177. John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT’L L. 782, 786 (2003) (quoting Richard N. Haass, former ambassador and director of Policy Planning Staff, U.S. Department of State).

178. See JAMES, *supra* note 3, at 24 (“sovereignty consists of being constitutionally apart”).

179. FOLWER & BUNCK, *supra* note 3, at 6.

180. INGRID DELUPIS, INTERNATIONAL LAW AND THE INDEPENDENT STATE 3 (1974).

181. BLIX, *supra* note 26, at 11–12.

182. For a recent discussion, see Richard H. Steinberg, *Who Is Sovereign?*, 40 STAN. J. INT’L L. 329 (2004).

183. *Id.* at 329.

184. *Id.* at 330.

185. *Id.* at 329.

186. *Id.* at 331–32.

sovereignty means essentially whatever one wishes, and hence, nothing at all. Although the indicia and formulations have varied over time and across circumstances, “sovereignty” has commonly indicated some amalgam of control, competence, status, rights, and recognition by relevant communities.<sup>187</sup> As noted, there are few bright lines and even fewer opportunities to empirically measure a state’s sovereignty. It is not always necessary, for example, that control over territory be *de jure*, nor that it be absolute and exclusive. Recognition, and with it deference, may come even if a government’s control is somewhat marginal. A state that exercises its “bundle of competences” will more often than not be recognized as “sovereign” by its peers, meaning that it will be given deference, respect, equality, or other rights, even if on a relative basis the state suffers a deficit of power, or wealth, or force. Always, in the end, we must attend to the actual behavior of states, which “helps to shape the meaning of sovereignty.”<sup>188</sup> As we shall see, at least according to some theorists, being treated *as if* one is in control, or *as if* one has sovereign rights, is what truly matters.

As noted, some domestic constitutional scholars insist that sovereignty can reside only in “the people.” The *locus* of sovereignty has also been the subject of international scholarly attention. Originally, of course, sovereignty resided in the monarchy. Depending upon the form of government, however, theorists have long acknowledged that sovereignty might lie as well in a legislature, or in the people themselves, or both.<sup>189</sup> “Monarchical sovereignty has given way to popular sovereignty, and popular sovereignty has come to be understood in terms of representation—both political and symbolic.”<sup>190</sup> As one commentator observed: “[A]s states moved from absolutist to representative rule, democratically elected governments co-opted a term that had originally been linked with the supreme powers of a state’s ruler and used it to assert their own sovereign powers delegated to them by their citizens.”<sup>191</sup> Republican objections notwithstanding, in terms of conceptual evolution, it has not been at all unusual to speak in terms of “sovereign” governments or states, recognizing of course the ultimate representative character of the states’ sovereignty.

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187. See FOWLER & BUNCK, *supra* note 3, at 45 (“Perhaps for many observers today domestic political supremacy amounts to little more than occupying the recognized seat of government.”).

188. *Id.* at 42.

189. See WEBER, *supra* note 3, at 8 (discussing locus of sovereignty authority).

190. *Id.*

191. FOWLER & BUNCK, *supra* note 3, at 6.

Finally, international relations scholars have given the *origins* of sovereignty far more considered attention than domestic constitutional scholars, who are trapped between the positions that either “the states” or “the people” consented to the Constitution and are thus “truly” sovereign. Some international scholars have noted, in particular, that sovereignty does not *automatically* arise whenever a state possesses a monopoly on coercive power. Although the state and sovereignty reinforce one another, there can be states (people, territory, and government) that are not in fact “sovereign.”<sup>192</sup> According to some scholars who have studied the origins of modern sovereignty, a community must “recognize” the state before it can rule effectively.<sup>193</sup> As one scholar stated:

It is when a sufficient element in the community in which the state operates has sufficiently come to accept it and when, in the process of becoming accepted to this sufficient extent, the state has adjusted its forms and its outlook to the demands and conditions of the community—it is then and only then . . . that the concept of sovereignty has been newly coined.<sup>194</sup>

Thus, sovereignty does not simply arise with the erection of a capitol, the election of a legislature or an executive, or even the ratification of a constitution. Rather, “[i]t is only when the community responds to the state and the state responds to the community in which it rules that the discussion of political power can take place in terms of sovereignty.”<sup>195</sup>

“Sovereignty,” as should be obvious from even this brief discussion, is a great deal more complex than domestic constitutional discourses acknowledge.<sup>196</sup> One cannot, for example, define “sovereignty” in some formalistic sense, or capture it by measuring guns, dollars, or personnel. It is more than the product of some distributional calculus, for example, but less than supreme and absolute authority within a territory. As one scholar has observed, sovereignty is “a perpetually tentative undertaking; one can only cite the latest edition and anticipate the next revision.”<sup>197</sup> That does not mean, as Skeptics contend, that sovereignty is therefore meaningless or solely a rhetorical parry. It means, rather, that one must stay current with the evolutionary progress of the concept. Meanings, even of basic

192. See HINSLEY, *supra* note 3, at 20–21.

193. *Id.* at 21.

194. *Id.*

195. *Id.* at 21–22.

196. SOVEREIGNTY IN TRANSITION, *supra* note 2, at 307 (describing sovereignty as “a prism through which many different legal or political problems might be examined”).

197. FOWLER & BUNCK, *supra* note 3, at xi.

constitutional concepts, change. “Our Federalism” is not the same today as it was in, say, 1930. Neither, for that matter, is our “privacy.” We can, as a result of the evolution highlighted here, hopefully at least throw off the classical straightjacket and see what else there might be.

*B. The “New Sovereignty”*

Historically, sovereignty “has been the source of greatest preoccupation and contention when conditions have been producing rapid changes in the scope of government or in the nature of society or in both.”<sup>198</sup> This is certainly the case across the globe in this modern era. Domestically, the balance of power that resulted from the “cooperative federalism” of the *shared* sovereignty era left the states in a substantially subordinated position, leaving their “sovereign” status in some doubt. Internationally, unique forms of governance have cropped up which have further threatened the traditional prerogatives of states and, thus, the concept of state sovereignty.

The sovereignty of today’s nation-state is beginning to bear far greater resemblance to the framers’ concept of a limited, partial, and divided authority than to the absolute, exclusive, and final authority of the classical model. As one international scholar noted: “One element of postmodern statehood is that sovereignty is considered to be increasingly ‘held in common’, ‘pooled among governments, negotiated by thousands of officials through hundreds of multilateral committees, compromised through acceptance of regulations and court judgements.’”<sup>199</sup> In light of the resulting limitations on state authority, the question now *commonly* being asked, domestically as well as internationally, is whether the states can still be considered “sovereign” at all.

To better appreciate the character and status of state claims to sovereignty in the “post-modern” era, let us briefly consider the best-known example of the trend toward limited and partial sovereignty—the European Union. By way of a summary or overview, the EU is constituted by the various treaties and laws that are uniformly applicable throughout the European Union, which bind all the member states and their citizens.<sup>200</sup> These laws are interpreted by the European Court of Justice, which,

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198. HINSLEY, *supra* note 3, at 2.

199. Aalberts, *supra* note 29, at 34 (quoting W. Wallace, *The Sharing of Sovereignty: The European Paradox*, 47 POL. STUD. 503, 519 (1999)) (emphasis added).

200. See JOHN MCCORMICK, UNDERSTANDING THE EUROPEAN UNION: A CONCISE INTRODUCTION (2d ed. 2002).

among other things, gives opinions to national courts in cases where there are questions about the meaning of EU law.<sup>201</sup>

Pursuant to various treaties, EU member states have effectively agreed to *transfer* authority to the EU in a range of policy areas—for example, intra-European trade, the environment, agriculture, and social policy.<sup>202</sup> In these areas, EU law supersedes national law. In other areas, national law remains supreme.<sup>203</sup> Thus, member states have voluntarily surrendered important aspects of their “internal” and “external” sovereignty to the EU. According to one interpretation: “Sovereignty is pooled, in the sense that, in many areas, states’ legal authority over internal and external affairs is transferred to the Community as a whole, authorizing action through procedures not involving state vetoes.”<sup>204</sup>

In contravention of the classical model of sovereignty, this delegation of authority has led to the development of a new level of supra-state legal authority to which the member states are often subject.<sup>205</sup> The impact of this new arrangement on European governance has been substantial. EU legislative institutions, for example, have been quite active. Until the early 1990s, the EU was adopting 6,000–7,000 laws every year; the number has fallen significantly, by one count to about 1,500–1,800.<sup>206</sup> The complex structure of the EU consists of, among other things, the European Parliament, a directly elected representative body. As the powers of this body grow, the powers of the national legislatures may continue to decline.<sup>207</sup> In certain areas, the European Commission, another institution within the complex EU structure, is authorized to oversee negotiations with third parties on behalf of all the member states.<sup>208</sup> In addition, the Euro has replaced the national currencies of most of the member states.<sup>209</sup> Thus, the power to set fiscal policy, one of the traditional indicia of

201. *See id.* at 109–13 (describing the role of the European Court of Justice).

202. *See* Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 EUR. L.J. 255 (1995) (describing transfer of competences in various policy areas); *see also* McCormick, *supra* note 200, at 11.

203. *See* MCCORMICK, *supra* note 200, at 11.

204. Keohane, *supra* note 158, at 8.

205. *See* SOVEREIGNTY IN TRANSITION, *supra* note 2, at 186–87 (noting surrender of authority by member states over certain competences).

206. MCCORMICK, *supra* note 200, at 89. By comparison, the United States House of Representatives and the United States Senate each passed less than 1,000 pieces of legislation in the latest year for which figures are available. *See* NORMAN J. ORNSTEIN, THOMAS E. MANN, & MICHAEL J. MALBIN, *VITAL STATISTICS ON CONGRESS, 2001–2002* (2002).

207. The EU budget (\$86 billion in 2002) gives EU institutions an element of financial independence as well. MCCORMICK, *supra* note 200, at 11.

208. *Id.*

209. *Id.*

national sovereignty, has been transferred to the European Central Bank in Frankfurt.<sup>210</sup>

The challenges to sovereign authority encompass more than changes in regional governance structure. Indeed, derogations from the classical model of sovereignty are everywhere. For instance, many nation-states have voluntarily consented to a variety of obligations, including even binding enforcement mechanisms, with regard to human rights.<sup>211</sup> As Louis Henkin has reported: “In major regions of the world (Europe, the Americas), states have submitted to comprehensive systems of enforcement by commission, court, and political bodies, unthinkable to ‘sovereignty’ just a few years ago.”<sup>212</sup> Another scholar has suggested that “Europe, the cradle of external and unitary sovereignty, now serves as the model of co-operative mutual interference.”<sup>213</sup>

In sum, EU member states have surrendered powers to decision-making systems that function beyond the level of the state.<sup>214</sup> Nation-states have formally moved beyond the intergovernmental level to the creation of *supranational* organizations and bodies of common law.<sup>215</sup> As one scholar

210. EU member states can still do almost everything that American states cannot do; they can make treaties, for example, and they maintain an independent military. *See* MCCORMICK, *supra* note 200, at 9–12 (discussing distinction between confederation and federation). In addition, again by way of rough comparison, the EU institutions presently have few of the powers of the federal government in the United States; they cannot levy taxes or operate a common military. *Id.* at 11. The EU is thus not a true federation like the United States. The EU cannot technically force members to remain so; theoretically, but by no means practically, the member states can withdraw from the EU.

211. *See* Louis Henkin, *Human Rights and State Sovereignty*, 25 GA. J. INT’L & COMP. L. 31, 41–42 (1995/1996) (describing compliance and enforcement trend with regard to international human rights).

212. *Id.* at 42. As Professor Henkin also noted, however, some concessions on human rights have been over the strong objections of states who continue to invoke their sovereignty. *See id.* at 44 (“At the World Conference on Human Rights (Vienna, 1993) some states led the attack on the idea of human rights, and particularly on its enforcement, under the banner of ‘sovereignty’ . . .”).

213. Keohane, *supra* note 158, at 749.

214. Regional integration has occurred elsewhere around the globe, in the Americas, Asia, and Africa for example. To date, however, the EU is the most highly evolved example of regional integration in the world.

215. Some international scholars have described the EU and similar arrangements as a form of “multi-level governance.” *See* LIESBET HOOGHE & GARY MARKS, *MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION* (2001). This descriptive theory depicts contemporary structures in EU Europe as consisting of overlapping authorities and competing competencies. Under multi-level governance, “decision-making competencies are shared by actors at different levels.” Aalberts, *supra* note 29, at 28. Thus, although the EU is not a federation, “supranational institutions have become actors in their own right, playing an independent part in policy-making” and having substantial effects formerly considered to be the exclusive domain of “internal” state sovereignty. *Id.* Subnational and local governments have also gained in importance, resulting overall in a diminished role for nation-states. In many respects, “the traditional separation of domestic and international politics has been undermined because of transnational associations.” *Id.* Multi-level governance theory is based on the idea of governance beyond the state—in other words, governance including the state, but as only one

summarized the situation: “Overall, one can speak of a tripartite shift of authority away from national governments: upwards, as a most direct result of European integration; downwards, because of subnational empowerment; and sideways to, for instance, public-private partnerships.”<sup>216</sup> As a result, “states are only one among a variety of actors influencing decision-making at a variety of levels, and do not by definition have a final say.”<sup>217</sup> Nations have pooled, and thereby in some measure limited and devalued, their “sovereignty.” They have consented to substantial interventions with respect to their “internal” sovereignty. All of this has further widened the gap between political reality and the ideal of classical sovereignty. “The capacity and right of existing states to exercise supreme authority within their territory, control access to it, and speak for their citizens outside it, have all become harder to sustain and justify.”<sup>218</sup>

These and other post-modern developments have spurred some theorists to reconsider the traditional, formal concepts of state sovereignty. In particular, national interdependence, changes in governance structure like the EU, and other forces have forged what some scholars have called the “new sovereignty.”<sup>219</sup>

In thumbnail form, the “new sovereignty” has two basic characteristics that distinguish it from classical sovereignty. First, in contrast to classical sovereignty, the new sovereignty “is not virginity, which you either have or you don’t.”<sup>220</sup> Sovereignty is not a “chunk” or absolute, but a “basket of attributes and corresponding rights and duties.”<sup>221</sup> This is not a new idea so much as a return to a conception of sovereignty which had been eclipsed for many years by the formal, classical model. As one scholar noted some time ago: “[S]overeignty has traditionally been used as a term to denote the collection of functions exercised by a state.”<sup>222</sup> Or as Hans Blix, the official at the center of the pre-war weapons search in Iraq once said: “As ownership is described as a bundle of rights, sovereignty may be described

among many actors, if still a key actor. Aalberts, *supra* note 29, at 28.

216. Aalberts, *supra* note 29, at 28.

217. *Id.* Intergovernmental theorists view these new governance arrangements as necessitating bargaining, while states retain sovereignty. *See, e.g.*, ALAN S. MILWARD, *THE EUROPEAN RESCUE OF THE NATION STATE* (1992) (describing intergovernmentalism theory). Supranationalists, by contrast, view these new structures as obviating state sovereignty. *See, e.g.*, R.A.W. Rhodes, *The New Governance: Governing Without Government*, 44 *POL. STUDIES* 652 (1996).

218. Bellamy, *supra* note 174, at 167.

219. *See generally* CHAYES & CHAYES, *supra* note 3.

220. Geoffrey Howe, *Sovereignty and Interdependence: Britain’s Place in the World*, 66 *INT’L AFF.* 675–95 (1990).

221. FOWLER & BUNCK, *supra* note 3, at 70.

222. DELUPIS, *supra* note 180, at 3.

as a bundle of competences.”<sup>223</sup> Although sovereignty has been devalued by new arrangements and political realities, it persists and prospers insofar as these competences continue to be performed and used to sustain state claims to internal sovereignty.

Second, the “new sovereignty” is not based upon a state’s ability to demand or coerce other states, or its exclusive control over policies or other matters. Rather, the new concept of state sovereignty has been characterized primarily in terms of a state’s ability to act effectively within international regimes. With few exceptions, nation-states cannot control, coerce, or dictate like they used to.<sup>224</sup> In a word, sovereignty, once exclusive and isolationist, has become “relational.”<sup>225</sup> As Abram and Antonia Chayes, leading proponents of a particular version of the “new sovereignty,” have explained: “[T]he only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system.”<sup>226</sup> Thus, states have to maintain their sovereignty by *actively* practicing it, by propping it up and maintaining it.<sup>227</sup>

The “new sovereignty” is a substantial change from the classical model. For one thing, sovereignty’s traditionally negative, proscriptive character has become more positive, proactive, and affirming. Sovereignty is “a *resource* to be used, rather than a constraint that inhibits or limits our capacity for action.”<sup>228</sup> It is, to be sure, less of a sledgehammer or “slam dunk” argument than is classical sovereignty. Sovereignty retains considerable force and prospers insofar as nations support it by playing functional roles and advancing winning justifications for being left alone or being deferred to with regard to decisions and policies that affect them. “Under conditions of extensive and intensive interdependence, formal sovereignty becomes less a territorially defined barrier than a bargaining resource.”<sup>229</sup>

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223. BLIX, *supra* note 26, at 11–12.

224. Interestingly, the United States may be one of the exceptions to this general rule. Indeed, some have noted the irony that the United States, which has always had a distributed sovereignty, has conducted itself as a classical sovereign in foreign relations, while the states of Europe, which originated the classical form of sovereignty, have pooled and limited their sovereignty. *See generally* Keohane, *supra* note 158, at 744 (noting the irony of the United States clinging to a classical concept of sovereignty in foreign affairs, while European states have adopted “pooled” sovereignty).

225. Anne-Marie Slaughter, *In Memoriam: Abram Chayes*, 114 HARV. L. REV. 682, 685 (2001).

226. CHAYES & CHAYES, *supra* note 3, at 27.

227. *See* STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 3, at 11 (noting “the variety of ways in which states are constantly negotiating their sovereignty”); *id.* at 12 (“sovereignty provides textual and/or contextual prescriptions for what a state must do to be recognized as sovereign”).

228. Howe, *supra* note 220, at 680 (emphasis added).

229. Keohane, *supra* note 158, at 748.

Bargaining, of course, entails sacrifice. As the complexity of the EU demonstrates, in order to preserve effective “behavioral” sovereignty nation-states must give up some aspects of their formal, legal sovereignty. Even powerful countries must support international cooperation if they hope to preserve their policymaking autonomy. As Chayes and Chayes have stated: “Sovereignty, in the end, is status—the vindication of the state’s existence as a member of the international system.”<sup>230</sup>

### C. *Sovereignty as a Social Construct*

Developments in Europe and elsewhere have given rise to various theories regarding state sovereignty. There are those who, without offering a coherent theory of state sovereignty, nevertheless maintain that nations retain their “sovereignty” despite the general erosion of their authority.<sup>231</sup> There are international *Classicists* who argue that sovereignty cannot be shared, pooled, or negotiated. Since no state currently exercises exclusive, final, and enforceable authority, these scholars suggest, no state is “sovereign.”<sup>232</sup> There are international *Republicans*, who argue that the concept of the sovereign state is, and in fact always has been, inconsistent with republican and democratic principles, and an impediment to the realization of human rights and general welfare.<sup>233</sup> And there are international *Skeptics*, who argue that claims to “sovereignty” persist primarily because they provide a rhetorical advantage.<sup>234</sup> This synthesis should sound arrestingly familiar. Each of the domestic theories regarding

230. CHAYES & CHAYES, *supra* note 3, at 27 (“[F]or all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life.”).

231. Intergovernmental theorists regard consolidation and interdependence as a form of bargaining, while supranationalists see it as loss of sovereignty. See MILWARD, *supra* note 217 (intergovernmentalism); Rhodes, *supra* note 217 (supranationalism). Some scholars note that EU members do in fact retain the final say as to whether they will remain members. It has been commonly noted, however, that *practical realities* make withdrawal from the EU next to impossible. See, e.g., Bellamy, *supra* note 174, at 176 (stating that member states can formally, but not practically, withdraw from the EU); MCCORMICK, *supra* note 200, at 119 (noting that while withdrawal from the EU is permissible, “it is practically unlikely, because the economic ties among the member states would probably make it more costly to leave than to stay in”).

232. See generally CAMILLERI & FALK, *supra* note 3 (questioning the continued usefulness of the concept of sovereignty in light of interdependence and other developments).

233. See, e.g., Henkin, *supra* note 211, at 33 (“But the benefits of a system in which states were let alone were seen in state terms, with the individual an incidental, indirect beneficiary, and often not a beneficiary at all.”).

234. See, e.g., KRASNER, *supra* note 170 (arguing that sovereignty is an incoherent concept).

sovereignty discussed in Part III is indeed represented in international scholarly discourse concerning state sovereignty.

As noted in Part III, however, none of these theories is capable of advancing our consideration of state sovereignty very far, if at all. Part of what the evolution of sovereignty in general, and the “new sovereignty” in particular, demonstrates is that state sovereignty cannot, as Classicists apparently believe, be fixed for all times and purposes. “Like all social norms, the principle of sovereignty has a history, a history that has involved the same sort of communicative processes that surround the production of other social norms.”<sup>235</sup> Thus, “as the prescriptions for sovereign recognition change, so does the meaning of sovereignty.”<sup>236</sup>

We might, as “new sovereignty” theorists have, go about untangling the seeming anomaly of persistent state claims to sovereignty and diminishing state powers by redefining sovereignty for a new era. It might be helpful, in addition, to examine how state sovereignty is generated in the first place, and ultimately sustained. This section looks to social construction theory, which is well suited to this task. Some international relations scholars have recognized that it is not particularly helpful to treat sovereignty as something that can be measured or rigidly defined. They have applied principles of social construction theory to examine statehood and sovereignty as constructs, facts that are ultimately generated by human agreement. This can help explain how it is that states continue to be recognized and treated as “sovereign” despite their seeming loss of classical authority. It can also help us to understand how something like the “new sovereignty” might arise. The theory’s sensitivity to the extent to which state sovereignty is constructed enables us to track “important qualitative changes in the meaning of both state and sovereignty.”<sup>237</sup>

The section begins with a brief distillation of the basic principles of social construction theory. It will then specifically examine how social construction theory has been applied to the concepts of statehood and sovereignty in the international context. Part IV will then return to domestic constitutional concerns, incorporating the lessons learned in this Part.

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235. *Id.*

236. STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 3, at 13.

237. *Id.* at 12.

### *1. Some Basic Principles of Social Construction*

Social construction theory essentially posits that “there are portions of the real world, objective facts in the world, that are only facts by human agreement,”<sup>238</sup> that “[i]n a sense there are things that exist only because we believe them to exist.”<sup>239</sup> Objects like money, property, governments, and marriages have physical properties; but none of them can truly exist unless we arrive at some agreement as to what it means to say that something is “money,” or “government,” or what have you. These concepts are human inventions.

John Searle, a leading proponent of social construction theory, distinguishes two types of facts that order the world. “Institutional facts” are those that “require human institutions for their existence.”<sup>240</sup> For a piece of paper to be a five dollar bill, for example, there must be the “human institution of *money*.”<sup>241</sup> “Brute facts,” by contrast, are those which are not dependent on any human opinion.<sup>242</sup> The fact that “hydrogen atoms have one electron” is a “brute fact.”<sup>243</sup> The fact that “the sun is 93 million miles from earth” is a “brute fact.”<sup>244</sup> The fact that George Bush is “president,” by contrast, is an “institutional fact” because there must be some shared understanding of what it means to be “president” for this status term to have meaning.<sup>245</sup> To preview the discussion that follows, social constructionists posit that “state” and “sovereignty,” like “president,” are institutional, rather than brute, facts.

The distinction drawn is essentially one between matters of “brute physics and biology” versus “features of the world that are matters of culture and society.”<sup>246</sup> Searle and other constructionists are primarily interested in *how* institutional facts are created. It is not necessary to grasp all of the technical nuances and formal logic of social construction theory to understand the basic process by which this occurs. According to Searle,

238. SEARLE, *supra* note 32, at 1; *see also* P.L. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1991).

239. SEARLE, *supra* note 32, at 1.

240. *Id.* at 2.

241. *Id.*

242. *Id.*

243. *Id.*

244. SEARLE, *supra* note 32, at 27.

245. *Id.*

246. *Id.* at 27. Social construction theory posits a need to “distinguish those true statements we make that attribute features to the world that exist quite independently of any attitude or stance we take, and those statements that attribute features that exist only relative to our interests, attitudes, stances, purposes, etc.” *Id.* at 12.

the fundamental “apparatus”<sup>247</sup> necessary to account for and order social reality includes three basic elements: (1) constitutive rules; (2) imposition of function; and (3) collective intentionality.

*Constitutive rules* are critical to the construction of institutional facts. These rules must be distinguished from mere “regulative rules.”<sup>248</sup> A regulative rule regulates antecedently existing activities. Hence, “drive on the right side of the road” is a regulative rule; activity which precedes the rule is being regulated.<sup>249</sup> Constitutive rules do not merely regulate. Rather, they “create the very possibility” of certain activities.<sup>250</sup> Searle gives as an example the rules of chess.<sup>251</sup> “Chess” cannot exist without a set of constitutive rules to tell players and observers *how* it is to be played. The rules constitute, in a sense, the game; they define it for us. Institutional facts exist only within systems of constitutive rules; “the systems of rules create the possibility of facts of this type .”<sup>252</sup>

The *imposition of functions* is the second critical element of the constructive apparatus. The structure of social reality is by and large taken for granted—“weightless and invisible”; as Searle notes, we don’t reflect on the ontology of “car” or “house” or “money” as institutional facts.<sup>253</sup> We see these and other objects in terms of their *functions*, not their physical properties.<sup>254</sup> Some objects are constructed to serve specific functions. In most cases, however, we impose some function or functions on an object to understand it. As Searle notes, as we attribute functions to an object (a river is used to swim in, for example), “we are situating these facts relative to a system of values that we hold.”<sup>255</sup> Imposed functions are not always oriented toward some action. As Searle observes: “Sometimes the agentive function assigned to an object is that of standing for or representing something else.”<sup>256</sup> This type of imposition of function is called “symbolism.”<sup>257</sup>

247. SEARLE, *supra* note 32, at 13.

248. *Id.* at 27.

249. *Id.*

250. *Id.* at 28.

251. *Id.* at 27–28.

252. *Id.* at 28.

253. *Id.* at 4.

254. SEARLE, *supra* note 32, at 4. These are what Searle calls “observer-relevant” features of the social world—they are “ontologically subjective.” *Id.* at 9–10.

255. *Id.* at 14, 15. A specific feature (X) may malfunction; yet we will still consider a function of the object itself to be X. *Id.*

256. SEARLE, *supra* note 32, at 21.

257. *Id.* at 21. Searle refers to symbols as a special class of “agentive function,” with “agentive” meaning matters of the use to which agents put specific entities. *Id.*

Finally, the development of what Searle calls *collective intentionality* completes social construction. Collective intentionality refers to the “shared intentional states”—beliefs, desires, purposes<sup>258</sup>—of relevant participant and observer communities. A “social” fact is, thus, any fact involving collective intentionality or, to use another phrase, *human agreement*.<sup>259</sup> With regard to institutional facts, collective intentionality involves “the imposition of a collectively recognized *status* to which a function is attached.”<sup>260</sup> It is important to recognize that this does not mean that the community of relevant actors or observers must be *conscious* that they are collectively imposing a function or status; as Searle notes, in the course of acting “they may simply *evolve* institutional facts.”<sup>261</sup> “As long as people continue to recognize [the object] as having the . . . status function, the institutional fact is created and maintained.”<sup>262</sup> “They do not in addition have to recognize that they are so recognizing, and they may hold all sorts of other false beliefs about what they are doing and why they are doing it.”<sup>263</sup>

With this basic apparatus, we can grasp the rudimentary process by which institutional facts are generated. We first must conceptualize a hierarchy of facts where brute facts precede institutional facts; in other words, institutional facts essentially sit atop brute facts.<sup>264</sup> Currency, for example, must exist in some physical form or another before we can generate the institutional fact of “money.”<sup>265</sup> So too with “state,” which has a set of physical properties (territory and population, for example). Once this physical realization is in place, the object (currency or territory) is assigned a function and becomes, within a set of constitutive rules, the construct we call “money” or “state.”

Collective intentionality is a critical part of the movement from object to institutional fact.<sup>266</sup> As Searle posits: “The key element in the move

258. *Id.* at 24.

259. *Id.* at 26.

260. SEARLE, *supra* note 32, at 41.

261. *Id.* at 47 (emphasis added).

262. *Id.* Searle uses the example of a boundary wall which has collapsed but is still *treated as* a boundary by the community. It is intended to function the same way but the means by which it does so is the *collective* recognition that the stones have a special status to which this function is attached. *Id.* at 28.

263. *Id.* at 47–48.

264. SEARLE, *supra* note 32, at 34–35.

265. *Id.*

266. “The central span on the bridge from physics to society is collective intentionality, and the decisive movement on that bridge in the creation of social reality is the collective intentional imposition of function on entities that cannot perform those functions without that imposition.” SEARLE, *supra* note 32, at 41.

from the collective imposition of a function to the creation of institutional facts is the imposition of a collectively recognized *status* to which a function is attached.”<sup>267</sup> In essence, the principle of “self-referentiality” posits that for *X* to be money, it “must be believed to be” money, or “used as” money, or “regarded as” money.<sup>268</sup> As Searle states, “for social facts, the attitude that we take toward the phenomenon is partly constitutive of the phenomenon.”<sup>269</sup> Stated somewhat differently: “[P]rocess is prior to product”; “social objects are always . . . constituted by social acts; and, in a sense, *the object is just the continuous possibility of the activity.*”<sup>270</sup>

Searle reduced the basic process of institutional fact-generation to a formula: “*X counts as Y in C,*”<sup>271</sup> where *X* is the object, *Y* is the status function, and *C* represents the circumstances or conditions under which *X* takes on the status *Y*. For example, paper (*X*) counts as money (*Y*) under certain conditions of commerce and exchange (*C*). Or, once again to anticipate later discussion, state (*X*) counts as sovereign (*Y*) under certain conditions (*C*).<sup>272</sup> This process applies to institutions as well as objects. Importantly, Searle notes that institutions, unlike certain other objects, do not wear out as this formula is repeatedly invoked over time. Instead, “each use of the institution is in a sense a renewal of that institution”; thus, “constant use renews and strengthens institutions such as marriage, property, and universities.”<sup>273</sup> One can thus anticipate that repeated use can do the same thing for institutional facts like “state” and “sovereignty.”

There are two additional points which should be noted as a supplement to this basic distillation of social construction; these will take on special significance when we consider *domestic* state sovereignty as an institutional fact. First, there is a significant *linguistic* component to the generation of institutional facts. Indeed, Searle notes that “language is

267. *Id.*

268. *Id.* at 32.

269. *Id.* at 33. “Part of being a cocktail party is being thought to be a cocktail party; part of being a war is being thought to be a war. This is a remarkable feature of social facts; it has no analogue among physical facts.” *Id.* at 34. Searle also notes the possibility that a social fact can be created by means of “performative utterances” or declarations. For example, the utterance “War is hereby declared” creates the very state of affairs it represents. *Id.*

270. SEARLE, *supra* note 32, at 36. As Searle says, seeming to be *F* (the observer-relative feature) “logically precedes” being *F*. Thus, “seeming to be *F* is a *necessary condition* of being *F*.” *Id.* at 13 (emphasis added).

271. *Id.* at 46.

272. Of course, “state” is itself an institutional fact. It is composed of physical properties like territory and people. We can give the status function of state (*Y*) to a territory and population (*X*) under certain circumstances, such as where the territory and population has come together under a constitution or other consensual agreement.

273. SEARLE, *supra* note 32, at 57.

essentially constitutive of institutional reality.”<sup>274</sup> This stems from the fact that for institutional facts, unlike brute ones, we need a system of representation like language to convey and constitute the facts.<sup>275</sup> As a result, “the linguistic element appears to be partly constitutive of the fact.”<sup>276</sup> *Symbolism* is especially important to the process of generating social constructs. “The feature of language essential for the constitution of institutional facts is the existence of symbolic devices, such as words, that by convention mean or represent or symbolize something beyond themselves.”<sup>277</sup> By “symbolism” Searle means that “there are words, symbols, or other conventional devices that mean something or express something or represent or symbolize something beyond themselves, in a way that is publicly understandable.”<sup>278</sup>

The importance of symbolism makes perfect sense when we consider that the process of institutional fact-generation requires shared understandings. “Because the new status exists only by convention, there must be some conventional way to represent the status or the system will not work.”<sup>279</sup> Thus, symbols are especially useful, indeed at times critical, means for conveying social status constructions.<sup>280</sup> In terms of the formula for generation of institutional facts: “Physically X and Y are exactly the same thing. The only difference is that we have imposed a status on the X element, and this new status needs markers, because, empirically speaking, there isn’t anything else there.”<sup>281</sup> Social construction theory sensitizes us to the host of markers we otherwise take for granted. A passport, for example, is not simply a document that permits us to leave and re-enter the country. It is a status indicator, a “speech act” that combines with a host of other markers to constitute institutional facts like nation and citizenship.<sup>282</sup>

The second supplemental point is that, generally speaking, when in the process of generating institutional facts we assign functions to an object or institution, we generate *power* on its behalf. According to Searle: “Because the creation of institutional facts is a matter of imposing a status and with it a function on some entity that does not already have that status-

274. *Id.* at 59.

275. *Id.* at 37.

276. *Id.*

277. *Id.* at 60.

278. SEARLE, *supra* note 32, at 60–61; *see also id.* at 66 (Linguistic symbols “symbolize something beyond themselves, they do so by convention, and they are public”).

279. *Id.* at 69.

280. *Id.* at 3.

281. *Id.* at 69 (emphasis omitted).

282. *Id.* at 119.

function, in general the creation of a status-function is a matter of conferring some new power.”<sup>283</sup> The creation of an institutional fact, such as government or, indeed, sovereignty, is the conferral of power on the institutions of government or the state. There is, Searle notes, one class of exceptions to this typical conferral of power: “Some institutional facts involve pure status with no further function.”<sup>284</sup> These facts, and their symbols, can be either honorific or critical, positive or negative.

To summarize: “The secret of understanding the continued existence of institutional facts is simply that the individuals directly involved and a sufficient number of members of the relevant community must continue to recognize and accept the existence of such facts.”<sup>285</sup> In other words, “institutions survive on acceptance.”<sup>286</sup> As Searle notes, when de Gaulle insisted during World War II on the “dignity” and “honor” of France, he thereby “helped to re-create and maintain the French nation-state.”<sup>287</sup> In a similar fashion, the Declaration of Independence helped to create the *institutional fact* of independence in circumstances in which that institution did not yet exist.<sup>288</sup> Let us now see how this theory might apply to the institutional facts of statehood and state sovereignty.

## 2. *Statehood and Sovereignty as Institutional Facts*

The many and increasing limitations on nation-state sovereignty call into substantial doubt the classical conception of state sovereignty, which is based upon the principles of absolute, unitary, and supreme power. Indeed, many theorists see this conception as something of an easy target, since “the day of completely autonomous decision-making does seem, for most states on many issues, to be past.”<sup>289</sup> As we have already seen, classical sovereignty has not aged well.

In an effort to resolve the apparent tension between states’ diminishing power and the persistence, indeed prospering, of global “sovereignty talk,” social construction theorists have offered an alternative to the classical model. Social constructionists who focus specifically on statehood and sovereignty expressly reject the *reification* of the state.<sup>290</sup> Their beginning

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283. *Id.* at 95 (emphasis omitted).

284. SEARLE, *supra* note 32, at 96.

285. *Id.* at 117.

286. *Id.* at 118.

287. *Id.*

288. *Id.* at 118.

289. JAMES, *supra* note 3, at 179.

290. Reification is:

premise is that state sovereignty is “an inherently social concept.”<sup>291</sup> Social constructionists look beyond material objects like wealth, power, and territory in examining state sovereignty. Theirs is a *dynamic* theory of social interaction. This means that state sovereignty cannot be defined *for all time*; indeed, “the very attempt to treat sovereignty as a matter of definition and legal principle encourages a certain amnesia about its historical and culturally specific character.”<sup>292</sup> As two leading international social constructionists have stated: “The modern state system is not based on some timeless principle of sovereignty, but on the production of a normative conception that links authority, territory, population (society, nation), and recognition in a unique way and in a particular place (the state).”<sup>293</sup>

Social construction theorists posit that “neither state nor sovereignty should be assumed or taken as given, fixed, or immutable.”<sup>294</sup> The theory “directs us to a consideration of the constitutive relationship between state and sovereignty.”<sup>295</sup> It encourages us to “consider state, as an identity or agent, and sovereignty, as an institution or discourse, as mutually constitutive and constantly undergoing change and transformation.”<sup>296</sup> Adopting an approach that views all of international politics as socially constructed,<sup>297</sup> these scholars have read statehood and sovereignty as “institutional facts” rather than objects existing in the world as “brute facts.”<sup>298</sup> They have sought to explain the conditions (*C*) under which brute facts like territory and population (*X*) “count as” a state (*Y*). More importantly for present purposes, they have examined the conditions (*C*) under which a state (*X*) “counts as” sovereign (*Y*). The extent to which statehood and sovereignty are social constructs obviously differs in the

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the apprehension of the products of human activity *as if* they were something other than human products—such as facts of nature, results of cosmic laws, or manifestations of divine will. Reification implies that man is capable of forgetting his own authorship of the human world and, further, that the dialectic between man, the producer, and his products is lost to consciousness.

BERGER & LUCKMANN, *supra* note 238, at 106.

291. STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 3, at 1.

292. R.B.J. WALKER, *INSIDE/OUTSIDE: INTERNATIONAL RELATIONS AS POLITICAL THEORY* 166 (1993); *see also* HINSLEY, *supra* note 3, at 126–57 (discussing the origins of modern sovereignty).

293. STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 3, at 3.

294. *Id.* at 11.

295. *Id.*

296. *Id.*

297. *See generally* WENDT, *supra* note 29 (arguing that all of international politics is socially constructed).

298. *See generally* STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 3 (presenting various social constructionist treatments of statehood and sovereignty).

global and domestic contexts, as do the specific conditions that support the generation of these institutional facts.<sup>299</sup> The general point, however, is that statehood and sovereignty can be conceptualized as constructs.

In making this point, it helps to present the theory, as applied, in a somewhat simplified, even mechanical manner. Thus, in terms of the basic constructive “apparatus” described in the previous section, the *constitutive rules* which make it possible to speak in terms of nation-state sovereignty might be thought of as all of the sources of international law—treaties, customary law, the state system itself—which together “create the very possibility” of state interaction and claims to sovereignty.<sup>300</sup> Like the rules of chess, this system of rules “create[s] the possibility of facts of this type.”<sup>301</sup> One of the important insights of constructionist thought in this area is that sovereignty is *relational*; there must be a system of accepted rules within which sovereigns relate to one another in order to speak of the institutional fact of (internally and externally) “sovereign” states.

The *imposition of functions* upon states is critical to the construction of “sovereignty.” Social constructionists “regard the state as an agent or identity that may have specific roles designated to it by sovereignty.”<sup>302</sup> Nation-states *earn* their identities by performing certain basic functions and having these functions associated with them over time. An example is the inclusion or exclusion of citizens: “[E]stablishing the criteria for national citizenship—whether in everyday discourse or by legal proclamation—constructs the foundation of a state’s identity, the nation.”<sup>303</sup> Similarly, “promises to provide protection from some foreign ‘other’ reinforce that identity.”<sup>304</sup> Although nations in the EU have lost

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299. For example, international social constructionists maintain that the state itself is a social construct. See STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 3, at 3. They posit that “even our most enduring institutions are based on collective understandings, . . . they are reified structures that were once upon a time conceived *ex nihilo* by human consciousness . . . [which] were subsequently diffused and consolidated until they were taken for granted.” Emanuel Adler, *Seizing the Middle Ground: Constructivism in World Politics*, 3 EUR. J. INT’L REL. 319, 322 (1997); see also Aalberts, *supra* note 29, at 34 (“[T]he sovereign state should not be mistaken for a ‘natural’, consequently unchangeable, being.”); J. Anderson, *The Shifting State of Politics: New Medieval and Postmodern Territorialities?*, 14 ENV’T & PLAN. D: SOCIETY AND SPACE 133–53 (1996) (examining territory as a social construct). There is a substantial sense in which our understanding of the states is based upon shared understandings. Nevertheless, the extent to which certain *aspects* of statehood like territory and population can be considered constructs is not the same in the international and domestic realms. State territories, for example, are far less flexible under the Constitution than they are in certain international contexts. We may need to adapt social construction theory to make use of its general principles.

300. SEARLE, *supra* note 32, at 28.

301. *Id.*

302. STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 3, at 13.

303. *Id.* at 13–14.

304. *Id.*

certain sovereign functions—coining money, for instance—they have undertaken a number of other functions, including representing national interests in bodies like the European Parliament. As they perform these functions, citizens, theorists, diplomats, and other states will eventually come to associate their claims to sovereign status with the functions performed. State identity is thus an ongoing process, a production that evolves over time.

International social constructionists posit that state sovereignty is constructed primarily “out of interaction with other states and with the international society they form.”<sup>305</sup> According to these theorists, “[s]tates can be defined in terms of their claims to sovereignty, while sovereignty can be defined in terms of the interactions and practices of states.”<sup>306</sup> The premise is that “there is a close connection between what actors *do* [and *say*] and what they *are*.”<sup>307</sup> Social construction theorists primarily urge an examination of “the variety of ways in which practices construct, reproduce, reconstruct, and deconstruct both state and sovereignty.”<sup>308</sup>

Consider once again the emerging multi-level governance structures of the EU. A positivist approach to sovereignty would focus on the empirical realities of policy-making in the EU as central to the sovereignty issue. A social constructionist, by contrast, posits that “a comprehension of sovereignty as a social and political construct, existing merely by virtue of (state) practice to *accept* this institutional fact *for real*, might be more helpful when untangling the puzzle relating to emerging multilevel governance structures in the states system in EU Europe.”<sup>309</sup>

In addition to state practices, social construction theorists emphasize the *language* or *symbols* which are used to generate the institutional facts of state and sovereignty. As one scholar has noted, the justification of sovereignty has typically

taken the form of an appeal to higher-order values that define the identity or *raison d’ etre* of the state, whether they entail the pursuit of justice, the achievement of civic glory, the protection of a divinely ordained social order, or the advancement of individuals’ rights and the celebration of the nation.<sup>310</sup>

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305. *Id.* at 13.

306. *Id.* at 11.

307. Aalberts, *supra* note 29, at 36.

308. STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 3, at 11 (emphasis added).

309. Aalberts, *supra* note 29, at 33.

310. STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 3, at 11.

The character of justifications for state sovereignty are thus an important part of the constructive process. For example, international social constructionists have asserted that “an analysis of the justifications given by states for the wars and interventions on which they embark is another way to observe some of the practices that construct and reconstruct sovereignty, as well as how these practices have changed over time.”<sup>311</sup>

Sometimes, for example, state justifications are based upon a symbolic analogy to *personhood*; thus states, like persons, are said to have various interests and “rights” to autonomy, equality, and independence.<sup>312</sup> In urging self-determination as a part of state sovereignty, one scholar has observed: “Within domestic society, the best way to further a moral claim is to ‘graft’ it to prevailing views about what constitutes a fully realized human being, or to beliefs about the ideal community of such beings.”<sup>313</sup> Or, as another put it: “New ideas are more likely to be influential if they ‘fit’ well with existing ideas and ideologies in a particular historical setting.”<sup>314</sup> Thus, part of the social construction of nation-states has involved *treating* the states as self-determining and autonomous because *persons* have these basic characteristics.<sup>315</sup> We shall see that this sort of “grafting” is prevalent in the construction of domestic state sovereignty as well.

Finally, the ultimate formation of a *collective intentionality*, or shared understanding, of state sovereignty comes through the combination of state functions, practices, and justifications. What sovereignty is and entails depends upon states reaching a shared understanding of its character. Social construction theory directs our attention in particular to “the ways the meaning of sovereignty is negotiated out of interactions with intersubjectively identifiable communities.”<sup>316</sup>

The basic idea here is that “interaction forms the foundation[s] of social reality.”<sup>317</sup> As nation-states negotiate and participate in new forms of governance structure, for example, they reinforce their sovereign status

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311. *Id.* at 13.

312. See Christian Reus-Smit, *Human Rights and the Social Construction of Sovereignty*, 27 REV. OF INT'L STUD. 526 (2001) (“As theorists of communicative action observe, actors [seeking to justify moral claims] usually try to associate their prescriptions with values that are already accepted as normative within the relevant speech community.”).

313. See *id.* at 527; see also *id.* (“Historically, the identity values defining ideal individuals and states have been closely linked . . .”).

314. KATHRYN SIKKINK, IDEAS AND INSTITUTIONS: DEVELOPMENTALISM IN BRAZIL AND ARGENTINA 26 (1991).

315. *Id.*

316. STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 3, at 11.

317. Aalberts, *supra* note 29, at 36.

by exercising *control* over the process and touting their autonomy and independence at critical junctures.<sup>318</sup> Even if nations cannot dictate terms, for example within the EU, they can still substantially impact final decisions as they form intergovernmental, and other, power structures. As states interact with other states and institutions, they prop up and sustain their sovereign identities; they communicate something about who they are as they insist upon recognition.<sup>319</sup> The key to understanding sovereignty as a social construct is that other nations come to recognize and accept claims to sovereignty—whether one views this status as indicating autonomy, or control, or equality—even though the *empirical realities* do not dictate such recognition.<sup>320</sup> In other words, “[a]s long as states accept and *act* upon each other as being sovereign, they *are*.”<sup>321</sup>

This does not mean, to respond to the Skeptic’s concern, that state sovereignty is a wholly subjective construct, or that it has no appreciable effect on policy and power. Citizens, sub-state actors, and supra-state actors all rely upon and respect state sovereignty even without the threat of coercion or the use of force. Sovereignty may not be represented materially, but it exists just the same. As one leading social constructionist has noted: “Cultural phenomena are just as objective, just as constraining, just as real as power and interest . . . The point is that the real world consists of a lot more than material forces *as such*.”<sup>322</sup>

In sum, through the lens of social construction theory sovereignty “emerges as a product of knowledgeable practices by human agents, including citizens, non-citizens, theorists, and diplomats. It is neither natural nor ever fully ‘completed.’ It has to be actively propped up and preserved, and its meanings and their referents vary across both time and space.”<sup>323</sup> Sovereignty is social, invariably in process, and as such always “at stake.”<sup>324</sup> It is through interaction, practice, and justifications that

318. The theory is expressly critical of neo-realism, which combines the elements of sovereignty—territory, population, authority, recognition—“into a single, unproblematic actor: the sovereign state.” STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 3, at 5. “What neorealists fail to recognize, however, is how extensively the socially constructed practices of sovereignty—of recognition, of intervention, of the language of justification—contribute to the structures of international society that exist beyond neorealist analysis.” *Id.*

319. “When entities interact in their quality as states, their identity as sovereign states is (re)confirmed.” Aalberts, *supra* note 29, at 36.

320. “It is recognition . . . that makes sovereignty, besides being a supposed feature of individual states, an institution shared by many.” *Id.* at 37.

321. *Id.* at 40.

322. WENDT, *supra* note 29, at 136.

323. STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 3, at 18.

324. Aalberts, *supra* note 29, at 39.

shared meanings with regard to statehood and state sovereignty arise.<sup>325</sup> Under social construction theory, sovereignty emerges not as the essence of states, a “brute fact,” but as a dynamic construct.

Social construction theory offers an alternative perspective—one that helps move us beyond the major camps of state sovereignty detractors. Parting company with Classicists, social constructionists do not see state sovereignty as a brute, static fact of statehood. Rather, statehood and state sovereignty are viewed as variable, constantly *in process*, negotiated, and ultimately in need of active preservation. Note that this description echoes the basic foundation of the “new sovereignty” described above. Disagreeing with Republicans, international social constructionists view state and sovereignty as *relational* concepts, with states as the ultimate locus of a representative sovereignty. Finally, eschewing the cynicism of the Skeptic, constructionists assert that sovereignty matters because in the “real world” sovereignty continues to be treated *as if* it matters.

#### V. TOWARD A RE-CONCEPTUALIZATION OF DOMESTIC STATE SOVEREIGNTY

This Part returns to the principal domestic constitutional concerns of the Article. As noted, statehood and state sovereignty are *imported* constitutional conceptions. If we are to continue debating “state sovereignty” in constitutional discourse (and it certainly appears that we are going to do so), we should consider whether the insights of those for whom state sovereignty is a central concern might add something to our understanding of the concept. This consideration does not mean that sovereignty must mean precisely the same thing for nations as for the American states, or that statehood and state sovereignty are constructed in precisely the same way domestically as internationally.<sup>326</sup> The idea, rather, is that a different way of looking at the *concept* of sovereignty will benefit our domestic constitutional discourse.

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325. *Id.* at 35; *see also id.* (arguing that “structure has no meaning outside of a (state) practice to accept certain concepts and institutions as a basic rule in international politics.”).

326. For example, international social constructionists argue that the entire international political system can be treated as a social construct. *See* WENDT, *supra* note 29. This Article does not assert that the entire constitutional system of vertically distributed authority is a social construct. The Constitution instructs and limits in a relatively specific manner as to many aspects of this distribution. We know, for example, that the Constitution does not permit the states to conduct foreign policy on behalf of the United States. *See* U.S. CONST. art. I, § 10 (prohibiting states from entering into treaties). Nor does it permit them to coin money. *Id.* Still, the Constitution does not tell us much of anything about state “sovereignty,” a concept even more readily characterized as an institutional fact than, for example, “President.”

Based upon the discussion in Part IV, this Part puts to one side the classical model of sovereignty. As noted, sovereignty has never in fact been the bright line Classicists embrace. It is, rather, a still-evolving concept that admits of no easy definition. We have to address state sovereignty on its own terms, where it resides and where and how it is manifested and practiced. As sovereignty has evolved, including into the “new sovereignty” discussed in connection with international relations, it has become less a static and formal concept than a dynamic institution. That, in a broad sense, is the vision of state sovereignty this Part will pursue.

Social construction theory and the concept of the “new sovereignty” are ideally situated to examine the dynamic concept of state sovereignty. Accordingly, accepting the demise of classical sovereignty and using the work of international social constructionists as a model, this Part conceptualizes domestic state sovereignty as a social, political, and legal construct rather than a brute, inherent fact. It utilizes an adaptation of social construction theory to sketch the construction of statehood and state sovereignty. Social construction theory in particular enables us to move beyond classical and skeptical arguments about whether the states are “really” sovereign by demonstrating the construction and evolution of state sovereignty. Using the essential elements of the constructive apparatus, as described in Part IV—constitutive rules, imposition of functions, and shared understandings—this Part examines the basic process whereby the domestic state (*X*) counts as “sovereign” (*Y*) in certain circumstances (*C*). It reads state sovereignty as an “institutional fact” generated by imposed functions and statuses; a variety of legal, political, and social discourses; and the dynamics of state practices and interactions with citizens and other institutions.

Ultimately, the jettisoning of the classical model and the application of social construction theory will accomplish three things insofar as domestic state sovereignty is concerned. First, as it has in the international context, they will reconcile the persistence of sovereignty talk in constitutional discourse concerning the states with the limited and constrained powers states actually possess. Second, they will provide an alternative to Classicist, Republican, and Skeptical conceptions of state sovereignty. Third, and perhaps most importantly, they will help to clarify the concept of state sovereignty by explaining how it is generated and sustained. As we shall see, all of these advances will significantly impact how state sovereignty should be studied, practiced, and enforced.

In the end, application of social construction theory will expose two different concepts of state sovereignty; one based upon state competence

and substantially resembling the “new sovereignty” discussed above, and the other a principally juridical construct based upon inherent status. After comparing and contrasting these “two sovereignties,” the Part concludes with some thoughts regarding the implications of a new, socially constructed state sovereignty for courts, states, and scholars.

*A. A Post-Classical, Post-Modern Sovereignty*

Internationalists have long understood that state sovereignty is a variable construct that evolves over time and is, in some sense, always in process and always “at stake.” The sooner domestic constitutionalists accept this, the sooner we can proceed with a meaningful discussion of state sovereignty. This section speaks in broad terms of how we might begin to reconceptualize domestic state sovereignty. The next section more specifically applies social construction theory to the situation of the American states.

The discussion thus far confirms what ought, in any event, to be apparent from our own constitutional and jurisprudential history, namely that sovereignty does not mean the same thing regardless of social, political, or legal context. Broadly speaking, domestic state sovereignty has indicated such disparate ideas as classical enclave exclusivity, the exercise of sovereign competences or functions, equality among states, and recognition of sovereign status. It has both internal (intrastate) and external (interstate) aspects. Indeed, state sovereignty shares many of the characteristics that have been ascribed to postmodern statehood more generally: It “is considered to be increasingly ‘held in common,’ ‘pooled among governments, negotiated by thousands of officials . . . , compromised through acceptance of regulations and court judgements.’”<sup>327</sup> Although diminished and shared sovereignty is a relatively recent phenomenon for nation-states, it is part of the basic fabric of the sovereignty of the American states.

Whatever sovereignty is or has become, a matter to which we shall shortly turn, one version of sovereignty we can and should drop from domestic constitutional debate is the formal or classical model. For one thing, classical sovereignty was dead on arrival insofar as the plan of the Constitution was concerned. It is not in any sense a fair barometer of the concept’s meaning or importance. Moreover, the conceptual evolution described in Part IV demonstrates that states can be “sovereign” even if

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327. Aalberts, *supra* note 29, at 34 (quoting William Wallace, *The Sharing of Sovereignty: The European Paradox*, 47 POL. STUD. 503, 506 (1999)) (emphasis added).

they are not formally granted exclusive and final authority over a territory or with respect to discrete enclaves of activity. States can be sovereign even if they do not have the power to coin money, or raise an army. As international relations scholars have recognized, when it comes to state sovereignty, the reality has never been one of bright line rules, but rather one of degrees. In this country, as in the rest of the world, sovereignty has always been less about formalism, juridical or otherwise, than about state practices and intergovernmental dynamics.

The Supreme Court's several failed attempts to enforce a classical model of sovereignty, prominently in the early era and more fleetingly in the "late" era, demonstrate the implausibility of the classical concept. These failures indicate that the classical model of sovereignty cannot properly account for social, political, and legal realities. The post-New Deal revolution is strong evidence that the Court cannot construct classical state sovereignty by simple judicial fiat. Concepts like the "new sovereignty," as well as theories of social construction, teach that such formalism cannot account for the *institutional fact* of state sovereignty, which must be based upon broader understandings and must account for political, historical, and social realities.

Social construction theory suggests that it is not productive to continue thinking and speaking of state sovereignty in terms of material facts like wealth and power, dollars and personnel, or the relative distribution of these sorts of things. To a substantial extent, sovereignty is about respect for and recognition of governments and communities that are at a profound disadvantage on these terms. As discussed below, this respect and recognition are products of what states do, how they are perceived in the world, and how their claims to sovereignty are justified. This is why nations with less than *complete* control over territory, or little wealth or power, often nevertheless succeed in advancing claims to sovereign rights and recognition. In order to appreciate what sovereignty is or means, we have to account for social, political, and legal discourses and, most especially, state and federal practices. We have to appreciate how sovereignty is generated; how it becomes an expectation, an ingrained norm of governmental and intergovernmental relations.

Indeed, one of the benefits that flows from reconceptualizing state sovereignty in terms of concepts like the "new sovereignty" and social construction theory is that we can better identify and study the concept. Sovereignty becomes more accessible and meaningful when it is viewed as a construct rather than a brute fact, as a dynamic process rather than a static formality. The focus necessarily shifts to what states do, whether that is litigating, bargaining, making claims to local control, acting as a

community, acting as the people's agent in supra-national institutions, or acting as a trustee of local welfare. The continued performance of these sorts of things props up the states' sovereignty, reinforcing that they are in some meaningful sense in charge of a domain, in possession of a "bundle of competences," or entitled to recognition by their peers or federal authorities. In terms of social construction theory, we can better appreciate that "each use of the institution is in a sense a renewal of that institution."<sup>328</sup>

The Supreme Court, of course, plays a role in all this, chiefly in validating state claims to sovereign status and recognition. To be sure, the Court must stand ready to occasionally remind Congress that there are limits to *its* sovereignty. By and large, however, meaningful and sustained boundaries arise from things like state practices; political, academic, and social discourses; and state justifications, not the handing down of judicial decrees. The focus for scholars thus cannot be Court-myopic. The discussion in Part IV suggests, rather, that we can locate state sovereignty in a complex dynamic process involving, among other things, symbolism, state practices, various discourses, and the normative basis for state justifications. This dynamic is manifested in everything from judicial opinions, to ordinary state legislation, to state negotiations with federal regulatory authorities, to judicial deference and doctrine, to state innovations and practices. Indeed, it is even manifested in such seemingly trivial things as state speech acts like flags, license plates, and other symbols. If we are looking for post-modern state sovereignty, we cannot find it in the *United States Reports* alone.

Substantively, international relations theorists have discovered that post-classical, post-modern state sovereignty can in fact be limited, partial, and divided yet still support claims to state control and deference. The heretofore curious nature of American-state sovereignty has thus become something less of an anomaly the world over. Compromised or pooled authority is still, as the experiment of the EU demonstrates, nonetheless a form of sovereignty. Indeed, some have suggested that by pooling their sovereignty, EU members have actually *enhanced* their authority by enabling members to accomplish things together that they could not achieve separately.<sup>329</sup> Whether or not that is the case, it is at least clear that by voluntarily devaluing their sovereignty, nations have not thereby ceded it altogether. Sovereignty has, true to its dynamic character, changed

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328. SEARLE, *supra* note 32, at 57.

329. *See, e.g.*, JAMES, *supra* note 3, at 187 (noting that it may be the case that cooperation among states enables them to do things in unison they could not otherwise do).

shape. On one view, it has become a bargaining resource, a sort of earned recognition. Whatever its form, it is clear that for nations, as social actors, sovereignty retains significant meaning. The same is true within our borders as well. That is why, despite skeptical disavowals, the concept of state sovereignty will not simply fade away.

There is more here than a simple affirmation of the Framers' prescience that states can be "sovereign" even if they are only partially so. Viewing state sovereignty as a resource has important implications for how state sovereignty can and will be exercised in the future. The governors of California, Texas, New York, and Florida recently decided to pool their political influence and form a group they call the "Big Four" to lobby Congress on behalf of their states' interests.<sup>330</sup> They did this apparently to counteract what they felt was the disproportionate influence of the smaller states in securing federal funds and advancing their agendas. This is an unusually flexible, if understandably pragmatic, sharing of state sovereignty. It demonstrates, as does the EU, that states can sometimes enhance their individual sovereignties by pooling or sharing their power. States are doing this sort of thing in other, more ordinary, contexts as well, such as "pooling" their resources in lawsuits designed to protect local environments or to force federal policy changes.<sup>331</sup>

In sum, thus far this Article has suggested that a re-conceptualization of domestic state sovereignty must move beyond classical constraints and recognize that sovereignty is a great deal more relative than, say, virginity. The meaning of sovereignty has changed from one era to the next, in response to historical, social, legal, and political circumstances the Classicist largely ignores. As the EU and other global events have shown, there is indeed a meaningful sense in which we can speak of "divided," "partial," and "pooled" state sovereignty. There is a sense, as well, in which we can meaningfully speak of states as the locus of sovereignty, if only in a representative sense. More important than fixing the meaning or locus of state sovereignty, however, is understanding the process whereby state sovereignty, in all these various forms, is actually generated and sustained. In order to concretize these admittedly general observations, the Article next turns to social construction theory.

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330. See Raymond Hernandez & Al Baker, *Governors Join As "Big Four" To Pool Clout*, N.Y. TIMES, July 20, 2004, at B1.

331. See Andrew C. Revkin, *New York City and 8 States Plan to Sue Power Plants*, N.Y. TIMES, July 21, 2004, at A15 (reporting that California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin had joined a lawsuit against companies emitting carbon dioxide).

## *B. The Construction of the Sovereign States of America*

This section, following the lead of a group of international relations scholars discussed in Part IV, utilizes the principles of social construction to demonstrate that *domestic* state sovereignty is an institutional, rather than a brute, fact. It applies the basic apparatus of social construction to the concept of American state sovereignty.

### *1. The Constitutive Rules of State Sovereignty*

The Constitution, as mentioned, does not contain the term “sovereignty.” Sovereign statehood is a human invention, a legal, social, and political object that has been constructed over time, based upon shared understandings. Although the Constitution does not invoke “state sovereignty,” it does contain certain basic “constitutive rules” that allow for its construction. Recall that “constitutive” rules, unlike “regulative” rules, do not merely regulate activity. “Federalism,” for example, provides various *regulative* rules which have at various times curtailed and expanded federal exercise of enumerated powers. These rules or standards regulate institutional activity (commerce, for example) that would otherwise occur regardless of the Constitution. Constitutive rules, by contrast, do more than merely regulate existing activity. They “create the very possibility” of certain activities.<sup>332</sup> As analogized by Searle, think of the rules of chess as an example of constitutive rules. Without the rules of the game, there would be no such thing as “chess.” As for “chess,” so too for “sovereignty.”

The constitutive rules with regard to state sovereignty are set forth in the Constitution itself, in what constitutional scholars generally refer to as its “structure.” These rules make it possible to speak of the states as “sovereign.” Without these rules, the very notion of “dual sovereignty” would not be plausible.

#### *a. The Rule of Preservation*

The rule of sovereign self-preservation is the most critical. Anti-Federalists feared that the Constitution would utterly *annihilate* the states. Yet with all of the changes that have occurred with regard to the regulative rules of federalism, the constitutive rule of state preservation has remained fixed in constitutional structure. It is at least clear, as the Supreme Court

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332. SEARLE, *supra* note 32, at 28.

has said, that “neither government may destroy the other.”<sup>333</sup> The Constitution, the Court declared in *Texas v. White*, “looks to an indestructible Union, composed of indestructible States.”<sup>334</sup>

The Constitution reinforces the constitutive rule of state preservation in various structural provisions. As the Court noted in *Lane County v. Oregon*,<sup>335</sup> “in many articles of the Constitution the necessary existence of the States . . . is distinctly recognized.”<sup>336</sup> The Constitution protects, for example, the *territorial* integrity of the states.<sup>337</sup> State citizenship, as well, is expressly recognized and carries with it certain privileges.<sup>338</sup> The Constitution cannot be amended without the participation of the states.<sup>339</sup> Finally, the Guarantee Clause<sup>340</sup> “presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights.”<sup>341</sup>

In order to protect their right to exist, states are entitled to defend themselves against internal threats to integrity, peace, and tranquility. Thus, states, like any other authority with “internal” sovereignty, may prosecute criminals in order to preserve their existence, as well as their internal “peace and dignity.”<sup>342</sup> “Each [state] has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses . . .”<sup>343</sup> Although one hopes it does not come to pass, states may also resist efforts by internal or external forces to extinguish or annihilate them altogether. The Second Amendment, whose meaning with regard to who retains the “right” to bear arms has yet to be definitively resolved, contemplates the existence in all free states of a “well regulated Militia.”<sup>344</sup> Moreover, states may also

333. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).

334. 74 U.S. (7 Wall.) 700, 725 (1868).

335. 74 U.S. (7 Wall.) 71 (1868).

336. *Id.* at 76; see Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbra*, 77 B.U. L. REV. 1089 (1997) (noting the Court’s embrace in federalism areas of the sort of penumbral reasoning common to substantive due process precedents).

337. U.S. CONST. art. IV, § 3 (“[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”).

338. See U.S. CONST. art. III, § 2; U.S. CONST. art. IV, § 2.

339. U.S. CONST. art. V.

340. U.S. CONST. art. IV, § 4.

341. *Helvering v. Gerhardt*, 304 U.S. 405, 414–15 (1938).

342. *United States v. Lanza*, 260 U.S. 377, 382 (1922); see also *Heath v. Alabama*, 474 U.S. 82, 90 (1985) (under “dual sovereignty” principle, state can prosecute person for crime even if another state has also prosecuted for same offense).

343. *United States v. Wheeler*, 435 U.S. 313, 320 (1978).

344. U.S. CONST. amend. II.

expect that central governmental power will be used to protect their existence should it be threatened.<sup>345</sup>

The first constitutive rule with regard to statehood, and the one that more than any other indicates that states are intended to be a permanent part of the plan of government, is the rule of preservation. Whatever else the central government may be empowered to do, it may not destroy the states.

*b. The Rule of Separateness*

It would make little sense to preserve the states if the central sovereign could simply dictate to them such basic principles as the formation of their governments. The Constitution thus sets forth, in various structural provisions, a constitutive rule of separateness. This rule, like the rule of preservation, provides support for state claims to “internal” sovereignty.

The Constitution contemplates that state governments will be composed of legislative, judicial, and executive branches.<sup>346</sup> It gives no authority, however, to the central government to dictate who may serve in state governments, where they may serve, the manner in which they shall be chosen, what their basic qualifications must be, or how these institutions of government are to be funded.<sup>347</sup> Thus, as to all of these things, the states must have the final say.

As the Supreme Court has said, these are “functions essential to separate and independent existence.”<sup>348</sup> The Constitution by negative implication provides that these functions must remain within the exclusive control of the states. In this sense, the rule of separateness makes it possible to speak in terms of “state sovereignty.”

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345. See U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

346. See U.S. CONST. art. VI, cl. 3 (“[t]he Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution”).

347. See *Coyle v. Smith*, 221 U.S. 559, 565 (1911) (the “power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers”); see also *Taylor v. Beckham*, 178 U.S. 548, 570–71 (1900); *Boyd v. Nebraska*, 143 U.S. 135, 161 (1892). Only the states, for example, may establish the qualifications for voters for state and local elections.

348. *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868).

*c. The Rule of Participation*

The Constitution also plainly provides that states possess the right to participate in the governance of the Nation. In matters both small and large, the Constitution sets forth a rule of political participation which allows us to speak in terms of “sovereign” states.

Article V absolutely and unequivocally guarantees to each state equal suffrage in the Senate.<sup>349</sup> This guarantees that each state will have an equal vote in all matters of national governance. It requires that all states be granted an equal opportunity to be heard on legislative proposals. Unlike states’ representation in the House of Representatives, which, because it is based upon population, varies, the right to equal suffrage in the Senate is a constant and an absolute.<sup>350</sup> Unless a state consents to its waiver, this right cannot be diluted or abridged. In this sense we can begin to speak in terms of the “external” sovereignty of the states; each state has the right to have its vote counted equally among its “peers.”

Article V also grants states the right to participate in the constitutional amendment process.<sup>351</sup> It guarantees that the states shall have a substantial voice in all fundamental proposals to alter the basic charter of government. This right, too, is subject to neither abridgement nor denial. In addition, Article II of the Constitution preserves an important role for the states in the selection of the president.<sup>352</sup> State electors are appointed, and must meet in their respective states to cast their votes for president. States thus play a critical role in the selection of the nation’s chief executive.

The rule of political participation preserves a substantial role for the states in national governance. The constitutional structures that comprise this rule place the states at the center of the Nation’s political activity. The states have the final say in important decision-making not only at the local, but also at the national level.

349. *See* U.S. CONST. art. V (“[N]o State, without its Consent, shall be deprived of its equal suffrage in the Senate”).

350. *See* THE FEDERALIST No. 62 (James Madison) (Isaac Kramnick ed., 1987), at 365 (“[T]he equal vote allowed to each State [in the Senate] is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty.”).

351. *See id.* (providing that proposed amendments may be ratified by the legislatures of three fourths of the states, or by conventions in three fourths of the states).

352. *See* U.S. CONST. art. II, § 1, cl. 2 (requiring the choice of state Electors).

*d. The Rule of Interpretive Independence*

Article III of the Constitution sets forth the jurisdiction of the federal courts.<sup>353</sup> As the Supreme Court has emphasized, the “judicial power of the United States” does not generally extend to matters relating solely to the constitutions or laws of the states.<sup>354</sup> By clear negative implication, and as an incident of federalism, the Constitution provides that the states should generally be free to interpret their own laws and constitutions.<sup>355</sup> So long as no federal constitutional right or power is implicated, the states possess interpretive independence.

This is a significant, although often underappreciated, aspect of state sovereignty. It means that so long as no federal constitutional right or power is implicated, the states are the *final* interpreters of their own laws and constitutions. For example, the New York courts recently invalidated that state’s death penalty scheme, a decision that, since it was based solely on state law, could not be appealed to the Supreme Court.<sup>356</sup> The Constitution’s constitutive rule of interpretive independence empowers the states to decide such pivotal issues for themselves, free from federal interference.

These are the constitutive rules—preservation, separateness, participation, and interpretive independence—which *make it possible* to speak in terms of a “dual sovereignty” under our constitutional system. These rules do not *define* state sovereignty. They do, however, establish a legal and communicative baseline for our thinking about statehood and, thus, ultimately about state sovereignty. Some of the rules, like those involving participation and interpretive independence, position the states as final decision-makers. Some, like separateness, invoke “internal”

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353. See U.S. CONST. art. III, § 2, cl. 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .”).

354. See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (noting that the Court generally defers to state courts on the interpretation of state law); *Minnesota v. Nat’l Tea Co.*, 309 U.S. 551, 557 (1940) (“It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.”). There are, of course, exceptions to this rule. The most famous such exception in recent years is, of course, *Bush v. Gore*, 531 U.S. 98 (2000). In that case, the Court refused to defer to the Florida Supreme Court’s interpretation of Florida election law. See *id.* at 115 (“To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.”).

355. See *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (recognizing that the Court acts as an “outsider[]” lacking the common exposure to local law which comes from sitting in the jurisdiction” and that deference to state courts “helps build a cooperative judicial federalism”).

356. See *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004) (invalidating state deadlock instruction).

sovereignty, while others, like equal participation, sound in “external” sovereignty. There is enough in these constitutive rules, this constitutional structure, to at least permit talk of the “sovereign” states in a *de jure* sense. To get at the heart of the “institutional facts” of statehood and state sovereignty, however, we must examine the remainder of the constructive process. To do this, we must consider the imposition of functions upon the “state,” the language and form of state justifications for sovereignty, the variety of discourses on state sovereignty, and the dynamic process of state interaction with citizens and institutions.

## 2. *Sovereign Symbolism: Imposition of Function and Status*

With the basic constitutive rules in place, this section will further elaborate the circumstances (*C*) in which the state (*X*) is considered to possess the status of sovereign (*Y*).<sup>357</sup> By way of review, recall four general principles from the discussion, in Part IV, of social construction theory generally, and of the construction of nation-state sovereignty in particular. First, statehood and sovereignty are *variable* constructs; their meaning changes depending upon, among other things, the functions or statuses imposed upon them. Second, the specific manner in which state sovereignty is justified or represented, including the symbols or metaphors used to depict it, are of critical importance in understanding the construction of statehood and sovereignty. Third, as Searle notes, these symbols and justifications usually result in the transfer of some *power* to an object.<sup>358</sup> The exception is a class of status symbols, which can be either positive or negative in character and substantive effect and which relate more to sheer status than to power or function. Fourth, and finally, the *meaning* of an institutional fact like sovereignty ultimately depends upon the formation, over time, of shared understandings or agreements by relevant communities that states are entitled to be recognized and treated as sovereign.

The state consists of certain brute, empirical facts. Each state has territory, people, and a government. In terms of moving beyond these

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357. Recall that *X* is the object, *Y* is the status function, and *C* is the circumstances or conditions under which *X* takes on the status *Y*. SEARLE, *supra* note 32, at 46. The “state” is also, of course, a construct. Its empirical elements (*X*)—territory, population, and government—constitute a “state” (*Y*) under certain conditions (*C*). In the interest of economy, that process is not elaborated here. For a discussion in the international context of the social construction of the state itself, see Alexander B. Murphy, *The Sovereign State System as Political-Territorial Ideal: Historical and Contemporary Considerations*, in STATE SOVEREIGNTY AS SOCIAL CONSTRUCT, *supra* note 3, at 81.

358. SEARLE, *supra* note 32, at 95.

brute facts, and demonstrating the general process by which statehood and state sovereignty are constructed, we are fortunate to have a rich symbolism in constitutional discourse. States have been depicted or represented using no less than eight symbols or metaphors. We can map the general construction of statehood and sovereignty by tracking these symbols, noting the functions and statuses they impose on states and the way they have been used to justify, or at times to refute, claims of state sovereignty. These symbols represent functions, values, and statuses that are attached to states and which delineate state sovereignty. In order to see clearly how it is that state sovereignty is ultimately accepted or agreed upon, however, we must in addition examine the practices of states, the various discourses in which their sovereignty is debated, and the effect these and other forces have on the ultimate recognition of state claims to sovereignty.

As it happens, the eight symbols of sovereign statehood that have been most prominent in constitutional discourse can be readily divided into those which impose specific *functions* on the states, and those which are based exclusively upon *status*. As we shall see, this makes it possible, in the end, to characterize modern state sovereignty both in terms of state competences and in terms of pure state status.

*a. Functional Symbols*

Recall that the Classicist would separate state function or competence from the concept of state sovereignty, arguing in essence that the states would perform many of their various functions whether or not they were considered “sovereign.”<sup>359</sup> Social construction theory, by contrast, holds that it is primarily *through* the imposition of functions that institutional facts like sovereignty are ultimately generated. State function and state sovereignty are thus conceived as *relational*; the identity roles assigned to states are therefore intimately tied to their most effective claims to “sovereignty.”<sup>360</sup>

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359. See Gey, *supra* note 21, at 1670–75 (arguing, in response to normative justifications for state innovation and attention to local problems that “the realization of those benefits does not require a system of judicially protected state sovereignty”). Note here the narrow emphasis on *judicial* enforcement of state sovereignty. Classicists like Professor Gey are not concerned with whether or not the states enforce, or construct, their own sovereignty through the functions they perform.

360. Recall that in forming a shared understanding of an institutional fact like state sovereignty, the community of relevant actors or observers need not be *conscious* that they are collectively imposing such a function; in the course of acting they may simply evolve institutional facts. SEARLE, *supra* note 32, at 47. “As long as people continue to recognize the [object] as having the . . . status function, the institutional fact is created and maintained.” *Id.* Searle uses the example of a boundary

*(1) State as Trustee*

Early defenders of the constitutional design, eager to rebut arguments that the states would be wholly annihilated in the new government, conceived of the federal and state governments as “but different agents and trustees of the people, instituted with different powers, and designated for different purposes.”<sup>361</sup> Defenses of the plan of the constitutional convention routinely emphasized that states would be considered “sovereign” insofar as they served the people’s local and, hence, most basic needs. As trustees, states were supposed to *administer* the day-to-day needs of the political community.<sup>362</sup> The Constitution, Madison stated, “leaves to the several States a residuary and inviolable sovereignty over all other objects” of legislation not among the enumerated powers of the central government.<sup>363</sup>

Recall that the origins of sovereignty in civil society depend to some extent on the community’s *recognition* of the sovereign authority of the government.<sup>364</sup> In administering local welfare, the Framers believed that the States would be the most recognizable forces in people’s lives. The state-as-trustee metaphor represents the early belief that the States would have a “superiority of influence” with the people; this, it was believed, “would result partly from the diffusive construction of the national government, but chiefly from the nature of the *objects* to which the attention of the State administrations would be directed.”<sup>365</sup> So long as the

wall which has collapsed but is still *treated as a boundary* by the community. *Id.* at 39. It is intended to function the same way but the means by which it does so is the *collective* recognition that the stones have a special status to which this function is attached. *See id.* at 39. Moreover, these communities “do not in addition have to recognize that they are so recognizing, and they may hold all sorts of other false beliefs about what they are doing and why they are doing it.” *Id.* at 47–48. Again, to utilize one of Searle’s examples, we may actually, although quite mistakenly, believe the King to be divinely appointed to rule. *See id.* at 96. So long as we believe it, however, and act upon that belief in submitting to the King’s authority, then it matters not that we are mistaken in our belief. *See id.*

361. THE FEDERALIST NO. 46, at 297 (James Madison) (Isaac Kramnick ed., 1987).

362. *See* THE FEDERALIST NO. 45, at 296 (James Madison) (Isaac Kramnick ed., 1987) (noting that state power would “extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”); *see also* John C. Yoo, *Federalism and Judicial Review*, in THE TENTH AMENDMENT AND STATE SOVEREIGNTY: CONSTITUTIONAL HISTORY AND CONTEMPORARY ISSUES 164 (Mark R. Killenbeck ed., 2002) (“Broadly stated, the Framers understood the Constitution to grant the national government primarily those powers involving foreign relations. The states would retain primary jurisdiction over almost all other domestic matters, such as taxation, judicial administration and law enforcement, and social and moral legislation.”).

363. THE FEDERALIST NO. 39, at 258 (James Madison) (Isaac Kramnick ed., 1987).

364. *See* discussion *supra* notes 192–94 and accompanying text.

365. THE FEDERALIST NO. 17, at 157 (James Madison) (Isaac Kramnick ed., 1987) (emphasis added).

states actively attended to local matters like taxation, crime, and morality, they would be recognized, both by the people and by the central government, as “sovereign.” They would enjoy the benefit of a special *attachment* to the people.<sup>366</sup>

In the early days of the republic, it was hoped or believed that citizen “affection, esteem, and reverence” for their state governments “would insure them so decided an *empire* over their respective citizens as to render them at all times a complete counterpoise, and, not unfrequently, dangerous rivals to the power of the Union.”<sup>367</sup> But the Framers recognized that the states’ sovereignty might be diminished, or transferred to the central government, should the states fail to effectively use what would become known as their “police powers.”<sup>368</sup> Indeed, critics of the concept of sovereign statehood have noted that “local” needs are, more often than not, today met by central authorities.<sup>369</sup> The power that has accrued over time to the national government has significantly blurred the distinction between what is “local” and what is truly “national.” There is at present scarcely an area of our lives which is not affected by federal rule or regulation.

Social construction theory can help us to understand why, in light of this seeming diminution of state power, the states continue nevertheless to be regarded as “sovereign.” The theory posits that sovereignty cannot be measured as a “brute” fact; it is not a matter of dollars and cents, or relative manpower, or a demarcation of supposed “enclaves,” or even numbers of laws or regulations. We cannot say, for example, that the states are only “forty percent responsible” for local welfare and thus not truly “sovereign.”<sup>370</sup> Rather, we must examine, with regard not only to the

366. Based upon this rough division of functions, Hamilton reasoned as follows:

Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias toward their local governments than towards the government of the Union; unless the force of that principle should be destroyed by a much better administration of the latter.

THE FEDERALIST No. 17, at 157 (James Madison) (Isaac Kramnick ed., 1987).

367. *Id.* (emphasis added).

368. The same point applies to other structures of shared sovereignty. Although EU institutions are not today capable of overshadowing their national members, this may not always be the case.

369. See Rubin & Feeley, *supra* note 23, at 929–30 (discussing rise in national administrative power).

370. Rubin & Feeley suggest that sovereignty is a function of the “control over appointed officials, public resources, and regulatory rules.” *Id.* at 931. No doubt, as a simple matter of resources and brute strength, states are at a sizeable disadvantage. A social constructionist would submit, however, that the matter is not one of quantitative comparison—of physical, political, and administrative power. See *id.* at 929–31 (suggesting a typology of powers in which states are inferior).

trustee function but also the remaining functions that have been imposed upon the states, the discourses, dynamics, and practices which generate and ultimately sustain state claims to sovereignty.

The imposition of the function of trustee is, of course, deeply ingrained in our constitutional, political, and social discussions. We are indebted to the Framers for this. Their understanding has been brought forward by academic discourse, which has a tendency to pay homage to the Framers' statements and opinions. This discourse has typically touted trusteeship, or some version of it, as one of the virtues of vigorous statehood.<sup>371</sup> Various theories, including most recently economics and public choice theories, have been utilized to explain why some decisions are better left to local decision-makers.<sup>372</sup> Indeed, although there is no quantitative measure for this, it seems that most theorists support at least the rudimentary proposition that there is a role for the states as "trustees" of local welfare. So do most members of the current Supreme Court, although they actually say so on a relatively infrequent basis. Every now and then, however, the Court reminds us that there may be some areas of local control, like crime and marriage for instance, that Congress may not encroach upon.<sup>373</sup>

At various critical points in our history, political discourse has similarly emphasized the importance of local control. "States' rights" has been a rallying cry, for example, for supporting state control of matters like morality and education.<sup>374</sup> Of course, most rightly rejected the racist agenda some sought to further under the banner of "states' rights" and state sovereignty.<sup>375</sup> Still, the sentiment at the heart of the justification for local control was one with seemingly broad appeal in other contexts. One could certainly disagree with Governor Wallace's persistent refusal to permit desegregation of the schools yet still accept the idea that there ought to be some limit to central intervention in the "internal sovereignty" of the states.

It is a matter of the way in which states use the power and authority they do have, how they assert their sovereignty, and how others accept state claims to sovereignty.

371. See, e.g., Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 525–30 (1995) (discussing traditionally stated values of federalism).

372. See, e.g., Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward A Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 274–90 (1990) (elaborating on the conditions under which local law dominates national law).

373. See *United States v. Morrison*, 529 U.S. 598, 626–27 (2000) (gender-motivated crime); *United States v. Lopez*, 514 U.S. 549, 563–64 (1995) (gun possession and local safety; marriage).

374. See generally FORREST McDONALD, *STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776–1876* (2000).

375. See WILLIAM RIKER, *FEDERALISM: ORIGINS, OPERATION, AND SIGNIFICANCE* (1964) (examining connection between "states' rights" and racism).

More benignly, and no doubt to greater effect in terms of constructing state sovereignty, presidents and other public officials have regularly touted the “devolution” of power from the federal government to the states. This is now a ritual of presidential and other politics. President Nixon declared: “It is time for a New Federalism in which power, funds, and responsibility will flow from Washington to the states and to the people.”<sup>376</sup> President Reagan in the 1980s and the Republican-controlled Congress in the 1990s also aggressively pushed agendas of “devolution.”<sup>377</sup> This was partially reflected in the discretion granted to states to, for example, set eligibility requirements for federal welfare programs.<sup>378</sup> Even within this federal regulatory scheme, states managed to exercise substantial control over welfare policy. Midwestern and Southern states, for example, “took a harder line [than federal regulations required], reflecting a tougher work ethic.”<sup>379</sup> With these and other transfers of power, “state governments have become increasingly competent in economic regulation and public administration.”<sup>380</sup> The “devolution” agenda remains popular today with the Bush Administration.<sup>381</sup>

More generally and closer still to the ground, again as part of what we might consider their “internal” sovereignty, states (and, by delegation of authority, localities) actively exercise their so-called “police powers.” These powers affect such critical life decisions as who may marry or adopt, whether one may seek assistance in ending a life, and whether the state itself may take life as punishment for criminal behavior.<sup>382</sup>

376. Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE J. ON REG. 227, 288 (1996) (quoting President Richard Nixon).

377. See generally *id.* See also JOHN J. DIJULIO & DONALD F. KETTL, *FINE PRINT: THE CONTRACT WITH AMERICA, DEVOLUTION, AND THE ADMINISTRATIVE REALITIES OF AMERICAN FEDERALISM* (1995).

378. See TIMOTHY CONLAN, *FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM 257–92* (1998) (describing the “evolutionary devolution” of the mid-1990s).

379. LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* 191 (1992).

380. Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 672 (2001).

381. See Felicity Barringer, *Bush Seeks Shift in Logging Rules*, N.Y. TIMES, July 13, 2004, at A1 (reporting that the administration has proposed a rule leaving it to state governors to determine what, if any, limits there should be on logging in national forests).

382. See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002) (finding a state legislative “consensus” that execution of the mentally retarded was cruel and unusual punishment); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (canvassing state laws on assisted suicide); *Lofton v. Secretary of Dept. of Children and Family Servs.* 377 F.3d 1275 (11th Cir. 2004) (upholding Florida’s ban on adoption by practicing homosexuals).

Notwithstanding the undeniably enhanced federal role in virtually all matters of governance, the ubiquitous exercise of these and other state “police” powers reinforces the states’ trustee relationship with citizens. The object of regulation does not necessarily have to be something as critical as birth, death, or marriage to contribute to sovereignty’s construction. We do not usually focus upon such seemingly trivial things, but even when states issue driver’s licenses, or liquor licenses, or prosecute crimes, or prohibit smoking in bars, or the use of hand-held cell phones while driving, they are in effect making effective claims to sovereign control. Each such exercise or practice of this imposed function reinforces the institutional fact of the “sovereign” trustee acting in pursuance of the general welfare. This occurs, as social construction theory posits, whether or not we are conscious of the process.

We must, as some of these examples demonstrate, be generally aware of the influence of the media in the constructive process. In particular, controversies which stem from the states’ police powers and which play out on a grand public stage, nationally or regionally, for example, reinforce on a broad scale the *perception* that the states retain substantial control over matters of local welfare. This perception is a crucial element of the construction of state sovereignty, since “for social facts, the attitude that we take toward the phenomenon is partly constitutive of the phenomenon.”<sup>383</sup> The current debate regarding whether homosexuals should have the right to marry is only the latest example. The focus in this debate has primarily been on the acts of state (and in some cases sub-state) officials in Massachusetts, New York, and California. There has been national debate, to be sure, but it has been mostly a reaction to events and circumstances in the states. The states effectively set the agenda in this debate over morality; indeed, even if there is to be a constitutional amendment, the states will be intimately involved in shaping policy. This is, of course, nothing particularly new. The states have a long history of regulating local morality in such areas as assisted suicide, narcotics legislation, and public nudity. Over time, we have all come to expect that the states will largely control this agenda, and to a substantial extent have the “final say” with regard to morality.<sup>384</sup>

Far more than citizen perception is being affected and generated in these contexts. Over time, the imposition of the trustee function, and more

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383. SEARLE, *supra* note 32, at 33.

384. Even silly proposals, such as the recent measure proposed in the Louisiana legislature to ban the public wearing of “low rider” pants and other revealing clothing, help to reinforce the notion that local values and morals are the domain of the states.

importantly its repeated exercise by states, has a real and substantial effect on the attitudes and perceptions of supra-state regulators, who often reach an understanding that deference to state “trustees” on such matters is generally appropriate.<sup>385</sup> Federal courts, for example, are both loathe to interfere with the exercise of state police powers and increasingly likely to look to state examples when fashioning new constitutional rules. Thus, for example, when the Supreme Court examined a claim to a “right” to assisted suicide, it canvassed state laws to determine what state practices had been on the matter.<sup>386</sup> This has now become a regular practice of the courts in deciding whether certain unenumerated rights exist under the Constitution. Similarly, when the Court was asked to decide whether the Constitution prohibits the execution of the mentally retarded, it based its decision on the number of state laws that prohibited the practice.<sup>387</sup>

It is not only the federal courts which respect and recognize the states’ claim to trusteeship with regard to “local” matters. While federal regulators are often less reticent than the courts to interfere with the state’s role as trustee, the pragmatic truth is that it is often just plain bad politics to do so. As a result, the vast array of state general welfare laws are not subject to any federal influence or intervention whatsoever. In other areas once thought to be truly local, such as education, states may no longer exercise *exclusive* control. But this does not mean that they make no valid claim to “sovereignty” in such areas. States, like modern nations participating in supranational institutions, can be powerful and effective negotiators on behalf of their citizens. The course of the No Child Left Behind Act, a recent major federal overhaul of public education, is one case in point.<sup>388</sup> The path of this law demonstrates that the federal government is not at liberty to simply enact such measures and then wholly disregard the objections of the states. Since its passage, the No Child Left Behind Act has been subject to sustained and vocal state criticisms.<sup>389</sup> Federal authorities thus have had little choice but to negotiate with the affected states. As a result, numerous exemptions to federal rules

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385. See, e.g., Carl Hulse & David D. Kirkpatrick, *Conservatives Press Ahead on Anti-Gay Issue*, N.Y. TIMES, July 9, 2004, at A15 (noting opposition to federal solution to gay marriage by, among others, Senate Minority Leader Tom Daschle, who noted that “[t]he regulation of marriage has long been under the purview of the states . . . and I believe that is where it should remain”).

386. See *Glucksberg*, 521 U.S. at 720 (canvassing state laws on assisted suicide).

387. See *Atkins*, 536 U.S. 304 (invalidating legislation which provided for the execution of the mentally retarded, based primarily upon the Court’s finding of a state legislative “consensus” that such punishment was deemed cruel and unusual).

388. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001).

389. See Sam Dillon, *President’s Initiative to Shake Up Education Is Facing Protests in Many State Capitols*, N.Y. TIMES, Mar. 8, 2004, at A12.

and regulations have been granted.<sup>390</sup> This is not an aberrant pattern. The same process has affected other areas of traditionally “local” concern. Federal welfare, environmental, and labor regulations, among others, have all been significantly altered in response to state concerns.

States thus may not exercise *exclusive* control in these and other areas, but federal authorities feel compelled, politically and otherwise, to negotiate with them and often to accommodate their concerns. State sovereignty in this sense is like the “new sovereignty” of nations, who can no longer dictate outcomes but who nevertheless exercise sovereign prerogatives through such things as cooperation and bargaining. The perception that the states are “sovereign” trustees is thus inter-subjective; it is shared by states, federal courts, federal regulators, and citizens. This understanding is not some academic construct; it has tangible, objective effects in terms of the shape of policies that affect local concerns. In sum, it is the “shared understanding” that states are in some sense “sovereign” that keeps the federal government from simply dictating terms to them.

The examples could well be multiplied many times over, and in a variety of policy areas. In these and other generally non-transparent ways, the idea that the states are “sovereign trustees” has become, over time, a shared understanding. One aspect of state sovereignty, namely control over local welfare and conditions, or “internal” sovereignty, has been constructed as a result of historical, academic, judicial, and political discourses, and more importantly as a result of continuous state practices like the exercise of their police powers and the securing of exemptions from federal regulations. States are thus regarded as, and ultimately treated as, “sovereign” not because they have a monopoly with regard to local concerns or the ability to stave off all federal regulation, but because there is an agreement that they are the most legitimate locus of authority with regard to issues of local welfare.

## (2) *State as Agent*

As mentioned, the Framers considered the states to be “but different agents and trustees of the people . . . .”<sup>391</sup> As trustees, states function as the primary administrators of local health, safety, welfare, and morals.

390. Diane Jean Schemo, *Rules Eased On Upgrading U.S. Schools*, N.Y. TIMES, Mar. 16, 2004, at A20; Diana Jean Schemo, *14 States Ask U.S. to Revise Some Education Law Rules*, N.Y. TIMES, Mar. 25, 2004, at A16; Diana Jean Schemo, *New Exceptions in Testing Law For Some Ill or Injured Students*, N.Y. TIMES, Mar. 30, 2004, at A14; Diana Jean Schemo, *States' End Run Dilutes Burden For Special Ed*, N.Y. TIMES, June 7, 2004, at A1.

391. THE FEDERALIST No. 46, at 297 (James Madison) (Isaac Kramnick ed., 1987).

Sovereignty in this sense is effective control over internal concerns like health, safety, and morality. The imposition of the agency function contributes further to the construction of state sovereignty. In terms of agency, the states serve, or again are at least perceived to serve, as buffers and representatives in interactions with other states and with the central government.

The agency function, like the trustee function, originated with the Framers. Elaborating on what the states were intended to become, Alexander Hamilton asserted that the states would be the “voice” and “arm” of the people’s discontent should the central government overreach its proper boundaries.<sup>392</sup> As always, Anti-Federalist opponents of the constitutional plan put the matter in stronger terms. Fisher Ames of Massachusetts, for example, considered the states to be the “safeguard and ornament of the Constitution;” “they will afford a shelter against the abuse of power, and will be the natural avengers of our violated rights.”<sup>393</sup>

The form this “avenging” would assume was not made entirely clear, although it was ominously noted at the time of the framing that the state militias would substantially outnumber federal armies.<sup>394</sup> More optimistically, however, the states were intended to function as agents primarily by interposing themselves between local citizens and overzealous federal regulators. Like the imposition of the states’ trustee function with regard to local concerns, the imposition of this function has been critical to sovereign statehood from the beginning.

Today, state-as-agent is every bit as deeply ingrained in our legal and political culture as state-as-trustee. The Framers provided the broad picture in terms of expectations. But state-as-agent, like state-as-trustee, has been sustained over time as a result of legal, social, and political discourses, as

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392. THE FEDERALIST No. 26, at 199 (Alexander Hamilton) (Isaac Kramnick ed., 1987); *see also* THE FEDERALIST No. 51, at 321 (James Madison) (Isaac Kramnick ed., 1987) (“The different governments will control each other, at the same time that each will be controlled by itself.”); THE FEDERALIST No. 28 (Alexander Hamilton) (Isaac Kramnick ed., 1987), at 206 (“Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.”).

393. 2 JOHNATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 46 (1836).

394. *See* THE FEDERALIST No. 46, at 301 (James Madison) (Isaac Kramnick ed., 1987) (projecting a federal army of twenty-five or thirty thousand, opposed by “a militia amounting to near half a million of citizens with arms in their hands”); THE FEDERALIST No. 28, at 206–07 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (noting difficulty in raising and maintaining large federal army, and ability of states to defend themselves against any such force); *see also* THE FEDERALIST No. 17, at 157 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (noting that states might be “dangerous rivals to the power of the Union”).

well as state and federal practices. “States’ rights” controversies, from nullification to secession to desegregation, were grounded upon the idea that meaningful “state sovereignty” was necessary to constrain the federal government, and ultimately to preserve individual liberties.<sup>395</sup> Constitutional theorists have long contributed to the imposition of the agency function in their work as well. Scholars routinely emphasize that “checking tyranny” is a critical role for the states.<sup>396</sup> On occasion, the Supreme Court also reminds us that we need truly sovereign states in order to check central authority and preserve individual freedom.<sup>397</sup>

As was true with respect to the state-as-trustee function, the imposition of the state-as-agent function is not solely a matter of historical, political, judicial, and academic discourses. Especially in the past few decades, it has become critical for states to put theory into practice, to become active and effective advocates for state interests. The Supreme Court pushed the agency function to the fore in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>398</sup> where the Court abandoned a short run at instituting a form of “quasi-classical” sovereignty in which it identified exclusive state enclaves that Congress could not encroach upon in exercising its commerce power.<sup>399</sup> The Court held instead that the states would henceforth be responsible for negotiating and protecting their own sovereignty, principally by utilizing the tools provided in the constitutional structure and through their effective advocacy in the political process.<sup>400</sup>

Some feared that in light of the relatively few actual “safeguards” the Constitution and political process provided the states, the balance would tip even more substantially in favor of federal regulators. There can be little doubt that the balance of *material* power rests comfortably in favor of Congress. But again, as a social construct and institutional fact, sovereignty is not solely or even primarily about material facts like wealth

395. See THE FEDERALIST No. 51, at 321 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (noting that with states “a double security arises to the rights of the people”).

396. See, e.g., Deborah J. Merritt, *Federalism As Empowerment*, 47 FLA. L. REV. 541, 546–47 (1995) (arguing that autonomous states “temper the direction of federal law by supplementing federal legislation and regulating areas that Congress has not preempted” and that “state and local governments are vigorous lobbyists and litigants”).

397. See *Printz v. United States*, 521 U.S. 898, 921 (1997) (“This separation of the two spheres is one of the Constitution’s structural protections of liberty.”); *New York v. United States*, 505 U.S. 144, 181 (1992) (“[T]he Constitution divides authority between federal and state governments for the protection of individuals.”); *Gregory v. Ashcroft*, 501 U.S. 452, 457–60 (1991) (cataloguing benefits of federalism, including preservation of individual liberty).

398. 469 U.S. 528 (1985).

399. See *id.* at 531 (abandoning the “traditional governmental functions” test as “unworkable” and “inconsistent with established principles of federalism”).

400. See *id.* at 552–53 (describing structural and political safeguards).

and personnel. It is, rather, about the dynamics of what the states do, and how citizens and institutions perceive them as a result. There is more than ample anecdotal evidence to support the perception that states act as effective buffers and emissaries on behalf of their citizens.<sup>401</sup>

The states' agency function is manifested in two primary contexts. The first we might call "interposition."<sup>402</sup> When a state interposes its "sovereignty" against a claim of federal authority or jurisdiction, it contributes to the perception that it is a vigilant and effective agent for the people. Sometimes these interpositions are of a rather striking character. For example, the governor of Nevada has refused to permit federal authorities to store nuclear waste in his state, arguing that the waste had not been demonstrated by adequate scientific evidence to be safe.<sup>403</sup> This standoff with the President and several federal agencies received significant national attention. It exhibited a single state official standing firmly and, to the home constituents, bravely against an encroachment by a powerful federal government. High-profile episodes pitting state officials against federal "encroachers" contribute to the perception that "sovereign" states are a necessary bulwark against central overreaching.

States "interpose" in other ways as well. For instance, vertical jurisdictional battles among state and federal prosecutors are routine aspects of federalism. Here the states do not seek to prevent federal authorities from exercising their own sovereign powers, but to stake their claim to an equivalency in terms of executive authority. For example, not willing to be overshadowed by federal prosecutors, state prosecutors have asserted their state's jurisdiction and interest, as a "separate sovereign," in prosecuting notorious criminals like Timothy McVeigh and Terry

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401. One may accurately observe that the examples here and elsewhere are anecdotal episodes. One might argue that these examples do not convey the "real" balance of power between the states and the federal government. But one of the principal tenets of social construction theory is that this sort of "reality" cannot be known as a "brute fact." What matters is the perception, or shared understanding, that states serve these functions. And that perception, in turn, does have real, objective consequences in terms of effects on policy outcomes and citizen loyalties. The perception that states are *effective* agents may, in the end, be mistaken. As social construction theory posits, however, relevant observers may mistakenly believe that an object (state) serves a particular function (agency). What is important is that the observers treat the object *as if* it serves this function, and as deserving of the status the function imposes. In terms of construction, "the reality of sovereignty consists in its use and acceptance." Werner & de Wilde, *supra* note 30, at 304.

402. This is not the same "interposition" that was once advocated by extreme states' righters, essentially the claimed right of the states to declare federal laws null and void. The concept is, rather, interposition as buffer.

403. See *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, 373 F.3d 1251 (D.C. Cir. 2004) (invalidating plan for storage of nuclear waste at Yucca Mountain site in Nevada).

Nichols.<sup>404</sup> These sorts of literal and figurative “turf wars” lead, over time, to the imposition of the agency function. Citizens grow to expect their state officials to defend the moral interests of the locality and its interest in justice, separate and apart from any national interests. These and other interpositions reinforce the states’ separateness, their independent right to a form of “external sovereignty” and equality.

The second manner in which the agency function has been imposed on states is far more common than interposition. This we will call the states’ “emissary” role. The basic idea is that state officials serve as emissaries or representatives of their citizens in the political process. They privately, and often publicly, negotiate and bargain with federal authorities regarding the implementation of federal policies. Each time they bargain and negotiate, the states reinforce their “sovereign” status as representatives of separate legal and political communities, as protectors of their citizens’ interests. States, of course, lose many of these battles. The political reality, however, is that the states’ most significant victories are likely to be publicized. So, for example, returning again to the No Child Left Behind legislation, publicity regarding successful state negotiations leading to exemptions, or alterations, or additional funding communicates that the states can indeed serve as effective emissaries.<sup>405</sup> States routinely bargain with and cajole federal authorities to alter and amend not only educational, but also welfare, environmental, and other federal requirements and regulations. Although they do not exclusively control the agenda, or the outcome, with regard to these policies, states do have a real, substantial, and public effect on the shape and direction of policies. States contribute to the structure of the negotiation process as well; by actively exercising the agency role, they maintain their status as members in good standing in the federal system.

This is a different conception of state sovereignty, one that sheds the classical focus on exclusivity and brute power and examines instead the dynamics of state behavior and its effect on policy outcomes and governance processes. Insofar as states are perceived as legitimate and effective agents on behalf of their citizens, they are granted recognition as sovereigns and treated as if they are in control of a domain. This concept of state sovereignty begins to resemble in a significant manner the “new sovereignty” of nation-states. “Sovereignty, in the end, is status—the

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404. See *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (“When a defendant in a single act violates the ‘peace and dignity’ of two sovereigns by breaking the laws of each, he has committed two distinct ‘offences.’”) (quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922)).

405. See sources cited *supra* at notes 388–90.

vindication of the state's existence as a member of the [federal] system."<sup>406</sup>

### (3) *State as Community*

A simple conception of "community" is a unified group of individuals sharing common interests, living in a common location.<sup>407</sup> In the most rudimentary sense, the states readily meet this definition; they are separate communities. States are physical places marked off by boundaries. They have their own charter documents, or constitutions. They set their own rules of membership, which they call "citizenship." And, perhaps most importantly, states have recognizable members—their citizens.<sup>408</sup> The addition of a formal governmental structure transforms the state into a particular type of community. As the Supreme Court has observed: "A state, in the ordinary sense of the Constitution, is a *political community* of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."<sup>409</sup>

There are two principal implications, in terms of "sovereignty," of states taking on their roles as separate communities. First, each state community constitutes a separate, distinct, and *equal* locus of authority with respect to other states. The states, "as political communities, [are] distinct and sovereign, and consequently foreign to each other."<sup>410</sup> Thus, as separate sovereign communities, the states enjoy a measure of "external" sovereignty with regard to one another. Except insofar as the Constitution requires unity or recognition, the states are legally and politically independent of one another.<sup>411</sup> They can and do "protect" their citizens by

406. CHAYES & CHAYES, *supra* note 3, at 27 ("[F]or all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life.").

407. See, e.g., WEBSTER'S NEW COLLEGIATE DICTIONARY 226 (1976) (defining "community" as, *inter alia*, "a unified body of individuals"; "the people with common interests living in a particular area").

408. See *Texas v. White*, 74 U.S. (7 Wall.) 700, 720 (1868) ("The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.").

409. *Id.* at 721 (emphasis added).

410. *Bank of the United States v. Daniel*, 37 U.S. (12 Pet.) 32, 54 (1838); see also *Coyle v. Oklahoma*, 221 U.S. 559, 567 (1911).

411. Some of these limits on interstate "external" sovereignty are expressly set forth in the Constitution. See, e.g., U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the

refusing to give effect to policies of other states with which they disagree. Iowa, for example, is not compelled to follow Massachusetts or Hawaii in honoring the marriages of two men, or two women.<sup>412</sup>

The second general implication, in terms of sovereignty, of state-as-community is that the states are generally perceived as serving many of the same functions as other typical communities. Judicial and scholarly discourses regularly emphasize that as communities, states do such things as encourage political participation, foster respect for local concerns, offer choices to citizens, and foster competition.<sup>413</sup> There have been many variations on these themes, too many to describe here in full detail. Constitutional scholars have suggested, for example, that the states, like other communities, permit the accumulation of “social capital,” which enables citizens to overcome the usual obstacles to collective action.<sup>414</sup> Others have posited that states, like other communities, may play a formative role in individual development, or “may help foster civic identities that overlap with more deeply felt identities in ways that create cross-cutting allegiances.”<sup>415</sup> There is no way to empirically test these various assertions and theories. Nor is there any point in doing so, insofar as state sovereignty is conceived as a social construct. The point is that over time these and other “community” functions have been effectively imposed on the states; they constitute, in part, circumstances (*C*) in which the states (*X*) are deemed to count as sovereign (*Y*).

Active states continually prop up their sovereignty by demonstrating their community *bona fides*. The nation recently witnessed California’s citizenry expressing its social, economic, and political discontent in the gubernatorial election that resulted in the recall of the incumbent governor

several States”). Others, like the so-called “dormant” commerce clause, have been imposed as a matter of judicial interpretation. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (holding that protectionist state legislation is *per se* invalid).

412. In this particular case, note that the community function also reinforces the states’ role as trustee of local morality. As the discussion has demonstrated, states can, of course, serve more than one function at once.

413. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; . . . and it makes government more responsive by putting the States in competition for a mobile citizenry.”); *see also* Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism For A Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988) (discussing the “values” of federalism); Michael McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1491–1511 (1987) (same).

414. *See* Jason Mazzone, *The Social Capital Argument For Federalism*, 11 S. CAL. INTERDISC. L.J. 27 (2001) (arguing that “federalism also promotes the kinds of social relationships that allow citizens to overcome collective action barriers and get things done”).

415. *See* Rubin & Feeley, *supra* note 23, at 938; Sorenson, *supra* note 49, at 98.

and the election of Arnold Schwarzenegger. To be sure, not all elections receive this sort of attention; most do not involve such colorful characters. But the California election was one example of what states are understood to provide in terms of *opportunity* for political participation. The opportunity need not relate to an election of national concern or curiosity. State and local elections receive plentiful local media coverage, and anyone who is paying the slightest attention will be aware that an election is taking place. Even if citizens are not inclined to participate, the state at least offers them the opportunity, and they know that this is so. Ballot initiatives and statewide referenda regarding issues of state and local concern such as taxes, affirmative action in public education, assisted suicide, and “medical marijuana” also focus substantial attention on states as political communities. So long as states continue to offer and encourage these sorts of opportunities, they will continue to be perceived as sovereign political communities.

The same can be said for the imposition of other community functions, including fostering respect for local concerns, offering meaningful choices to citizens, fostering competition, and fostering civic identities. There are those who assert that the states do not actually provide such benefits, that they are, for example, too overshadowed by federal authority and too homogenous to serve as real choices or effective communities.<sup>416</sup> We cannot empirically demonstrate that states do or do not perform these functions. There are, however, sufficient indicia of state engagement and heterogeneity to argue that a shared understanding has in fact arisen with respect to these elements of state sovereignty as well.

As the discussion of the trustee and agency functions demonstrated,<sup>417</sup> states do pay attention to and pursue local community interests and concerns, often with substantial vigor. Moreover, it would appear that states offer enough choices and foster sufficient competition to at least be *perceived* as unique communities. Some states have income and sales taxes, some do not; some permit the use of medical marijuana, some do not; some allow assisted suicide, others proscribe it; some states permit homosexuals to marry, most do not; some states have what we might consider a recognizable religious identity, most are secular and indistinguishable on this basis; some states rely upon agriculture, others industry; some states have what might be considered “liberal” cultures,

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416. See Rubin & Feeley, *supra* note 23, at 920 (arguing that “we have a national political culture, and no state is likely to take advantage of the normative independence that serves as federalism’s *raison d’etre* to suppress local variation”) (emphasis added).

417. See *supra* notes 184–90, 203–10.

while others are considered to be generally more “conservative.” The distinctions could be multiplied many times over.

Is some critical mass of people going to move from one state to another because of these or other differences? Probably not, but this again misses the point of conceiving of sovereignty as an institutional fact.<sup>418</sup> These and other distinctions would seem to be at least sufficient to lead to the perception, among citizens, political leaders, many if not most academics, and most judges, that states comprise unique, separate communities that offer different choices in terms of living experiences. This is something one would surely not have to belabor with two citizens, one from Massachusetts and the other from Mississippi. This is certainly not to deny that there is a substantial degree of homogeneity among the states, particularly in terms of economic considerations and policies. But there is sufficient demarcation to give rise to the perception that it makes a difference which state’s membership one chooses to join. Because there are separate communities out there, one is at liberty, if sufficiently motivated, to pack up and move.<sup>419</sup> As the Supreme Court stated in *McCulloch v. Maryland*:<sup>420</sup> “No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.”<sup>421</sup> That statement remains as true today as when it was made, very early in the conceptual evolution of statehood.

Finally, in terms of the imposition of community functions, the states are said to do such things as foster civic identities and even contribute to individual development. It is not at all difficult to see how this perception might arise. The states themselves contribute to the imposition of such functions in carrying out activities most of us do not consciously think of as claims to sovereignty. For example, flagship state schools are recognizable arms of the state that contribute substantially to education, one of the most important aspects of personal development. In addition to offering a discounted but quality higher education, these state institutions often foster strong loyalties among their alumni. Even such seemingly trivial objects as state flags, license plates, and slogans all contribute to civic identity and personality. These state symbols are intended to

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418. Corporate citizens, of course, are quite likely to be swayed by distinctions among states with regard to tax, employment, and property laws, for example. In this sense, states function as communities that offer what are sometimes make-or-break choices.

419. See McConnell, *supra* note 111, at 1503 (noting that “[t]he main reason oppression at the federal level is more dangerous is that it is more difficult to escape”).

420. 17 U.S. (4 Wheat.) 316 (1819).

421. *Id.* at 403.

engender citizen loyalty and identification; they are in that respect very subtle claims to sovereignty, but claims nonetheless. Objects and symbols like the vilified confederate flag, the license plate motto “Live Free or Die,” and the slogan “Don’t Mess With Texas” are mostly underappreciated currents of an ongoing state sovereignty discourse. These things are far from trivial. They contribute substantially, if not always consciously, to the shared perception that states are sovereign communities and that membership in those communities has special meaning.<sup>422</sup>

In sum, it would be difficult, if not impossible, to prove with any empirical precision that the states actually serve the various community functions often attributed to them. But it is not at all hard to believe that through social, political, judicial, and academic discourses, as well as continuous state practices, the states are perceived as existing to serve a variety of functions typically associated with other communities. Insofar as they do so, states stake out claims to recognition as sovereigns. And insofar as their sovereignty is recognized and acted upon, the states are in fact “sovereign.”

#### (4) *State as Laboratory*

A final function that has been imposed upon states is perhaps the best known, but least understood. States have been said to function as “laboratories” from the earliest recorded moments in constitutional discourse. Alexander Hamilton argued that states would supply model legislation “which will, in many cases, leave little more to be done by the federal legislature than to review the different laws and reduce them into one general act.”<sup>423</sup> On one view, then, a diversity of sovereign state lawmaking laboratories would contribute to the content of federal law.

But others have argued that there is value in experimentation itself. One of the principal arguments in favor of “sovereign” states was that “federalism enables a people to try experiments which could not safely be tried in a large centralized country.”<sup>424</sup> Justices Holmes and Brandeis popularized this version of state-as-laboratory in their *Lochner* era

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422. This is not to suggest that everyone agrees with the claims such symbols make, or that the state by making such claims exercises precisely the sort of influence that, say, a family or religious community does in terms of identity formation and individual development. These sorts of things do, however, contribute to the imposition of community functions with regard to the states.

423. THE FEDERALIST No. 51, at 340 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

424. 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 353 (1888).

dissents,<sup>425</sup> which would ultimately become celebrated for repudiating *Lochner*'s economic substantive due process. Holmes specifically objected to the Court's invocation of the Fourteenth Amendment's Due Process Clause "to prevent the making of social experiments . . . in the insulated chambers afforded by the several states."<sup>426</sup> Justice Brandeis considered it "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>427</sup>

The persistence of the laboratory metaphor is a testament to the social construction thesis. The symbol has an uneven history. The framers supported it, as did Supreme Court luminaries like Brandeis and Holmes. But the modern Court has been stingy with its references to the laboratory function. It is mostly mentioned in passing in concurrences and dissents.<sup>428</sup> Some academics have questioned the utility of this particular representation of state function since what is happening in the "real world" of state legislation is nothing like the controlled environment of the scientific laboratory.<sup>429</sup>

Still, state-as-laboratory continues to exert influence on how the states are perceived, and how their "sovereignty" is represented. Social, academic, and political discourses, and the dynamics of state practices have combined to support the perception that the states are critical innovators. Various discourses continue to emphasize that the states ought to be provided the breathing room to decide certain matters in the first instance.<sup>430</sup> Again, the debate over gay marriage demonstrates the entrenched nature of the laboratory function. Politicians who favor permitting the states to deal with this issue without federal interference generally tout some version of the "laboratory" function to channel their

425. See, e.g., *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

426. *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

427. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

428. See James A. Gardner, *The "States-As-Laboratories" Metaphor In State Constitutional Law*, 30 VAL. U. L. REV. 475, 483 (1996) (noting that the laboratory function does not provide the foundation for Supreme Court holdings). The Court does sometimes mention the laboratory metaphor in passing, as one of the many benefits of federalism. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (federalism "allows for more innovation and experimentation in government").

429. See Gardner, *supra* note 428, at 480–82 (1996) (arguing that states are not engaged in scientific experimentation in any sense, but a loose form of policy experimentation); see also Rubin & Feeley, *supra* note 23, at 923–24 (noting lack of controls and central direction in state "experimentation").

430. See Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745, 1750–76 (2004) (describing and elaborating on the state-as-laboratory metaphor, and examining the Supreme Court's invocation of this functional symbol).

argument against federal action.<sup>431</sup> The idea that states sometimes act as laboratories of experiment has seeped into our social discourse.<sup>432</sup> Many academics, who may well be aware that the laboratory metaphor is technically flawed, nevertheless support the idea that the states should be permitted to “experiment” before a national solution is implemented.<sup>433</sup>

Recall as well that social construction theorists who have studied state sovereignty in the international context stress that in a significant sense states *are* what they *do*. States, functioning as trustees, continue to legislate with respect to novel social and economic issues like the death penalty, involuntary institutionalization, assisted suicide, medical marijuana, stem cell research, environmental concerns, criminal sentencing, and a host of other matters. Their efforts can have several tangible effects. First, other states may follow a bolder state’s lead.<sup>434</sup> Second, Congress is often constrained from interfering with these state efforts, partly, to be sure, from its own crowded agenda, but also because the matter is simply perceived to be one for the states to address in the first instance. This may be a matter of congressional deference, or an artful dodge of an issue for which Congress lacks political appetite. In either case, the result is that state law is essentially preserved, or “final.” Finally, once the states address a novel concern, the courts pay particular attention to the innovations the states have attempted.<sup>435</sup> These innovations are not always upheld, but they are generally treated by the courts with deference and respect. The shared understanding or agreement that states should be

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431. See Carl Hulse & David D. Kirkpatrick, *Conservatives Press Ahead on Anti-gay Issue*, N.Y. TIMES, July 9, 2004, at A15 (quoting then-Democratic Senate Leader Tom Daschle: “The regulation of marriage has long been under the purview of the states . . . and I believe that is where it should remain.”).

432. See, e.g., David Ginn, editorial, NORTHEASTERN NEWS, Dec. 3, 2003, available at <http://www.ny-news.com/main> (last visited Apr. 5, 2005) (“I was recently reminded that one of the major advantages of our federalist system is the freedom it gives states to experiment with different policies. Seen in this way, states are laboratories where creative solutions to social problems can be tested out.”).

433. See, e.g., Dale Carpenter, *The Federal Marriage Amendment: Unnecessary, Anti-Federalist, and Anti-Democratic*, available at [www.cato.org/pubs/wtpapers/040923paper.html](http://www.cato.org/pubs/wtpapers/040923paper.html) (Sept. 23, 2004) (“While respecting the power of the states to determine their own policies on matters as fundamental as property, criminal, and family law means there is a lack of uniformity in these areas, the corresponding benefits of state experimentation and local control have always been regarded as overwhelmingly compensating advantages of our federal system.”).

434. See, e.g., Danny Hakim, *Several States Likely to Follow California on Car Emissions*, N.Y. TIMES, June 11, 2004, at C4; Adam Liptak, *Justices’ Sentencing Ruling May Have Model in Kansas*, N.Y. TIMES, July 13, 2004, at A12 (reporting that Kansas had overhauled its sentencing procedures in anticipation of Supreme Court ruling, and that other states would likely follow its lead).

435. See *Roper v. Simmons*, 125 S. Ct. 1183, 1192–94 (2005) (citing state laws as basis for national consensus against execution of juvenile offenders).

allowed the breathing space to address novel issues substantially affects the legislative terrain.

Events regarding gay marriage in Massachusetts, as well as in communities in California and New York, can hardly be characterized as “experimentation” in the controlled laboratory sense. There is little efficiency in proceeding in this haphazard fashion.<sup>436</sup> But efficiency is only one goal. The value in experimentation, or innovation, or whatever one chooses to call what the states are doing, at least from the states’ point of view, is that it reinforces one of the states’ competences to such an extent that states gain citizen loyalty and a further measure of control over a critical local domain. The *idea* that marriage is a concern with regard to which the states should be allowed to innovate or “experiment” in the first instance remains politically, academically, judicially, and culturally popular. California’s recently enacted stem cell research initiative<sup>437</sup> can also be viewed in this light. Despite federal misgivings, California asserted its sovereign prerogative to “experiment” in this morally charged but scientifically promising field. Aside from the substantial profits that stand to be made, California positioned itself, in the eyes of its citizens and those in other states, as a proactive sovereign. Insofar as the states are perceived as innovators in this fashion, they will continue to be regarded as at least partially “sovereign.”

In sum, state sovereignty as an institutional fact arises from the various functions imposed upon the states. Social construction theory, and conceptions like the “new sovereignty,” posit that states *are* in substantial part what they *do*. Thus, sovereignty does not arise from the states’ exclusive authority, nor from some measure of their material resources or power. We ought not ask whether the states are “really” sovereign, for “the reality of sovereignty consists in its use and acceptance.”<sup>438</sup> The state (*X*) counts as sovereign (*Y*) as, and to the extent that, it performs the various functions described above (*C*). It counts as sovereign as, and to the extent that, shared understandings arise to the effect that states are entitled to deference with regard to local concerns and form legitimate sovereign polities entitled to recognition from other states and federal authorities. As in the international context, social construction theory can help to reconcile the continued recognition of state claims to “sovereignty” with

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436. As Rubin & Feeley note, “true federalism allows governmental sub-units to choose different goals, not to experiment with different mechanisms for achieving a single one.” Rubin & Feeley, *supra* note 23, at 924.

437. See CAL. CONST., art. 35, § 1 (“California Stem Cell Research and Cures Act”).

438. Werner & de Wilde, *supra* note 30, at 304.

their substantially limited powers by focusing attention on the dynamic process of sovereignty's construction.

*b. Status Symbols*

All of the aforementioned functional symbols transfer some power or other to the states—for example, to control local affairs, interpose, provide community benefits, or innovate. All of these powers are aspects of a state's sovereignty. As Searle noted, institutional facts do not always involve imposition of power; some are based upon status. An imposed status can be either positive or negative.<sup>439</sup> The use of status to construct state sovereignty has been less prevalent than the imposition of powers and functions. As we shall see, this has been almost exclusively a juridical process.<sup>440</sup> “Sovereignty” in this context depends upon a purported shared understanding that a state “takes on” the status of some other object or institution that is itself thought to be sovereign. Thus, the state (*X*) counts as sovereign (*Y*), or does not, where it is judicially determined that the state resembles, or does not resemble, some other sovereignty-bearing object (*C*). The use of status as a constructive element has come to define a version of state sovereignty distinct from that associated with the functions discussed above.

*(1) State as Corporation*

In terms of pure status, the states did not begin from an exalted position. The early colonies were merely a specie of the corporate form. Colonial constitutions, like the Massachusetts Bay Company Charter, were specifically “designed as corporate charters.”<sup>441</sup> In early discourse, states

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439. See SEARLE, *supra* note 32, at 96–97. For example, one can be voted either “most popular” or “least popular” person in one’s class. *Id.*

440. This is a situation unique to American state sovereignty. The European Court of Justice, for example, “has been remarkably frugal in its discussion of sovereignty.” SOVEREIGNTY IN TRANSITION, *supra* note 2, at 12.

441. Amar, *supra* note 59, at 1432–33. The corporate form was chosen largely for pragmatic reasons—it was most familiar to the colonists. See *id.* (examining corporate form). Organizationally, the colonial charters were the precursors of state governments. They instituted hierarchical leadership. *Id.* The corporate officers would later become state governors, deputy governors, and so on. *Id.* The charters set forth the boundaries of authority for these early officers. They laid the basic ground rules for a hybrid form, which was both a “profit-seeking entity” and an early form of governance. *Id.* The early adoption of the corporate form was mostly significant because it hinted at the framers’ experimental version of sovereignty, one which broke significantly with classical thought. Because they contained implicit boundaries for the exercise of sovereign power, corporate forms were an early break from English notions of absolute sovereignty. See *id.* at 1434–35 (“Within the limitations of their charters, governments could be sovereign, but that sovereignty could be bounded by the terms of

were often treated as no more “sovereign” than ordinary corporations. James Madison, who sometimes vouched for the “sovereignty” of the states, once expressed the view that there existed a “gradation” of authority “from the smallest corporation, with the most limited powers, to the largest empire with the most perfect sovereignty.”<sup>442</sup> “The states,” Madison insisted, “are not in that high degree Sovereign”; “they are Corporations with the power of Bye Laws.”<sup>443</sup>

This line of thought greatly influenced the early Supreme Court’s treatment of claims to sovereign statehood. Recall that there was in the Court’s sovereignty discourse a period of “pre-sovereignty.”<sup>444</sup> Early state claims to “sovereign immunity” fell victim to the imposition of the corporate status. If a state was only as “sovereign” as an ordinary corporation, then the state could be sued, just as any ordinary corporation might be.

In *Chisholm v. Georgia*,<sup>445</sup> the Court held that citizens from one state could indeed sue a foreign state in federal court. Despite their varying views on other matters (each justice wrote separately), the justices in *Chisholm* largely agreed that corporate status should be imposed upon the states.<sup>446</sup> Georgia creatively justified its claim to sovereignty by seeking to “graft” arguments for nation-state sovereignty onto its immunity defense.<sup>447</sup> The state insisted that to permit the suit to proceed would constitute an offense to the state’s “dignity.”<sup>448</sup> The Court soundly rejected this justification, holding that it would constitute no *offense* to state “dignity” to subject the states to suit at the bidding of foreign citizens:

[T]he obvious dictates of justice, and the purposes of society . . .  
[demand that] in certain cases one citizen may sue forty thousand;

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the delegation itself.”). Corporate officers who ventured beyond these boundaries were acting *ultra vires*. Thus, the concept of limited sovereignty found early expression in the symbol of the corporate body. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969). Indeed, “dual sovereignty” would later be defended on the ground that sovereignty could be incomplete, even divided, as it was in corporations.

442. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 463–64, 477, 479 (Max Farrand ed., 1966).

443. *Id.* at 477.

444. See *supra* notes 61–66 and accompanying text.

445. 2 U.S. (2 Dall.) 419, 447 (1793).

446. See *id.* (Opinion of Iredell, J.) (“Any body politic (sole or aggregate) whether its power be restricted or transcendent, is in this sense ‘a corporation.’”); *id.* at 468 (Opinion of Cushing, J.) (“[A]ll states whatever are corporations or bodies politic. The only question is, what are their powers?”).

447. See Reus-Smit, *supra* note 312, at 357 (noting that “the best way to further a moral claim is to ‘graft’ it to prevailing views about what constitutes a fully realized human being”).

448. See *Chisholm*, 2 U.S. at 456 (Wilson, J.) (discussing state claim to “dignity”).

for where a corporation is sued, all the members of it are actually sued, though not personally, sued. . . Will it be said, that the fifty odd thousand citizens in *Delaware* being . . . associated under their charter, that although it may become the latter to meet an individual on an equal footing in a Court of Justice, yet that such a procedure would not comport with the dignity of the former?<sup>449</sup>

As a mere corporate form, in other words, the state was held to possess no more “dignity” than a bank, a railroad, or a stockyard. Like those entities, the state had to yield to individual justice, citizen dignity, and the larger “purposes of society.”<sup>450</sup> The states, being mere corporations, were merely, as Justice Wilson stated in *Chisholm*, “the inferior contrivance of man.”<sup>451</sup>

*Chisholm* would, of course, later be overturned by the Eleventh Amendment,<sup>452</sup> and the Court has since piled on a number of state liberties from suit, including many which go well beyond the text of the amendment itself.<sup>453</sup> The modern Court, as we shall see, has drastically reversed *Chisholm*’s early prioritization of “dignitary” interests; today it is largely the *state’s* dignity which prevails over that of its citizens. Corporate symbolism would today be considered an outright insult to the states, as the character of their sovereign status has undergone a remarkable juridical change.

## (2) *State as Market Participant*

The discussion thus far has emphasized that state sovereignty is not an inherent aspect of statehood, but a flexible construct. Perhaps no symbol

449. *Id.* at 472.

450. *Id.* The idea that states were merely corporate forms influenced congressional thinking as well during this early period of history. The concept was relied upon by Congress in enacting important civil rights legislation, including the Civil Rights Act of 1781. Some sponsors and supporters of the enactment expressed the view that states would be covered by its proscriptions, which extended to all “persons.” See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 78–84 (1989) (Brennan, J.) (describing the legislative history of the Civil Rights Act of 1781). According to the Dictionary Act of 1780, which purported to provide definitions in aid of statutory construction, “person” included corporations and bodies politic. See *id.* (describing the Dictionary Act). Based upon the Dictionary Act, there was at least some indication that states would be covered by the Civil Rights Act. See CONG. GLOBE, 42d Cong., 1st Sess., 661–62 (1871) (“What is a State? Is it not a body politic and corporate?”) (Statement of Sen. Vichers); *id.* at 696 (“A State is a corporation.”) (Statement of Sen. Edmunds).

451. *Chisholm*, 2 U.S. at 455.

452. See U.S. CONST. amend. XI.

453. See *infra* notes 494–98 and accompanying text.

or marker demonstrates this fact more clearly than that of state-as-“market participant.”

Unlike the other status indicators, state-as-market participant does involve the transfer of some power to a state, although it is not sovereign power. Rather, this status provides states the power to act like any other corporation in the marketplace. The modern state enters markets of all kinds, purchasing goods and services just as any ordinary corporation does, and often on as large a scale. According to the “market participant” doctrine, where the state acts as a “market participant” rather than a “sovereign regulator,” it is permitted to restrict the flow of commerce in a manner that would otherwise be proscribed under the so-called “dormant commerce clause” doctrine.<sup>454</sup> The “dormant commerce clause” essentially prohibits state economic protectionism and measures which effect an undue burden on interstate commerce.<sup>455</sup> Where the state is labeled a “market participant,” the limits of the dormant commerce clause no longer apply and states can impose substantial burdens on interstate commerce.<sup>456</sup> The so-called “market participant exemption” is grounded in both the history of the Commerce Clause and principles of state sovereignty.<sup>457</sup> As

454. See *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) (holding that the distinction between “states as market participants and States as market regulators makes good sense and sound law”); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (distinguishing between state as regulator and state as participating in the market for Commerce Clause purposes); see also 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-11, at 1088–95 (3d ed. 2000). A similar distinction is found in antitrust law under the state action doctrine. See *Parker v. Brown*, 317 U.S. 341 (1943) (distinguishing between a state authorizing private parties to act anticompetitively and a state itself regulating commerce).

455. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (holding that economic protectionism is subject to a “per se rule” of invalidity); *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 350–54 (1977) (invalidating state law which had an undue burden on interstate commerce).

456. See Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 398 (1989) (arguing that the market-participant exemption reflects “a sound, if complex, accommodation of competing constitutional values”); Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097, 1097 (1988) (noting the “uneasy tension between the rule of interstate equality, which would brook no differential treatment, and the concept of state sovereignty, which would allow unrestricted preferences”).

457. As the Court has stated:

There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market . . . .

Restraint in this area is also counseled by *considerations of state sovereignty*, the role of each State ‘as guardian and trustee for its people,’ and ‘the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.’

*Reeves*, 447 U.S. at 437–39 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)) (internal citations omitted) (emphasis added).

the Supreme Court said in *Reeves, Inc. v. Stake*,<sup>458</sup> “the commerce clause was directed, as an historical matter, only at regulatory and taxing actions taken by states in their *sovereign* capacity.”<sup>459</sup> Thus, rather than existing as an inherent aspect of statehood, “sovereignty” is treated, in this context at least, as something which the states are or are not in possession of at any given moment. There are, at least according to the Court, apparently situations in which a state acts in its sovereign capacity, and situations in which it takes on some other distinct character.

In the end, however, what the states can or cannot do remains a question of their status. Whether a state will be permitted to disrupt the flow of commerce hinges entirely upon the formal category into which it is placed by the courts—“market regulator” or “market participant.” As the precedents indicate, this threshold inquiry does not involve any identifiable bright lines; it is hardly self-evident which role the state may be playing in any given situation and no set of factors seems to be determinative.<sup>460</sup> In social context, at least, one can well imagine that out-of-state firms which are disadvantaged by a state’s protectionism might draw the line between regulation and participation differently than the courts. Consistent with other status considerations, courts fix these sorts of lines without regard to impressions, appearances, or processes. The status is judicially determined, as the courts see it.

Corporate status in this context is a positive symbol from the states’ perspective. Under the market participant exemption, the Court “has shielded from commerce clause attack blatant favoritism of local interests.”<sup>461</sup> The state is “sovereign” to the same extent that a corporation is; thus insofar as a firm would enjoy the autonomy of the market so too will a state acting as a “market participant.” The exemption operates with something of a counter-intuitive backwardness insofar as sovereignty is concerned. It permits states to serve certain of their “sovereign” functions, such as structuring relations with their citizens and providing for the

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458. 447 U.S. 429.

459. *Id.* at 436–37 (quoting *TRIBE*, *supra* note 454, at 336).

460. See *White v. Mass. Council of Constr. Employers*, 460 U.S. 204, 214–15 (1983) (upholding a City of Boston executive order requiring any construction projects funded in whole or in part by the city to employ a workforce composed of at least half Boston residents as not violating the Commerce Clause); *Reeves*, 447 U.S. at 440 (holding that South Dakota’s policy of limiting sales of cement produced in a state-owned plant to state residents during times of shortage was permissible participation in the market, rather than regulation); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (holding that Maryland was acting as a market participant when it provided bounties for the destruction of inoperable automobile hulks, which effectively encouraged the processing of these hulks by in-state processors).

461. Coenen, *supra* note 456, at 397.

general welfare, so long as the Court concludes that a state is *not* acting in its usual “sovereign” capacity.

(3) *State as Nation*

In recent years, states have aggressively invoked their “sovereignty” in a variety of contexts. These claims have met with substantial success; so much so that some scholars have talked in terms of a federalism “revolution.”<sup>462</sup> The manner in which states have justified, and the Court has increasingly validated, state claims to “sovereignty” has been a significant element of the recent federalism revival. Status has been a critical aspect of this revival.

In holding, for example, that Congress cannot “commandeer” state officials to enforce federal regulatory policies, the Court has emphasized that states are not “mere political subdivisions of the United States,” or “regional offices,” or “administrative agencies of the Federal Government.”<sup>463</sup> As the Court stated in *Printz v. United States*,<sup>464</sup> which held that Congress could not “commandeer” state executive officials to enforce federal policies: “It is an essential attribute of the States’ retained sovereignty that they remain independent and autonomous . . .”<sup>465</sup> The Court has also increasingly upheld claims that the “dignity,” “respect,” and “esteem” of the states must be protected, even at the expense of citizens’ claims to injury at the hands of state officials.<sup>466</sup> The language of justification the states and the Court have used has puzzled scholars, who have offered several theories regarding the Court’s aggressive support of state autonomy, and its reliance on language of “dignity” and “esteem” in particular.<sup>467</sup> If the putatively “dignified” states are not political subdivisions or regional offices, then what status do they possess, what may they be likened to?

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462. See Gey, *supra* note 21, at 1601 (“It is now apparent that the United States is in the midst of a constitutional revolution.”).

463. *New York v. United States*, 505 U.S. 144, 188 (1992) (opinion of White, J.).

464. 521 U.S. 898 (1997).

465. *Id.* at 928.

466. See, e.g., *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002) (“[T]he primary function of sovereign immunity is . . . to afford the States the dignity and respect due sovereign entities.”).

467. See, e.g., Judith Resnick and Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003) (identifying “role dignity” in discussions of state sovereign immunity); Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121, 1127 (2000) (“Not since extending the language of the Fourteenth Amendment to corporations has the Court so anthropomorphized an abstract entity.”).

Some scholars have suggested that the Court has begun to impose a status akin to that of nations upon the states in order to explain or define their “sovereignty.”<sup>468</sup> There is some historical support for such an imposition. What we now know and refer to as “the states” might have been called something else entirely when the Constitution was framed: subdivisions, protectorates, provinces, or districts, for instance. The framers in all likelihood used “state” purposefully. The Constitution’s drafters were well versed in the law of nations.<sup>469</sup> It is, thus, no mere coincidence that “state” also happens to be the term used to describe and analyze the Westphalian system of sovereign states and nation-states which developed in the seventeenth century.<sup>470</sup> There is, in fact, substantial evidence that the Framers were aware of, indeed many had read, Emmerich de Vattel’s treatise, *The Law of Nations*, which itself did not distinguish between “nation” and “state.”<sup>471</sup> It is at least plausible, then, that the Framers to some extent relied upon the conception of “state” as it had been developed at the time within the law of nations.

Physically, as well, the American states possess the elementary aspects long thought to confer the status of nationhood; namely *territory*, *population*, and *government*.<sup>472</sup> “In the Constitution,” the Court has observed, “the term state most frequently expresses the combined idea . . . of *people*, *territory*, and *government*.”<sup>473</sup> Vattel described nations as “bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.”<sup>474</sup> States meet this definition as well.

The imposition of “nation” status upon the states is significant in two contexts. First, in their relations with *one another*, states have been

468. See Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027 (2001–2002) (comparing state sovereign immunity with principle of international law at time of framing); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999) (comparing references to “States” in Constitution to international nation-states); Peter Smith, *States As Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003) (locating dignity language in the law of nations, specifically the law of foreign sovereign immunity).

469. See Rappaport, *supra* note 468, at 830–38 (noting the framers’ familiarity with international legal texts and principles).

470. See *id.* (arguing that “state” was used by the founders more or less synonymously with “nation”).

471. EMMERICH DE VATTEL, *THE LAW OF NATIONS* (1863).

472. See JAMES, *supra* note 3, at 13; see also Keating, *supra* note 13, at 204.

473. *Texas v. White*, 74 U.S. (7 Wall.) 700, 720–21 (1869) (emphasis added).

474. DE VATTEL, *supra* note 471, §§ 1, 4 (“Nations, or sovereign states, are to be considered as so many free persons living together in the state of nature.”).

assigned an “external” sovereignty similar in some respects to that possessed by nation-states. The “several states are of equal dignity and authority, and [because] the independence of one implies the exclusion of power from all others[,] . . . the laws of one State have no operation outside of its territory, except so far as is allowed by comity.”<sup>475</sup> This sovereign equality is “a principle inferred from the constitutional structure and borrowed from background assumptions of the law of nations.”<sup>476</sup> The Court has borrowed principles of international law, including territorial limits and sovereign equality, in resolving disputes (*i.e.*, border claims) between states, determining the contours of the doctrine of inter-state immunity from suit and, prior to the mid-twentieth century, in fashioning a doctrine of personal jurisdiction.<sup>477</sup>

The second context, at least according to one theory of the “dignified” state, is the presently in-vogue doctrine of “sovereign immunity.” Peter Smith has recently suggested that the Court’s repeated references to state “dignity” are drawn from the law of nations, specifically the doctrine of foreign sovereign immunity.<sup>478</sup> This doctrine shields sovereign nations from lawsuits in foreign courts, at least under most circumstances.<sup>479</sup> The relationship is, as Professor Smith acknowledges, only implicit; the Court has not explicitly invoked nation status on behalf of the states. He argues, however, that sovereign “dignity” is a basic principle of the doctrine of foreign state sovereign immunity.<sup>480</sup> Although it is “impossible to know precisely what the Court intends when it relies on the concept of state dignity in the state sovereignty immunity cases,” Professor Smith argues that the Court’s “*rhetorical clues* suggest that it is drawing support from

475. *Brown v. Fletcher*, 210 U.S. 82, 89 (1908) (quoting *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877)); *see also* *Kansas v. Colorado*, 206 U.S. 46, 95 (1907) (“Neither state can legislate for, or impose its own policy on the other.”); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845) (“When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession . . .”).

476. Bradford Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1323 (1996); *see* *Coyle v. Smith*, 221 U.S. 559, 580 (1911) (“[T]he constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized.”); *see also* U.S. CONST. art. I, § 3, cl. 1 (providing for equal representation for states in the senate); U.S. CONST. art. V (requiring state participation in constitutional amendment process); U.S. CONST. art. IV, § 3, cl. 1 (preserving the territorial integrity of the states).

477. *See* Smith, *supra* note 468, at 81–87 (discussing cases and doctrine).

478. *See id.* at 7 (arguing that recent sovereign immunity precedents treat states as nations).

479. *See id.* at 36–47 (discussing foreign state immunity and law of nations).

480. *See id.* at 7 (arguing that dignity “has an established meaning, with established implications, in the doctrine of foreign state sovereign immunity”).

the doctrine of foreign state sovereign immunity and the law of nations.”<sup>481</sup>

Whether or not the Court is imposing the status of nation, however, Professor Smith ultimately concludes that this status would not support the Court’s state sovereignty immunity holdings. The concept of the state as figurative nation-state can work, he argues, only if the Court is willing to insist that states are *fully* sovereign nations within the meaning of international law.<sup>482</sup> This argument, as Professor Smith notes, would run counter to the significant constitutional divestiture of state sovereignty in matters of foreign affairs, as well as the post-ratification understanding of state sovereign authority.<sup>483</sup> More importantly, as Professor Smith also observes, the metaphor would run counter to the law of nations itself. Under that body of law, Congress is entitled to subject *foreign nations* to suit in domestic courts. Thus, the state-as-nation metaphor “clearly should lead to the conclusion that Congress *can* subject the states to suit in federal court.”<sup>484</sup> This, of course, is precisely the opposite conclusion the Court has reached over and over again in recent sovereign immunity cases.

Nationhood status has plainly been imposed upon states when they interact with one another. As they interact, states are equal, independent, territorially-bound, sovereign units. It is also possible that nation status is—to a limited degree—being imposed upon the states to support such things as state “sovereign immunity” from lawsuits.

#### (4) *State as Person*

Given the apparent inability of state-as-nation to explain the results in some recent cases, we should perhaps seek other explanations for the markedly improved status of the states. I have argued elsewhere that the whole of the federalism “revival” can plausibly be attributed to an effort to impose the status of *personhood* on the states.<sup>485</sup> That theory will be only briefly sketched here.

The Anti-Federalists argued forcefully in favor of respect not only for state dignity, but also for state “morality” and “rights.”<sup>486</sup> Given their

481. *Id.* at 77 (emphasis added).

482. *See id.* at 88 (“[T]he Court’s implicit suggestion in relying on the states’ dignity is that the states are analogous to independent sovereigns within the meaning of customary international law”).

483. *See id.* at 92 (noting that Constitution “specifically divested the states” of powers of foreign diplomacy and commerce).

484. *Id.* at 99 (emphasis added).

485. *See Zick, supra* note 25.

486. *See id.* at 229.

familiarity with the law of nations, which as Professor Smith observes includes such concepts as state “dignity,” it is a plausible interpretation of their writings that the Anti-Federalists were among the first to compare the states to nations. This comparison, in turn, would have formed the basis for the idea that states were akin to persons. Early international relations theorists, who wrote during the period of the monarchy, often likened sovereign nations to persons.<sup>487</sup> Thus, it is equally plausible that these early constitutional theorists were advocating a respect for state liberty that mirrored the rights possessed by persons.<sup>488</sup> Indeed, at the earliest moments, state sovereignty was justified with reference to such *individual* characteristics as personality, dignity, morality, and rights.<sup>489</sup>

Echoes of these sorts of justifications have surfaced in recent years as the states have aggressively advanced constitutional claims usually associated with persons. For example, the states have asserted constitutional rights to autonomy, equality, and due process.<sup>490</sup> Recall the specific insight of social constructionists regarding this sort of tactic: “Within domestic society, the best way to further a moral claim is to ‘graft’ it to prevailing views about what constitutes a fully realized human being, or to beliefs about the ideal community of such beings.”<sup>491</sup> Or, as another scholar put it: “New ideas are more likely to be influential if they ‘fit’ well within existing ideas and ideologies in a particular social setting.”<sup>492</sup> A significant part of the “new federalism” agenda has been to graft individual notions of self-determination, autonomy, and equality onto state arguments for constitutional rights.

487. See CAMILLERI & FALK, *supra* note 3, at 17 (noting that early theorists conceived of a state as “a living, articulate force, a historic individual with a personality and will of its own”) (quoting KENNETH DYSON, *THE STATE TRADITION IN WESTERN EUROPE: A STUDY OF AN IDEA AND AN INSTITUTION* 103 (1980)). Indeed, the nation-as-person metaphor can be traced back to de Vattel, who invoked it to argue on behalf of the “equality” of nations. See Bardo Fassbender, *Sovereignty and Constitutionalism in International Law*, in *SOVEREIGNTY IN TRANSITION*, *supra* note 2, at 121 (discussing origins of the nation-as-person analogy); see also Douglas G. Smith, *Interstate Commerce and the Principles of the Law of Nations*, 2004 UTAH L. REV. 111, 126–29 (discussing de Vattel’s conception of states as persons).

488. Nationhood and personhood are closely linked symbols. International relations theory, for example, has long analogized nations and persons. See, e.g., CAMILLERI & FALK, *supra* note 3, at 29 (noting that early international theorists contended that the state was a person with “personality” and “interests”).

489. See Zick, *supra* note 25, at 233–34.

490. See *id.* at 220–21 (describing newly discovered “fundamental rights” of states).

491. Reus-Smit, *supra* note 312, at 527.

492. KATHRYN SIKKIRK, *IDEAS AND INSTITUTIONS* 26 (1991); see also Reus-Smit, *supra* note 312, at 527 (“Historically, the identity values defining ideal individuals and states have been closely linked . . .”).

The result, in terms of constitutional doctrine, has been the generation of a series of state constitutional “rights” which resemble in many important respects the “fundamental” rights of persons to things like autonomy, equality, and process. In other words, as I have argued elsewhere, statehood has essentially become the “new personhood.”<sup>493</sup> The Court has increasingly expended its considerable capital not on expanding fundamental individual rights but on recognizing state claims to fundamental constitutional rights. As it has evolved recently, state sovereignty has come to closely resemble personal sovereignty.

Thus, the states currently enjoy a person-like right to order the intimate affairs of their sovereignty: Congress must at least be perfectly clear in its intention to invade such sacred state enclaves as deciding who may serve in positions of state authority and on what terms.<sup>494</sup> Through the vast expansion of “sovereign immunity,” states have gained what looks more and more like a right to respect and consideration equal to that of the federal government. States cannot be treated by Congress as “second class” sovereigns.<sup>495</sup> The anti-“commandeering” cases have produced a state right to something like the physical autonomy persons enjoy under various provisions of the Constitution.<sup>496</sup> The Court has also held that the states may not be “mentally” coerced into waiving their constitutional rights.<sup>497</sup> Finally, procedural protections have been erected to protect the states from “charges” that they have engaged in unconstitutional discrimination in violation of the Fourteenth Amendment and other Reconstruction Amendments.<sup>498</sup>

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493. Zick, *supra* note 25, at 223.

494. See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (asserting that the setting of qualifications for state judges “goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity”).

495. See Zick, *supra* note 25, at 259–67 (discussing state right to “equality”); see also *Alden v. Maine*, 527 U.S. 706, 749–50 (1999) (noting that the federal government enjoys immunity from suit and stating: “In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege.”); *id.* at 748 (stating that immunity’s central purpose is to “accord [] the States the respect owed them as members of the federation.”) (quoting *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

496. See *New York v. United States*, 505 U.S. 144, 152 (1992) (holding that Congress cannot compel state legislature to enforce federal regulatory programs); *Printz v. United States*, 521 U.S. 898, 905 (1997) (holding that state executive officials cannot be “pressed into federal service”).

497. See *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999) (concluding that “the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity”).

498. See, e.g., *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (invalidating provisions of the Americans With Disabilities Act which subjected states to lawsuits); *City of Boerne*

The language of justification, values, and the substance of protections which together comprise the recent renaissance of “states’ rights”—dignity, esteem, equality, autonomy, internal ordering, and procedural due process—can thus plausibly be read as an attempt to impose the status of person upon the states. Grafting these and other personal characteristics upon statehood has led to a substantial revival of state sovereignty in a number of constitutional contexts.

In sum, state sovereignty has been given meaning and substantive effect not only through the imposition of various functions but also through the imposition of formal statuses. If a state is a “market participant,” for example, then it may impede commerce; if it is a “market regulator,” then it generally may not do so. More substantively, states, once treated as possessing no more “sovereignty” than an ordinary corporation, have recently become nation- or person-like institutions with “rights” and claims to personal values like “dignity,” “esteem,” and “respect.” State sovereignty is manifested in this regard in the rights to autonomy, immunity, equality, and process states have been held to possess. This is another way in which the states, which do not possess classical sovereignty or substantial power relative to federal authorities, are nevertheless still considered to be and ultimately are treated as “sovereign.”

### *C. The “Two Sovereignties”*

The upshot of the evolution of the concept of domestic state sovereignty is that there are currently two rather distinct versions of state sovereignty circulating in constitutional discourses. These “two sovereignties” are based upon the shared understandings that have arisen, or are presently in process, from the imposition upon statehood of, on the one hand, various competences, and on the other hand, a variety of court-imposed statuses. State competences include such things as police powers, agency and community functions, and legislative and judicial innovations. The institution of state sovereignty is generated, and sustained, as a result of the continuous and vigorous exercise of these competences. Sovereignty based upon status, by contrast, is essentially an equation of

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v. Flores, 521 U.S. 507, 520 (1997) (holding that legislation enacted pursuant to Congress’s powers under the Reconstruction Amendments must exhibit “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end”). In deciding whether a legislative enactment of this sort is “congruent and proportional,” the Court does not defer to Congress; it conducts a “close review” of the legislative record. *College Savings Bank*, 527 U.S. at 645.

the sovereignty of the states with the sovereignty enjoyed by other purportedly similar objects, such as corporations, nations, or persons. The first of these sovereignties we will call *competence sovereignty* and the latter *status sovereignty*.

Competence sovereignty substantially resembles the “new sovereignty” described in Part IV. It arises from the proactive exercise of the functions associated with the symbols of trustee, agent, community, and laboratory. Through these functions, or “bundle of competences,”<sup>499</sup> states actively prop up and preserve their sovereignty. They become, and are regarded as, legitimate authorities for, and recognized representatives of, distinct political communities. States *earn* deference from courts, politicians, and sub- as well as supra-state institutions by bargaining, negotiating, providing remedies and outlets for political participation, and so forth.

Competence sovereignty is deeply ingrained in our constitutional and political systems. It arises, ultimately, from shared understandings that a state, to borrow from some of the many available definitions of sovereignty, is “in charge of a domain,”<sup>500</sup> has the “capacity to make and give effect to public decisions,”<sup>501</sup> has the ability to regulate movements across borders, and is “an independent entity entitled to freedom from external intervention.”<sup>502</sup> Even though the Constitution formally places states in a subordinated position relative to federal authorities, state sovereignty continues to prosper as a result of the social and political dynamic described above. State sovereignty constructs reality for federal and state authorities, as well as for citizens. That is why the concept persists and prospers despite the relative disadvantages of states.

Notice that competence sovereignty is not narrowly defined or confined to issues of wealth or exclusive power. It is in the nature of a bundle or basket of competences or functions states perform to greater or lesser degrees, rather than a “chunk” of stone that may be won or lost.<sup>503</sup> This version of state sovereignty comports with what we actually see in terms of state and federal practices; it jibes with the messy constitutional system we actually have rather than an unattainable and unrealistic sovereign monolith. On this view, the sovereignty of the state depends

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499. Blix, *supra* note 26, at 12.

500. James, *supra* note 3, at 19 (quoting Charles Burton Marshall, *The Exercise of Sovereignty* 3 (1965)).

501. James, *supra* note 3, at 19.

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

503. See Fowler & Bunck, *supra* note 3, at 64 (distinguishing the “basket” and “chunk” approaches to state sovereignty).

upon its competence in carrying out the functions of statehood. We can monitor and analyze state sovereignty by studying institutional behavior and state performance. States can prop up their own sovereignty by attending to sovereign functions, even those that may seem trivial or, in the short term, ineffectual.

Status sovereignty, by contrast, has nothing at all to do with the actions of states, or the dynamic between the states and federal authorities. Status sovereignty resembles the more traditional idea of inherent respect and recognition for states *as states*. It is, in this respect, precisely the negative proscription on federal authority the Skeptics have denounced, rather than a positive resource for states to utilize. It is propped up and maintained primarily as a result of states defending lawsuits in which courts decree that the states are immune from things like judicial processes and “commandeering.” Status sovereignty often means that states cannot be held accountable for, among other things, their alleged civil rights violations.

There is nothing inherently dysfunctional or disturbing about the existence of two different iterations or conceptions of domestic state sovereignty. After all, state sovereignty is a polysemous construct. But in fashioning a reconceptualization of state sovereignty, we should take advantage of the full range of insights that concepts like the “new sovereignty” and social construction theory offer for scholars, states, and courts. This should include insights regarding the circumstances in which state sovereignty is generated and, more importantly, how it is *sustained* over time. Based upon these insights, there are several reasons why, in terms of proposing a reconceptualization of state sovereignty, competence sovereignty is to be preferred over status sovereignty.

First, if one accepts that state sovereignty is an “institutional fact” that depends upon the generation of shared understandings, the primary problem with status sovereignty is readily apparent. Status sovereignty is imposed upon states almost exclusively by judicial fiat. It has been the product, so far, of the mostly implicit treatment of states as being “like” nations or persons or market participants. If there is a shared understanding on these terms, it is most likely not one shared by many outside a majority of the Court and, of course, the states whose immunity, or autonomy, or other right or power, happens to be vindicated. Competence sovereignty, by contrast, is the product of a much broader dynamic process of generation which includes social, academic, judicial, and political discourses as well as ongoing state performance and practices. The core “bundle of competences” that states are understood to possess have a long and distinguished history; they have, as the discussion

above showed, been associated with statehood at least since the framing of the Constitution. These functions or competences, in contrast to judicial comparisons of states to nations or persons, are thus deeply ingrained, mostly agreed-upon aspects of state sovereignty. They rest, therefore, on a much more solid foundation than does pure juridical status.

Second, status sovereignty, unlike competence sovereignty, has not been justified by reasoned judgments. Indeed, the Court never explains the basis for its invocation of state sovereignty in the immunity and autonomy cases. It is difficult to reach a *shared* understanding of what the states' sovereignty entails absent at least some principled discussion of its normative justification. Repeating over and over that the states are "sovereign," that they possess "dignity" and "esteem," and that they are entitled to "respect," falls far short of a reasoned justification. Indeed, it is precisely this sort of claim to state sovereignty that lends credence to the Skeptic's complaint that sovereignty is nothing but empty rhetoric or a disguise for power politics. The principal infirmity of the Court's status sovereignty is not, as some Classicists claim, that it is only a *partial* defense for states; sovereignty can be partial and yet still quite effective.<sup>504</sup> It is, rather, that the status imposed upon the states lacks sufficient justification or reason. It never becomes a part of any dynamic constructive process. It is not vetted, justified, or filtered. What *makes* a state "like" a nation? Or a person? The Court never says. The justifications for state competences and functions, by contrast, have been articulated over an expanse of time in a variety of social, political, and judicial discourses. They have survived the test of time.

Third, as noted, status sovereignty is entirely *passive* in character. It exists not to provide the states with power or authority, but rather, as Professor Rakove posits, "to deny some other locus of authority . . . that power."<sup>505</sup> Status sovereignty does not require that the states *do* anything at all, other than simply exist, to prop up or sustain their sovereignty. Institutional facts like state sovereignty thrive on performance, interaction, and repetition. The international concept of the "new sovereignty" demonstrates that most states, even powerful nation-states, cannot sit back and rest upon some sort of negative sovereignty status shield. The new sovereignty, unlike the old, is not absolute or defensive. It is proactive, and maintained largely by the states themselves. If it were not sustained in

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504. See Gey, *supra* note 21, at 1641 ("In the end, a coherent theory of state sovereignty must mean that states possess the authority to make final policy decisions with regard to some functions, and the federal government can do nothing about it.")

505. Rakove, *Hash II*, *supra* note 23, at 54.

this manner, nation-state sovereignty would likely atrophy, or worse. Status sovereignty carries “defensive emotive associations” which not only encourage the passivity mentioned above, but also stifle creative thinking about “a ground for a forward policy of one’s own.”<sup>506</sup> These are particular perils for the American states’ sovereignty, which is only guaranteed, in constitutive terms, in the most rudimentary and thin sense and otherwise requires constant state attention, maintenance, and repair.

Fourth, status sovereignty gives rise to a substantial moral objection. The objection, highlighted by the Court’s recent immunity, anti-commandeering, and “due process” precedents, is that status sovereignty encourages bad behavior by states. It is something of a license to behave in a manner that is disrespectful, even dismissive, of the rights of individuals. In domestic terms, it conjures the “states’ rights” of old, with its racist agenda and disregard for human rights. Sovereignty of this character thus “has a baleful influence on men’s minds”;<sup>507</sup> it encourages the attitude that citizens are subservient to state interests rather than the other way around.

This relates to a fifth, and for present purposes final, problem with status sovereignty, which is that a judicially maintained negative “rights talk” for states will, in all likelihood, not be sustainable over the long term. Nation-states have come to tolerate substantial interventions into their “internal” sovereignty in terms of enforcement of human rights.<sup>508</sup> There is no reason to expect that the states will continue to be shielded from liability for alleged violations of their citizens’ rights. Indeed, there are already signs that the Supreme Court is wary of taking status sovereignty to its logical extreme, which would prohibit Congress from authorizing *any* private lawsuits to remedy or prevent state civil rights violations. The Court has recently balked at the opportunity to take status sovereignty this far.<sup>509</sup> History suggests that the formalism of status sovereignty will, in the end, suffer the same fate as prior formalistic iterations of sovereignty.

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506. JAMES, *supra* note 3, at 260.

507. *Id.* at 257.

508. See, e.g., Ronald A. Brand, *Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century*, 25 HASTINGS INT’L. & COMP. L. REV. 279 (2002).

509. See *Tennessee v. Lane*, 541 U.S. 509 (2004) (permitting private suits against states pursuant to Title II of the Americans With Disabilities Act); *Nev. Dept. Of Human Resources v. Hibbs*, 538 U.S. 721, 734 (2003) (permitting private suits against states pursuant to Family and Medical Leave Act of 1993); see also *Sabri v. United States*, 541 U.S. 600, 1941, 1946 (2004) (upholding federal statute authorizing federal prosecution of bribery even absent connection between forbidden conduct and federal funds).

Even if its energies inclined in this direction, the Court should cease this project. A negative, discussion-ending status sovereignty plays right into the hands of Skeptics. As the Skeptics point out, “reasoning from a simplistic principle like sovereignty [is] much easier than doing the heavy if prosaic lifting of making federalism work by avoiding the allure of extreme formulations.”<sup>510</sup> Status sovereignty is precisely the sort of concept that “begs to be borrowed and assigned new and surprising uses, beckoning would-be consumers to take it down from the shelf and put it to work.”<sup>511</sup> It would be far preferable, not only from the standpoint of acknowledging the constructed nature of state sovereignty, but also for the overall health of our constitutional system, that states should be encouraged to assert their sovereignty in a much more proactive and dynamic fashion.<sup>512</sup>

Of course, as some Classicists posit, states will continue to function whether or not they are labeled “sovereign.” But this misses a critical point, namely that the states’ functions are an *integral* part of their claims to sovereign respect, recognition, and control. Yes, states will always perform some of these functions because this is, in some measure, why states exist in the first place. Better, however, they do so knowing that their own sovereignty is what is “at stake” and with some appreciation with regard to how they can contribute to its construction and prosperity. The more states rely on status sovereignty to bail them out, the more complacent they will become, and the weaker their claims to sovereignty will ultimately be. Moreover, a state that is aware of the need for proactivity will exercise its sovereignty in novel ways. The coming together of the “Big Four” states, discussed above, is a good example of this.<sup>513</sup> Professor Amar has suggested that states “can gain political goodwill by arming their citizens with remedies for constitutional wrongs threatened or perpetrated by *federal* officials.”<sup>514</sup> He contends that state sovereignty, applied in this positive fashion, can become what it once

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510. Rakove, *Hash II*, *supra* note 23, at 57.

511. *Id.*

512. This is not the same as suggesting, as others have, that the Court justify its “federalism” decisions with respect to the normative values associated with federalism or “dual sovereignty.” *See, e.g.,* Ann Althouse, *On Dignity and Deference: The Supreme Court’s New Federalism*, 68 U. CINN. L. REV. 245, 246 (2000) (noting “how the theme of deference to the states has drifted from normative, structural analysis to a states’ rights approach”). It certainly should do so, and this would, of course, contribute to the construction of competence sovereignty, not least by adding an important judicial discourse to that dynamic. This would help, but it would not suffice to establish state sovereignty. Sovereignty is not a matter of judicial fiat; it is ultimately a state-administered, state-driven institution.

513. *See supra* notes 330–31 and accompanying text.

514. Amar, *supra* note 59, at 1428.

was—a “tool[] to right government wrongs.”<sup>515</sup> Whatever means they choose, with whatever specific policy goals, states must endeavor to turn sovereignty from a negative proscription on federal power into a positive, functional resource.

As the ongoing experiment of the European Union suggests, a state can be successful and vigorous without traditional “sovereign” prerogatives like legal supremacy, coinage of money, and genuinely independent military forces. Social construction theory suggests, however, that in order to be meaningfully “sovereign,” the post-modern state must ultimately *appear* to be able to respond adequately to the expectations—economic, political, and social—of the community. For the American states, this means that they must continue to maintain a meaningful independence relative to other states and sub-state actors. They must be able to influence, but not necessarily dictate, policies with regard to fundamental matters like birth, marriage, and death. They must continue to resist and alter supra-state (federal) mandates affecting fundamental goods like education and welfare. They must be able to engender citizen loyalty. Finally, they must overcome their natural inertia and risk-aversion to serve as a potential source of solutions to the social and economic problems of the present and future. The “new sovereignty” of the states requires that states consistently, and preferably aggressively, *act* as sovereigns in order to be recognized as such.

#### *D. Implications*

This section summarizes the implications, for states, scholars, and courts, of the reconceptualization of sovereignty proposed in this article. As has been the case in international fields, the new domestic state sovereignty has substantial implications for statecraft, scholarship, and jurisprudence.

With regard first to states, the new sovereignty requires a level of proactivity and creativity that a status-based sovereignty does not. States have to be aware that their sovereignty is a resource, that it can be shared with other states and pooled in unique arrangements. States must realize that their sovereignty is always at stake. The positive news is that a state’s “sovereignty profile” is to a large degree something that it can actively influence and maintain. This does not require that a state always “win” in disputes with federal institutions, only that it assert its interests, and those

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515. *Id.* at 1429.

of its citizens, forcefully and publicly. The new sovereignty requires that states act with the knowledge that actions and appearances count. They are part of the constructive process that produces state sovereignty.

As for scholars, those who accept that states can in fact be “sovereign” can gain some insights from the new sovereignty into where, in fact, the states’ sovereignty resides. Scholars should not be counting brute facts like dollars, goods, troops, legislative enactments, and personnel in determining whether the states remain sovereign. Nor should constitutional scholars be concerned solely with formal indicia of sovereignty. Sovereignty occurs on the ground, in functions, relationships, and dynamics, rather than in brute materials. Scholars should be looking for instances in which states share or pool their sovereignty and exercise their sovereign functions. They should be thinking about, and perhaps proposing, novel methods for states to share their sovereignty, as European states have done and continue to do.

Finally, courts should recognize that status sovereignty is inherently flawed. The specific reasons were provided above. Above all, status sovereignty misconceives what sovereignty is. It is a construct that can only come about through the development of shared understandings over time. Sovereignty cannot simply be imposed or declared. And it should not be used as a defense, a mechanism for preserving formal state prerogatives that have little or nothing to do with either federalism or sovereignty, at least as properly conceived. If they wish to sustain the states, courts need to develop a more positive, normative vision of state sovereignty and federalism.

## VI. WHY STATE SOVEREIGNTY STILL MATTERS

It remains to be considered whether, if state sovereignty is not or at least should not be conceptualized as a sledgehammer as it was in the Classical model, it plays any useful role in constitutional discourse or practice. This Part argues that it does, for reasons similar to those advanced by international relations scholars who continue to defend the concept of state sovereignty.

If, as this Article has asserted, state sovereignty cannot be measured and is not independently verifiable, then sovereignty’s relevance ultimately depends upon its status as an institutional fact. Simply put, then, the question, whether the context is domestic or international, is whether state sovereignty helps to explain the ordering of the world.

Sovereignty does indeed serve this purpose for the relevant social and political actors. Indeed, state sovereignty persists, domestically and

abroad, precisely because it matters to states, diplomats, citizens, and institutions. Sovereignty is part of the discourse of statecraft. It is “a claim to ordering power.”<sup>516</sup> It is “a way of speaking about the world, a way of acting in the world.”<sup>517</sup> This is so whether we are talking about states or nation-states. Sovereignty effectively channels arguments and claims about power. In terms of domestic state sovereignty, it forces consideration of and attention to subsidiarity—the idea that there is a “second sovereign.” The concept has come to serve a similar function internationally, as supra-national structures like the EU have arisen.

Indeed, the primary benefit of retaining some concept of state sovereignty is that it contributes to order. As one international relations scholar said: “Sovereignty in both theory and practice is aimed at establishing order and clarity in an otherwise turbulent and incoherent world.”<sup>518</sup> The concept of sovereignty contributes to order by creating a class of political entities that are expected to be *permanent* fixtures in a governance system. Under the Constitution, for example, constitutive rules—preservation, separateness, participation, and interpretive independence—imply the permanency of states. But what actually makes “dual sovereignty” a reality is the constitutive process, the manner in which states move beyond these rules to stake claims to legitimacy, deference, and recognition. The constitutive process makes the concept of state sovereignty more than a merely symbolic check on federal authority. It gives substance to sovereignty in such a manner that the label “sovereign” does more than describe political and economic arrangements; it explains and justifies them “as if they belonged to the natural order of things.”<sup>519</sup>

Sovereignty does more than merely help to protect the states against elimination or annihilation. It provides a recognized legal and political hierarchy. As the constructive dynamic demonstrated, the idea that the states retain a “sovereign” status operates to, among other things, level the playing field in interactions between state and federal authorities. Sovereignty is in this respect a very powerful concept. It results in deference to and respect for states even though the Constitution does not mandate this in express terms; even though, in fact, Congress, for example, is not required to defer or desist. Sovereignty allows the states to bargain and negotiate *as if* they occupied a position of more or less equal

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516. SOVEREIGNTY IN TRANSITION, *supra* note 2, at 6.

517. CAMILLERI & FALK, *supra* note 3, at 11.

518. *Id.*

519. *Id.*

bargaining power. This does not mean that states always succeed in negotiations with federal authorities—far from it, of course. However, in a variety of circumstances that touch on local concerns, states are often given the “final say” whether or not the Constitution or empirical circumstances formally entitle them to it. The institutional fact of state sovereignty makes this possible.

Sovereignty contributes to order and stability in other ways as well. It creates expectations of how political entities are to behave. States, for example, recognize that they possess an “external” sovereignty in terms of their interstate relations. As a result, states are aware not only of their own latitude and power, but also of their obligation to respect the prerogatives of their “peers.” The doctrine of “separate sovereigns” codifies this particular shared understanding.<sup>520</sup>

Finally, by maintaining state permanence and order, the concept of sovereignty promotes the self-determination of local political communities. Advocates of “decentralization,” as opposed to a system of at least partially sovereign states, tend to downplay this critical conceptual function.<sup>521</sup> But a state that is aware of its sovereign status is likely to be bolder in terms of governance than some fungible unit in a decentralized system of authority; it will be more confident of its legitimacy. This confidence at least raises the *potential* for state innovation, the sort of proactive competence sovereignty this Article has defended. It buoys states to understand that an effective claim to control or deference might be made to blunt central interventions. There is, moreover, a distinct honor in maintaining a separateness and uniqueness. This is so not only for the states, as states, but far more importantly for their citizens, who surely have a greater stake in a sovereign community than one which is always compelled to follow central commands and to conform.

Of course, for sovereignty to serve any of these purposes, it *must* reside in the states, which of course act ultimately as representatives of the people. As a theoretical matter, the locus of sovereignty is likely never to be definitively fixed. However, as internationalists recognized long ago, sovereignty has been “co-opted” and utilized by democratic and republican states the world over. The Republican sentiment that the people who consented to the social contract are the only “true” sovereign is an

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520. See *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (“When a defendant in a single act violates the ‘peace and dignity’ of two sovereigns by breaking the laws of each, he has committed two distinct ‘offences.’”).

521. See generally Rubin & Feeley, *supra* note 23 (arguing that decentralization of authority would be more beneficial than maintaining the system of sovereign states).

accurate statement of political theory so far as it goes; but it offers little succor to states routinely faced with challenges and encroachments from sub- and supra-state institutions and private actors. “The people” have no means of expressing their “sovereignty” in response to these challenges, at least not on a day-to-day basis or in any manner that allows for contemporaneous expression of their will. The states do. In pragmatic terms, the concept of sovereignty can only serve its purposes if we accept that the states are the institutions that exercise “sovereign” powers.

## VII. CONCLUSION

The concept of state sovereignty is controversial, both in terms of international politics and, especially recently, in terms of domestic claims that the states are “sovereign.” Nations have relied on claims to “sovereignty” for centuries to maintain internal control and external respect and recognition. States have done much the same thing domestically. State “sovereignty” has risen to prominence mostly as a result of the Supreme Court’s recent invocation of the concept to vindicate state claims to independence, autonomy, immunity, and other “rights.” As a result, the timeless notion that the Constitution establishes a “dual sovereignty” has received renewed attention.

The general concerns raised by state claims to “sovereignty” are remarkably similar in both the international and domestic contexts. As one international relations scholar explained:

For many of us, the term seems unfortunate because it suggests separateness and independence in an era increasingly marked by togetherness and interdependence; it stands for freedom of action by states when the need is for central coordination and control; and it evokes the fear of unpredictable and irresponsible state behavior . . . .<sup>522</sup>

The defenses of state sovereignty are also similar regardless of context. For instance, the same scholar suggests that “we value sovereignty as a protective mantle and deplore such disrespect for it as is entailed by acts of aggression against states and arbitrary interventions into their affairs.”<sup>523</sup>

522. Inis Claude, Jr., *Foreword* to FOWLER & BUNCK, *supra* note 3, at ix.

523. *Id.*

The notion of sovereignty identifies the units that give the system its multistate character and is the essential indicator of the currently asserted and currently accepted implications of the status enjoyed by those units: the rights, immunities, responsibilities, and limitations attributed to states. Sovereignty, in short, has much to tell us about statehood and stateliness.

*Id.*

The enigma of sovereignty is that it is at the same time both troubling in terms of its broad implications, and critical in terms of such things as maintaining order and creating expectations of how political entities are to behave.

State sovereignty has long been a topic of serious and sustained interest in the field of international relations. Domestic considerations of state sovereignty, on the other hand, are sporadic and relatively thin; they seem to crop up only when, as has recently been the case, the Supreme Court focuses attention on the concept. Unfortunately, domestic constitutional scholarship has wholly failed to take advantage of the energy and sophistication scholars of international relations and politics have brought to their consideration of state sovereignty.

This Article has sought to bridge the scholarly divide. Specifically, it has done two things. First, it has emphasized sovereignty's flexibility and perpetual conceptual evolution. We cannot determine whether the states are "truly" sovereign with regard to a classical model of sovereignty that has been superseded the world over. Internationalists have acknowledged the ongoing evolution of state sovereignty. Lawyers, legal scholars, and judges should do the same. State sovereignty today can be partial, relational, divided, even "pooled" as it is in the European Union. Yet states can still exhibit the indicia of sovereignty, such as effective control over territory or domain, performance of traditional sovereign functions or competences, rights, and recognition. Thus, the mere fact that the states enjoy only a residual and partial sovereignty ought not stifle further consideration of the concept of state sovereignty.

Second, in addition to this conceptual updating, the Article has sought to explain how states continue to successfully assert claims to sovereignty despite their limited powers and material resources. The answer to this question lies in understanding how "sovereignty" is generated and maintained. This Article has suggested that social construction theory, which some internationalists have applied specifically to the concepts of statehood and sovereignty, provides one plausible answer. The theory reconceptualizes state sovereignty as an institutional fact dependent, in the end, upon the formation of shared understandings with regard to whether states are "sovereign" and under what circumstances. Social construction theory helpfully changes the focus from relative material authority (in terms of, for example, personnel, power, and wealth) to the dynamics of what states do, how they are represented, and how their claims to sovereignty are justified.

With some adjustments necessary to account for the different contexts, social construction theory can explain how the states continue to be

perceived as “sovereign” despite their relative disadvantages in terms of wealth and power. This Article demonstrated, in Part V, that state sovereignty has been, and continues to be, socially, politically, and legally constructed. It showed that states continue to be treated as sovereign—as being essentially “in charge of a domain,” or having the “final say” with respect to substantial matters, or possessing certain rights—despite lacking absolute and exclusive authority. Sometimes this is a matter of competence; just as the international “new sovereignty” depends upon bargaining, negotiation, and proactivity, so too does the states’ sovereignty depend on the perception of performance and exercise of typical “sovereign” functions like exercise of police powers and the provision of community benefits. At other times, state sovereignty is a juridical status imposed upon states by the Court to defend them from lawsuits, or federal “commandeering.” Thus, states enjoy some of the same sorts of “sovereign rights” as nations, or people. Both on the ground, in day-to-day administration, and in the courts, shared understandings have taken shape that the states are “sovereign” authorities.

This Article suggests that we stand at a crossroads with regard to what state sovereignty is to be in the post-classical, post-modern era. It identifies, as products of the constructive process, two distinct sovereignties which it labels “competence sovereignty” and “status sovereignty.” The Article argues that the juridical concept of status sovereignty is not sustainable, and should not be encouraged. A state sovereignty based upon defenses to lawsuits and judicially imposed recognition will not ultimately sustain the states, or satisfy skeptical critics who maintain that sovereignty is a mere cover for power politics. In the end, the states must generally administer and prop up their own sovereignty. Insofar as they do so, and do so effectively, state sovereignty will continue to be an important concept in terms of preserving the states and ordering federalism.