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SOVEREIGNTY-MODERN: A NEW APPROACH TO AN OUTDATED CONCEPT

*By John H. Jackson**

Although much criticized, the concept of “sovereignty” is still central to most thinking about international relations and particularly international law. The old “Westphalian” concept in the context of a nation-state’s “right” to monopolize certain exercises of power with respect to its territory and citizens has been discredited in many ways (as discussed below), but it is still prized and harbored by those who maintain certain “realist” views or who otherwise wish to prevent (sometimes with justification) foreign or international powers and authorities from interfering in a national government’s decisions and activities. Furthermore, when one begins to analyze and disaggregate the concept of sovereignty, it quickly becomes apparent that it has many dimensions. Often, however, the term “sovereignty” is invoked in a context or manner designed to avoid and prevent analysis, sometimes with an advocate’s intent to fend off criticism or justifications for international “infringements” on the activities of a nation-state or its internal stakeholders and power operators.

In addition to the “power monopoly” function, sovereignty also plays other important roles. For example, the concept is central to the idea of “equality of nations,” which can be abused and, at times, is dysfunctional and unrealistic, such as in inducing “consensus” as a way to avoid the “one nation, one vote” approach to decision making in international institutions. This approach can sometimes seriously misdirect actions of those institutions; but consensus, in turn, can often lead to paralysis, damaging appropriate coordination and other decision making at the international level.

The concept of equality of nations is linked to sovereignty concepts because sovereignty has fostered the idea that there is no higher power than the nation-state, so its “sovereignty” negates the idea that there is a higher power, whether foreign or international (unless consented to by the nation-state).

“Sovereignty” also plays a role in defining the status and rights of nation-states and their officials. Thus, we recognize “sovereign immunity” and the consequential immunity for various purposes of the officials of a nation-state.¹ Similarly, “sovereignty” implies a right against interference or intervention by any foreign (or international) power. It can also play an anti-democratic role in enforcing extravagant concepts of special privilege of government officials.

Therefore, one can easily see the logical connection between the sovereignty concepts and the very foundations and sources of international law. If sovereignty implies that there is “no higher power” than the nation-state, then it is argued that no international law norm is valid unless the state has somehow “consented” to it. Of course, treaties (or “conventions”) almost always imply, in a broader sense, the “legitimate” consent of the nation-states that accepted

* Of the Board of Editors. This article is the basis of a chapter in a book to be published as an expanded version of Professor Jackson’s Hersch Lauterpacht Memorial Lectures delivered November 5, 6, & 7, 2002, at Cambridge University.

¹ See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 41 ILM 536 (2002) (Int’l Ct. Justice, Feb. 14, 2002) (especially separate opinion of Judge *ad hoc* Bula-Bula, *id.* at 597 (in French)).

them.² However, important questions arise in connection with many treaty details, such as when a treaty-based international institution sees its practice and “jurisprudence” evolve over time and purports to obligate its members even though they opposed that evolution.³ Likewise, treaty making by various “sovereign” entities can be seriously antidemocratic and otherwise flawed.⁴

Like treaties, the other major source of international law norms, “customary international law,” is theoretically based on the notion of consent, through the “practice of states” and “*opinio juris*.” For centuries, practitioners and scholars have debated the impact of customary international law on “holdout” states, and what constitutes a “holdout,” but often in the context of rationalizing the notion that consent exists. The ambiguities of these notions are obvious, and form part of a broader mosaic of criticism against the very existence of “customary international law norms.”⁵

The above remarks do not exhaust the complexity of the “sovereignty” concept. This article, however, does not purport to cover all possible dimensions of sovereignty but, instead, focuses primarily on what might be thought of as the core of sovereignty—the “monopoly of power” dimension—although it will be clear that even this focus inevitably entails certain linkages and “slop-over penumbra” of the other sovereignty dimensions. This “core” dimension is examined in the context of its roles with respect to international law and institutions generally, and international relations and related disciplines such as economics.⁶

National government leaders and politicians, as well as special interest representatives, too often invoke the term “sovereignty” to forestall needed debate. Likewise, international elites often assume that “international is better” (thus downplaying the importance of sovereignty) and this is not always the better approach. What is needed is a close analysis of the policy framework that gets us away from these preconceived “mantras.”⁷ The objective is to shed some light on these policy debates or, in some cases, policy dilemmas, and to describe some of the policy framework that needs to be addressed.

² One classic exception may be the end-of-a-war treaty, at least in some circumstances. In addition, there are sticky problems in connection with state succession, including whether the colonial imposition of obligations carries over to a newly independent state.

³ An example of an “evolutionary approach” can be seen in some of Professor Thomas Franck’s writings, particularly, THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 8 (2002) (noting the evolution of practice regarding the veto power under the UN Charter). See also United States—Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WTO Doc. WT/DS58/AB/R, para. 130 (adopted Nov. 6, 1998).

⁴ E.g., John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AJIL 310 (1992).

⁵ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816 (1997); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 369 (2000); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449 (2000).

⁶ This article builds on several other of my published works. John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, in POLITICS, VALUES, AND FUNCTIONS: INTERNATIONAL LAW IN THE 21ST CENTURY—ESSAYS IN HONOR OF PROFESSOR LOUIS HENKIN 149 (Jonathan I. Charney et al. eds., 1998) [hereinafter Jackson, *The Great Sovereignty Debate*]; John H. Jackson, *Sovereignty, Subsidiarity, and Separation of Powers: The High-Wire Balancing Act of Globalization*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOUR OF ROBERT E. HUDEC 13 (Daniel L. M. Kennedy & James D. Southwick eds., 2002); see also Jackson, *supra* note 4; John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AJIL 60 (1997) (Editorial Comment); JOHN H. JACKSON, WILLIAM J. DAVEY, & ALAN O. SYKES, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS (4th ed. 2002). This article is also colored by some of my as yet unpublished work, particularly course lectures and the lecture series delivered recently at Cambridge University, cited in the asterisked note *supra*, *The Changing Fundamentals of International Law and International Economic Law: Perspectives on Sovereignty, Subsidiarity, Power Allocation and International Institution Building*.

⁷ John H. Jackson, *The WTO “Constitution” and Proposed Reforms: Seven “Mantras” Revisited*, 4 J. INT’L ECON. L. 67 (2001) (addressing “mantras” related to the WTO).

The subject of this article has been extensively addressed in different kinds of frameworks or academic disciplines, many contained in books by political science and international relations scholars with important insights,⁸ in addition to the many works by legal professionals.⁹ However, many of those works focus on how to describe the concept of “sovereignty,” how it has operated in the past and present in international relations, and how it can be criticized. This article addresses a somewhat different question; namely, What, if any, are the *valid* issues raised in the so-called sovereignty debates, and how can we analyze those issues for their *future* impact on policy?

The importance and need for this type of analytic activity should be obvious, but still merits mention. Much has been said and written about “globalization”; despite being an ambiguous term of controversial connotation, it is reasonably well understood to apply to the exogenous world circumstances of economic and other forces¹⁰ that have developed in recent decades owing, in major part, to the sharply reduced costs and time required for the transport of goods (and services), and similar reductions in costs and time requirements for communication.¹¹ These circumstances have led to new structures of production;¹² they, in turn, have resulted in greatly enhanced (and sometimes dangerous) interdependence, which we can do little to remedy and which often renders the older concepts of “sovereignty” or “independence” fictional. Indeed, these circumstances, particularly those of communication techniques heretofore unknown, are seen as having dramatic effect on the way governments act internally. In addition, these circumstances often demand action that no single nation-state can satisfactorily carry out, and thus require some type of institutional “coordination” mechanism. In some of these circumstances, therefore, a powerful tension is generated between traditional core “sovereignty,” on the one hand, and the international institution, on the other hand. This tension is constantly apparent, and addressed in numerous situations, some of which are poignantly and elaborately verbalized in the work of international juridical institutions

⁸ See, e.g., MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE* (1995); THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION* (1999); *THE GREENING OF SOVEREIGNTY IN WORLD POLITICS* (Karen T. Litfin ed., 1998); STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999); STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE (Gerald Kreijen et al. eds., 2002); STATE SOVEREIGNTY AS SOCIAL CONSTRUCT (Thomas J. Biersteker & Cynthia Weber eds., 1996); SUBSIDIARITY AND SHARED RESPONSIBILITY: NEW CHALLENGES FOR EU ENVIRONMENTAL POLICY (Ute Collier, Jonathan Golub, & Alexander Kreher eds., 1997); CENTRE FOR ECONOMIC POLICY RESEARCH [CEPR], *Making Sense of Subsidiarity*, in ANNUAL REPORT: MONITORING EUROPEAN INTEGRATION 4 (1993) [hereinafter CEPR, *Subsidiarity*]; see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* (1995).

⁹ See, e.g., LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* (1995); Marcel Brus, *Bridging the Gap Between State Sovereignty and International Governance: The Authority of Law*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE, *supra* note 8, at 3.

¹⁰ FRIEDMAN, *supra* note 8, at xviii. In particular, I note his interesting comment at that page:

I feel about globalization a lot like I feel about the dawn. Generally speaking, I think it is a good thing that the sun comes up every morning. It does more good than harm. But even if I didn't much care for the dawn there isn't much I could do about it.

¹¹ Some historical literature claims that at the turn of the previous century (late 1800s, early 1900s), the world was very integrated and, arguably, more freely permitted transactions to cross borders than at present. See, e.g., Jeffrey Frankel, *Globalization of the Economy*, in GOVERNANCE IN A GLOBALIZING WORLD 45 (Joseph S. Nye Jr. & John D. Donahue eds., 2000). However, the circumstances are vastly different today, particularly in view of the factors mentioned in the text, which have an astonishingly different impact on globalization of world society than the factors involved one hundred years ago.

¹² For example, the “just in time” inventory principles that have been introduced during the last few decades, calling for the smooth and efficient operation of communication transport, so that a factory can depend on the arrival of needed inputs just in time for production, without having to carry the interest impact of the purchase cost as well as the cost of storage. Clearly, recent events involving terrorism are changing that type of view of the globalized integration of production. See, for example, in addition to other works cited herein, Ruth Lapidoth, *Jerusalem—Past, Present and Future*, 48 REVUE INTERNATIONALE DE DROIT COMPARÉ 9, 32–33 (1996); Munther J. Haddadin, *Learning to Share: Divided Sovereignty over Water Resources*, HARV. INT'L REV., Summer 1995, at 22; Ruth Lapidoth, *Redefining Authority: The Past, Present, and Future of Sovereignty*, *id.* at 8.

such as the dispute settlement system of the World Trade Organization (WTO).¹³ In fact, the now extraordinarily elaborate jurisprudence of the WTO¹⁴ exemplifies the tension between internationalism and national governments' desires to govern and deliver to their democratic constituencies, a tension that is also manifested in a large number of international law and international relations contexts.

These considerations suggest the need for further rethinking (or reshaping) of the core concept and roles of sovereignty, and for a new phrase to differentiate these directions from the old and, some argue, outmoded "Westphalian" model. Inspired by the example of the Tate Museum in London, which developed a totally new museum called the "Tate Modern," this article suggests that we replace the word "sovereignty" (which Professor Louis Henkin wants us to do away with altogether¹⁵) with the phrase "sovereignty-modern." This article uses the new phrase to indicate the newer approach, which is arguably more pragmatic and more empirically based, embracing a more "balanced and balancing" approach for "core sovereignty." However, it should be noted that some dimensions of sovereignty other than what are here termed "core" might continue to benefit from the traditional approaches to sovereignty. But these are not the central subjects of this article.

Consequently, this article will approach the subject of "sovereignty-modern" in five further parts. These parts involve a connected logic; after noting the setting and "landscape" of the subject and the ambitions of the article, they proceed (part I) to outline, and remind the reader about, the older sovereignty concepts and to survey a small portion of a vast literature of criticisms of these older concepts. Part II then presents this author's views about what elements of the traditional sovereignty concepts may remain important in current global circumstances and how these "real policy values" need to be recognized and separated from the outmoded baggage of older Westphalian sovereignty concepts. Principally (but not exclusively), this article focuses on the "policy values" of allocating power to the decision-making mechanism that operates with authority and legitimacy.

Part III then fleshes out some of the policy detail of the "allocation" issues, in the modern and global context, with reference to policies that might suggest the need for a higher- or lower-level allocation of power.

Part IV briefly presents a group of examples to illustrate the approach suggested by parts II and III. These examples are purposely drawn from widely different subjects (economic matters, human rights, the environment, federal entities, etc.) to suggest the potential generality of the discussion in parts II and III. The emphasis in part IV on economic subjects reflects the stronger expertise of this author, but other subject areas are included to suggest their potential relevance.

Finally, part V draws some conclusions, including an important underlying theme of the article, first articulated in this introduction. This theme not only shows how the rethinking of "sovereignty" is necessary to escape the traps of use or misuse of older sovereignty thinking, but also challenges certain other key "fundamentals" of "general" international law thinking,

¹³ See, e.g., JOHN H. JACKSON, *THE JURISPRUDENCE OF THE GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* (2000) [hereinafter JACKSON, *THE GATT AND THE WTO*]; JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1997); JACKSON, DAVEY, & SYKES, *supra* note 6, ch. 7; John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems*, 1 J. INT'L ECON. L. 329 (1998) [hereinafter Jackson, *Dispute Settlement*].

¹⁴ In slightly more than eight years of existence (since Jan. 1, 1995), the WTO dispute settlement system has received 295 complaints, see Update of WTO Dispute Settlement Cases, WTO Doc. WT/DS/OV/14 (June 30, 2003), and has completed 71 with adopted reports. The total number of pages of the jurisprudence exceeds twenty-two thousand, and all informed observers seem to recognize that this is indeed a remarkable achievement, particularly when one examines the intricacy and complexity of the cases, and the importance of the analysis and reasoning. See, e.g., Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995–2002: A Statistical Analysis*, 6 J. INT'L ECON. L. 251 (2003).

¹⁵ HENKIN, *supra* note 9, discussed in Jackson, *supra* note 6, at 149.

such as the “nation-state consent” requirement of norm innovation and the notion of “equality of nations.”

I. TRADITIONAL WESTPHALIAN SOVEREIGNTY CONCEPTS: OUTMODED AND DISCREDITED?

The general perception is that the concept of sovereignty as it is thought of today, particularly as to its “core” of a monopoly of power for the highest authority of what evolved as the “nation-state,” began with the 1648 Treaty of Westphalia. To read the 128 clauses of that document is to wade through dozens of provisions dealing with minute details of ending the Thirty Years’ War,¹⁶ restoring properties to various feudal entities within their territories. It is hard to surmise from these any general principle of “sovereignty,” but as a “Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies,” the compact represented the passing of some power from the emperor with his claim of holy predominance, to many kings and lords who then treasured their own local predominance. As time passed, this developed into notions of the absolute right of the sovereign, and what we call “Westphalian sovereignty.”

One United States government official has succinctly defined the concept and its problems:

Historically, sovereignty has been associated with four main characteristics: First, a sovereign state is one that enjoys supreme political authority and monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognized by other governments as an independent entity entitled to freedom from external intervention. These components of sovereignty were never absolute, but together they offered a predictable foundation for world order. What is significant today is that each of these components—internal authority, border control, policy autonomy, and non-intervention—is being challenged in unprecedented ways.¹⁷

As noted above, a considerable amount of literature deals with the issue of “sovereignty” and the various concepts to which it might refer.¹⁸ Most of this literature is very critical of the idea of “sovereignty” as it has generally been known. One eminent scholar has described the sovereignty concept as “organized hypocrisy.”¹⁹ Some other authors have referred to it as being “of more value for purposes of oratory and persuasion than of science and law.”²⁰

Sovereignty has also been explored as a “social construct.” According to this view, “Numerous practices participate in the social construction of a territorial state as sovereign, including the stabilization of state boundaries, the recognition of territorial states as sovereign, and the conferring of rights onto sovereign states.”²¹ The approach of these authors seems to be that

¹⁶ The “Treaty of Westphalia” is the Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, Oct. 24, 1648, *available at* <<http://fletcher.tufts.edu/multi/texts/historical/westphalia.txt>> (visited Mar. 28, 2003).

¹⁷ Richard N. Haass, former ambassador and director of Policy Planning Staff, U.S. Department of State, *Sovereignty: Existing Rights, Evolving Responsibilities*, Remarks at the School of Foreign Service and the Mortara Center for International Studies, Georgetown University, at 2 (Jan. 14, 2003), transcript *available at* <http://www.georgetown.edu/sfs/documents/haass_sovereignty_20030114.pdf>. Ambassador Haass is currently president of the Council on Foreign Relations.

¹⁸ See *supra* note 8, especially CHAYES & CHAYES.

¹⁹ KRASNER, *supra* note 8, at 9, where he describes four ways that the term “sovereignty” has been used:

domestic sovereignty, referring to the organization of public authority within a state and to the level of effective control exercised by those holding authority; interdependence sovereignty, referring to the ability of public authorities to control transborder movements; international legal sovereignty, referring to the mutual recognition of states or other entities; and Westphalian sovereignty, referring to the exclusion of external actors from domestic authority configurations.

²⁰ FOWLER & BUNCK, *supra* note 8, at 21 (quoting QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 277–78 (1968)).

²¹ Cynthia Weber & Thomas J. Biersteker, *Reconstructing the Analysis of Sovereignty: Concluding Reflections and Directions for Future Research*, in *STATE SOVEREIGNTY AS SOCIAL CONSTRUCT*, *supra* note 8, at 278, 278.

no particular characteristics inhere in the concept of sovereignty, but that its nature depends very much on the customs and practices of nation-states and international systems,²² which practices could change over time.

A volume of twenty-five essays concerning sovereignty by more than that number of authors was published in 2002,²³ again taking a wide variety of critical viewpoints about sovereignty, including the far-reaching view of the eminent senior international law scholar and professor Henry Schermers, who states:

Sovereignty has many different aspects and none of these aspects is stable. The content of the notion of “sovereignty” is continuously changing, especially in recent years.

. . . .

From the above we may conclude that under international law the sovereignty of States must be reduced. International co-operation requires that all States be bound by some minimum requirements of international law without being entitled to claim that their sovereignty allows them to reject basic international regulations.

. . . .

Thirdly, we may conclude that the world community takes over sovereignty of territories where national governments completely fail and that therefore national sovereignty has disappeared in those territories. The world community by now has sufficient means to step in with the help of existing States and has therefore the obligation to rule those territories where the governments fail.²⁴

World leaders and diplomats have added their critical appraisals of older sovereignty ideas, while still recognizing the importance of some attributes of the concept. In 1992 the then United Nations secretary-general Boutros Boutros-Ghali said in his report to the Security Council, “Respect for [the state’s] fundamental sovereignty and integrity [is] crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality.”²⁵

Almost a decade later, after some abject failures by the United Nations to meet apparent needs for action and intervention in Bosnia, Somalia, Rwanda, and Kosovo, the new secretary-general Kofi Annan introduced his 1999 annual report to the General Assembly by noting that “[o]ur post-war institutions were built for an inter-*national* world, but we now live in a *global* world.”²⁶ Secretary-General Annan then expressed impatience with traditional notions of sovereignty:

A global era requires global engagement. . . .

. . . .

If States bent on criminal behaviour know that frontiers are not the absolute defence; if they know that the Security Council will take action to halt crimes against humanity, then they will not embark on such a course of action in expectation of sovereign impunity.

. . . .

If the collective conscience of humanity—a conscience which abhors cruelty, renounces injustice and seeks peace for all peoples—cannot find in the United Nations its greatest tribunal, there is a grave danger that it will look elsewhere for peace and for justice.

²² *Id.*

²³ STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE, *supra* note 8.

²⁴ Henry Schermers, *Different Aspects of Sovereignty*, in *id.* at 185, 192.

²⁵ AN AGENDA FOR PEACE—PREVENTIVE DIPLOMACY, PEACEMAKING, AND PEACE-KEEPING, REPORT OF THE SECRETARY-GENERAL, UN Doc. A/47/277-S/24111, para. 17 (1992), UN Sales No. E.95.I.15 (1995).

²⁶ UN Secretary-General Kofi Annan, *quoted in* Brus, *supra* note 9, at 19.

....

Any such evolution in our understanding of State sovereignty and individual sovereignty will, in some quarters, be met with distrust, scepticism, even hostility. But it is an evolution that we should welcome.²⁷

Weapons of mass destruction, genocide, failed states, and rogue states all pose extreme conceptual problems for doctrines of sovereignty. But, of course, an important dilemma develops when international institutions do not have the capacity or the will to act to prevent or redress such extreme dangers to world peace and security or to particular regions and populations. In what circumstances, then, should other entities, including powerful sovereign states, have the right or duty to step into the breach? And to what degree is there a requirement to exhaust recourse to international institutions before such action? Has the practice of nations already begun to develop new norms condoning such a practice?²⁸

Professor Thomas Franck, perceiving that sovereignty was devolving to the people, asserted in his seminal (and ahead of its time) 1992 article in this *Journal*:

The entitlement to democracy in international law has gone through both a normative and a customary evolution. It has evolved both as a system of rules and in the practice of states and organizations. This evolution has occurred in three phases. First came the normative entitlement to self-determination. Then came the normative entitlement to free expression as a human right. Now we see the emergence of a normative entitlement to a participatory electoral process.²⁹

Some of the discussion and practice about the role of "sovereignty" also focuses on the principle of "subsidiarity," which is variously defined, but roughly stands for the proposition that governmental functions should be allocated, among hierarchical governmental institutions, to those as near as possible to the most concerned constituents, usually downward on the hierarchical scale. Therefore, some believe that an allocation to a higher level of government would require special justification as to why that higher institutional power was necessary to achieve the desired goals.³⁰

In addition, most authors discussing "sovereignty" cite a very large number of "anomaly examples"; mainly situations of governmental entities that do not fit into the normal concepts of sovereignty.³¹ Thus, sovereignty is sometimes divided up or "fractionated," sometimes temporarily, sometimes nominally, for example, to facilitate a diplomatic compromise. We have recently seen some indications of this process in the context of negotiations over the past few years relating to the Middle East settlement and the status of Palestine.³²

Overall, the concept of sovereignty seems quite often to be extremely, and perhaps purposefully, misleading, and may act as a crutch for politicians and the media to avoid the tough and very complex thinking that should be undertaken about the real policy issues involved.³³

²⁷ Kofi A. Annan, Secretary-General's Speech to the 54th Session of the General Assembly, UN Doc. SG/SM/7136 (1999).

²⁸ MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* (2001).

²⁹ Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46, 90 (1992).

³⁰ See text at notes 50–54 *infra* and cited references.

³¹ ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD* (1990). Krasner, in his book, *supra* note 8, elaborately describes many such anomalies, which led him to the title *Sovereignty: Organized Hypocrisy*.

³² Wye River Memorandum, Oct. 23, 1998, Isr.-PLO, 37 ILM 1251 (1998) (witnessed by President Bill Clinton); see also Michael Barnett, *Sovereignty, Nationalism, and Regional Order in the Arab State System*, in *STATE SOVEREIGNTY AS SOCIAL CONSTRUCT*, *supra* note 8, at 148 (containing a remarkable brief account of the history of the "Arab state system" and its tensions with Westphalian notions of sovereignty). The history of Middle East negotiations, including the Wye Plantation discussions, is replete with references to the problem of Jerusalem, as well as other problems that challenge traditional notions of sovereignty with respect to territory, such as shared sovereignty for holy sites and allocation of governmental responsibilities, including control of security.

³³ See works cited in note 8 *supra*.

In the area of trade policy, one finds many specific instances of avoidance of “sovereignty concepts.” A striking example is the General Agreement on Tariffs and Trade (GATT) and now, the WTO, whose membership is not limited to a “sovereign entity” but, instead, to a “State or separate customs territory possessing full autonomy in the conduct of its external commercial relations.”³⁴

Sometimes the principle of noninterference on the nation-state level is closely linked to sovereignty, yet today’s globalized world abounds in instances in which the actions of one nation (particularly an economically powerful nation) constrain and influence the internal affairs of other nations. For example, powerful nations have been known to influence the domestic elections of other nations and to link certain policies or advantages (such as aid) to domestic policies relating to subjects such as human rights. International organizations also partake in some of these linkages, as evidenced by the so-called conditionality of the International Monetary Fund (IMF).³⁵

For these and other reasons, some scholars would like to do away with sovereignty entirely. Professor Henkin writes, “For legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era.” But he continues his thought by saying, “To this end, it is necessary to analyse, ‘decompose’ the concept”³⁶

This article expresses the view that the complete elimination of the word or concepts associated with “sovereignty” would lose some important principles. This observation leads me to part II, discussing affirmative attributes of sovereign concepts, and to part III, which develops the concept of “sovereignty-modern.”

II. POTENTIALLY VALID POLICY OBJECTIVES OF SOVEREIGNTY CONCEPTS

Sovereignty and the Allocation of Power

Recognizing that almost no perceptive observer or practitioner is prepared to sign on to the full import of the traditional Westphalian notion of sovereignty, what can be said in favor of modified or “evolving” sovereignty concepts?³⁷ Many, if not most, of the critics of the older sovereignty notions recognize, with varying degrees of support, some of the important and continuing contributions that the sovereignty concepts have made toward international discourse, stability, and peace. For example, Ambassador Richard Haass, formerly director of policy planning at the United States Department of State, noted in January 2003:

Sovereignty has been a source of stability for more than two centuries. It has fostered world order by establishing legal protections against external intervention and by offering a diplomatic foundation for the negotiation of international treaties, the formation of international organizations, and the development of international law. It has also provided a stable framework within which representative government and market economies could emerge in many nations. At the beginning of the twenty-first century, sovereignty remains an essential foundation for peace, democracy, and prosperity.³⁸

³⁴ General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. XXXIII, TIAS No. 1700, 55 UNTS 194 [hereinafter GATT]; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Art. XII, in WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1999) [hereinafter WTO Agreement].

³⁵ Many examples of linkages exist, such as pressures by the European Union for human rights protection in the Cotonou Agreement, the Association Agreement with African, Caribbean, and Pacific States. See Elisabeth de Vos, *The Cotonou Agreement: A Case of Forced Regional Integration? in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE*, *supra* note 8, at 497; see also KRASNER, *supra* note 8, at 105 (for other human rights linkages); GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, & KIMBERLY ANN ELLIOTT, *ECONOMIC SANCTIONS RECONSIDERED* (3d ed. forthcoming 2004) (for economic sanctions to promote human rights). On IMF conditionality, see, for example, Deborah E. Siegel, *Legal Aspects of the IMF/WTO Relationship: The Fund’s Articles of Agreement and the WTO Agreements*, 96 AJIL 561, 572–75 (2002).

³⁶ HENKIN, *supra* note 9, at 10, quoted in JACKSON, *THE GATT AND THE WTO*, *supra* note 13, at 367.

³⁷ See STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE, *supra* note 8, at 282–83.

³⁸ Haass, *supra* note 17, at 3.

As indicated at the outset of this article, sovereignty is deeply interwoven into the fabric of international law, and to abandon, wholesale, the concept of “sovereignty” requires very serious thought about a substitute that could efficiently fill the gaps left by its absence.

An anecdote serves as a good introduction to this section.³⁹ Testifying in 1994 before a U.S. congressional committee hearing on the massive Uruguay Round trade agreement and the World Trade Organization was the well-known Ralph Nader, who opposed congressional approval of that agreement.⁴⁰ While I do not accept some of the assumptions and details of his statements, there are intriguing aspects that merit respect, including the following:

A major result of this transformation to a World Trade Organization would be to undermine citizen control and chill the ability of domestic democratic bodies to make decisions on a vast array of domestic policies from food safety to federal and state procurement to communications and foreign investment policies.

Most simply, the Uruguay Round’s provisions would preset the parameters for domestic policy-making of legislative bodies around the world by putting into place comprehensive international rules about what policy objectives a country may pursue and what means a country may use to obtain even GATT-legal objectives, all the while consistently subordinating non-commercial standards, such as health and safety, to the dictates of international trade imperatives.

Decision-making power now in the hands of citizens and their elected representatives, including the Congress, would be seriously constrained by a bureaucracy and a dispute resolution body located in Geneva, Switzerland that would operate in secret and without the guarantees of due process and citizen participation found in domestic legislative bodies and courts.⁴¹

This and other concerns have led me to take a somewhat different tack in the analysis of sovereignty, rejecting the older Westphalian notions, while recognizing different important aspects of sovereignty.

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

Today, no sensible person would agree that this antiquated version of sovereignty exists. A multitude of treaties and customary international law norms impose international legal constraints (at the least) that circumscribe extreme forms of arbitrary actions even against a sovereign’s own citizens.

So what does “sovereignty,” as practically used today, signify? I offer a hypothesis: most (but not all) of the time that “sovereignty” is used in current policy debates, it actually refers to questions about the allocation of power; normally “government decision-making power.” That is, when someone argues that the United States should not accept a treaty because that treaty infringes upon U.S. sovereignty, what the person most often means is that he or she believes a certain set of decisions should be made, as a matter of good governmental policy, at the nation-state (U.S.) level, and not at the international level.⁴²

³⁹ I admit that in many ways this incident considerably influenced my thinking about sovereignty. I also testified at this hearing. Jackson, *The Great Sovereignty Debate*, *supra* note 6, at 174 n.31.

⁴⁰ *The Uruguay Round of the General Agreement on Tariffs and Trade: Hearing Before the Senate Comm. on Foreign Relations*, 104th Cong. (1994), 1994 WL 266499.

⁴¹ *Id.* (prepared statement of Ralph Nader).

⁴² The author previously articulated these concepts in JACKSON, *THE GATT AND THE WTO*, *supra* note 13, at 369. “Power” is used here similarly to the phrase “effective” or “legitimate authority,” although these terms could be subject to considerable additional discussion.

Another way to articulate this idea is to ask whether a certain governmental decision should be made in Geneva, Washington, D.C., Sacramento, Berkeley, or even a smaller subnational or subfederal unit of government. Or, when focusing on Europe, should a decision be taken in Geneva, Brussels, Berlin, Bavaria, Munich, or a smaller unit?

There are various other dimensions to the “power allocation” analysis. Those mentioned above could be designated as “vertical,” whereas there are also “horizontal” allocations to consider, such as the separation of powers within a government entity (e.g., legislative, executive, judicial) and division of powers among various international organizations (e.g., the WTO, the International Labour Organization, the IMF, the World Bank). Indeed, one can go even further and note that power allocation could refer to the types of participants involved: governmental, nongovernmental (which can embrace issues of government versus private enterprises), and so forth. This is obviously a subject that could have widespread relevance, but this article will focus on the vertical governmental choices of allocation of power.

In all those dimensions one can ask a number of questions that would affect the allocation issues. Questions of legitimacy loom large; today there is often a focus on “democratic legitimization,” which is frequently meant to challenge more traditional concepts of sovereignty (illustrated by views noted in the previous section and related to notions that sovereignty is gravitating away from ideas of “sovereignty for the benefit of the nation-state” and toward ideas of “sovereignty of the people”⁴³).

Other major topics relevant to vertical allocation issues include the capacity of the institution at each level to perform the tasks needed to pursue the fundamental policy goals motivating the choices (e.g., market economic efficiency principles, cultural identities, preserving peace, subsidiarity concepts, environmental and externalities questions, environmental and global commons issues).

Clearly, the answer to the question of where decisions should be made will differ for different subjects. One approach may be appropriate for fixing potholes in streets or requiring sidewalks, another for educational standards and budgets, yet another for food safety standards, and still another for the rules necessary for an integrated global market to work efficiently in a way that creates more wealth for the whole world. Questions of culture and religion pose further decisional challenges.

When one reflects on these questions of allocation of power, this issue is easily identified as arising in dozens of questions at various government levels. News reports recount activities related to these questions almost daily.⁴⁴

Values Involved in Power Allocation Analysis

Clearly, many values or policy objectives could influence consideration of the appropriate level or other (horizontal) distribution of power within a landscape of governmental and nongovernmental institutions. A small, illustrative group of these policies is outlined below.

Reasons for preferring governmental action at an international level. Many reasons could be given for preferring an international-level power allocation, including what economists call “coordination

⁴³ Franck, *supra* note 29; see also INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY [ICISS], THE RESPONSIBILITY TO PROTECT 11 (International Development Research Centre, 2001); Schermers, *supra* note 24.

⁴⁴ As an exercise verifying this proposition, the author, with very able student research assistance, formulated a chart of the many news and other reports that touch on these allocation-of-power questions at various levels of government. This report involves too many instances to include in this article, but we could make it available to interested persons. As an example, one can examine the *Financial Times* (London) for May 12, 2003, which in this single issue touches on seven or more topics of “allocating power or authority”; they include the United Kingdom’s consideration of joining the euro single currency, the role of international law in cases of unilateral use of armed force, European Union measures relating to carbon emissions, testing requirements for chemicals, the control of Iraqi oil exports, WTO rulings related to steel tariffs, and ideas for a European common defense fund.

benefits,"⁴⁵ sometimes analyzed in game theory as the "Prisoners' Dilemma."⁴⁶ In this situation, if governments each act in their own interest without any coordination, the result will be damaging to everyone; whereas matters would improve if states assumed certain, presumably minimal, constraints so as to avoid the dangers of separate action. Likewise, much has been said about the "race to the bottom" in relation to necessary government regulation⁴⁷ and the worry that competition between nation-states could lead to a degradation of socially important economic regulation.

Economists sometimes suggest that the upward placement of government decision making is particularly needed where there is so-called factor mobility, such as investment funds or personal migration. This is partly because governments find it more difficult to tax or regulate in an effective way in the face of factor mobility.⁴⁸

The subject area of the environment directly engages these issues of power allocation. Issues involving the so-called global commons, where actions that degrade the environment have "spill-over effects," illustrate the need for higher supervision.⁴⁹

Many other subject matters are very controversial and remain unresolved in this regard. For example, at what level should competition policy (monopoly policy) be handled? What about human rights, or democratic values and democratic institutions? Questions of local corruption or cronyism might seem to call for a higher level of supervision.

Allocating power more locally; the principle of "subsidiarity." Advocates of subsidiarity (a concept much discussed in Europe) note the value of having government decisions made as far down the "power ladder" as possible. Historically, subsidiarity derives partly from Catholic philosophy of the nineteenth and early twentieth centuries.⁵⁰ Among the various policy values that it involves,⁵¹ one of the basic ideas is that a government closer to the constituents can better reflect the subtleties, necessary complexity, and detail embodied in its decisions in a way that most benefits those constituents. As one politician has said, "Those who know your name are most likely to know your needs."⁵²

Likewise, it is often said that the decision making that is furthest down the ladder and closest to the constituent will be policed by a greater sense of accountability. Indeed, many illustrations of the dangers of distant power come to mind, including, of course, the origins of the United States in its rebellion against England in the eighteenth century. Similarly, colonialism,

⁴⁵ Cary Coglianese, *Globalization and the Design of International Institutions*, in GOVERNANCE IN A GLOBALIZING WORLD, *supra* note 11, at 297, 298–300.

⁴⁶ Robert O. Keohane, *International Relations, Old and New*, in A NEW HANDBOOK OF POLITICAL SCIENCE 462, 469 (Robert E. Goodin & Hans-Dieter Klingemann eds., 1996).

⁴⁷ John H. Jackson, *International Economic Law in Times That Are Interesting*, 3 J. INT'L ECON. L. 3 (2000). See also REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES (Daniel C. Esty & Damien Geradin eds., 2001); and articles in 3 J. INT'L ECON. L. 215–385 (2000).

⁴⁸ RONALD W. JONES, GLOBALIZATION AND THE THEORY OF INPUT TRADE 135 (2000).

⁴⁹ William C. Clark, *Environmental Globalization*, in GOVERNANCE IN A GLOBALIZING WORLD, *supra* note 11, at 86.

⁵⁰ For a succinct overview of the history of the concept of subsidiarity, with mention of sources that go back as far as Aristotle and a sixteenth-century book by the political philosopher Johannes Althusius, leading to nineteenth- and twentieth-century Catholic social thought, including the papal encyclical *Quadragesimo Anno* (fortieth year) in 1931, see Thomas Stauffer, *Subsidiarity as Legitimacy?* in World Bank Institute, Intergovernmental Fiscal Relations and Local Financial Management Program, topic 3 (July 26–Aug. 6, 1999), at <<http://www.worldbank.org/wbi/publicfinance/documents/stauffer.pdf>>; see also Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AJIL 38 (2003).

⁵¹ CEPR, *Subsidiarity*, *supra* note 8; see also Carozza, *supra* note 50 (a remarkably full account and history of the concept of subsidiarity, which elaborates an argument for its importance in the context of applying international human rights obligations, somewhat counter to the approach of many human rights advocates who argue that human rights norms are "universal").

⁵² George W. Bush, Campaign speech made to the Annual Convention of the National Conference of State Legislatures in Chicago (July 18, 2000), quoted in Lisa B. Song, *Bush Pushes More State, Local Control of Schools*, CHI. TRIB., July 18, 2000, Metro §, at 1 (online ed.), available in LEXIS, News Library, Majpap File; transcript of entire speech available at <http://www.pbs.org/newshour/bb/politics/july-dec00/stump_7-20.html> (visited Sept. 11, 2003).

particularly twentieth-century, post–Second World War colonialism⁵³ and the move to decolonize, raised a number of these issues. Decisions made remotely from constituents often become distorted to accommodate the decision makers' goals, which are local to their own situation and institution, and are not made to accommodate the targeted "beneficiaries."⁵⁴

As a counterpart to European subsidiarity, an enormous amount of discussion about "federalism," which really engages these same issues, takes place in the United States. There is a worry that decisions taken "inside the beltway" often neglect the facts and details "on the ground" in local areas, partly to accommodate the particular, relatively selfish goals of some senators or other members of the U.S. Congress. Indeed, during the last decade, the U.S. Supreme Court has been paying a great deal of attention to "constitutional federalism," and one must ponder whether the Supreme Court's attitudes are wholly based on an appropriate view of the U.S. Constitution, or are at least partially motivated by policy considerations (not necessarily *inappropriate* ones) about where power should reside.⁵⁵

Some other policy goals and values supporting both directions. At times, the controversy over the level on which to place a government decision is truly a controversy over the substance of an issue. Thus, national leaders will use international norms to further policy that they feel is important to implement at their own level but is difficult to do because of the structure of their national constitution or political landscape. Likewise, other leaders may want to retain power over certain issues at the national or even the subnational level, because they feel they have more control at those levels in pursuing the policies that they favor. These issues do raise the question of attempts by power elites to bypass democratic procedures that annoy them.

Another policy that can urge allocation both up and down the ladder is the policy of preventing a governmental institution from *misusing* power. Thus, those who wish to have governmental decisions made at a higher level, such as at the international level, must also consider the potential misuse of power that could occur in international institutions. The often inferior effectiveness of the constraints on international institutions to those on national institutions (e.g., lack of elections) may be the core of an argument against placing power at the higher level. On the other hand, power clearly can also be misused at lower levels of government. Likewise, there is generally a "separation of powers" principle that could apply. The U.S. Constitution has, as its centerpiece, the separation-of-powers principles to avoid monopolies of power, which then lead to misuse. Such separation can be as between various relatively "equal" levels of governmental action, or as between higher and lower levels of governmental action. For example, in considering how governments should make decisions, it may be determined that only a portion of a certain power should be allocated to the higher level, reserving to a lower level some powers that would be used to check the higher level. To some extent, the implementation of treaties, without having direct application in domestic legal systems, is potentially such a check against power at the higher level. But allocation of greater power to the higher-level treaty may also check lower-level misuse of power.⁵⁶

Another aspect of the decision involving the allocation of power is the policy goal of "rule orientation" regarding the matter concerned. Particularly for economic purposes, a rule system that provides additional clarity, security, and predictability can be very significant, particularly when the subject matter involves millions of entrepreneurs ("decentralized decision making" as part of the market system). Thus, part of the consideration regarding on what level to place governmental power might deal with whether different levels have different abilities

⁵³ Gerard Kreijen, *The Transformation of Sovereignty and African Independence: No Shortcuts to Statehood*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE, *supra* note 8, at 45.

⁵⁴ See TIP O'NEILL & GARY HYMEL, ALL POLITICS IS LOCAL (1994).

⁵⁵ See generally Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11 (2000) (and noted references); see also *infra* note 73 and corresponding text.

⁵⁶ Elaine Ciulla Kamarck, *Globalization and Public Administration Reform*, in GOVERNANCE IN A GLOBALIZING WORLD, *supra* note 11, at 229, 250.

to make an effective rule-oriented program. Of course, this question raises a risk inherent in internationalism in the minds of some, who may view with suspicion a rule system's method of interpreting treaty text.

III. THE POWER ALLOCATION POLICY ANALYSIS: A CORE APPROACH?

A Fuzzy Road Map of the Policy Landscape

On the basis of the analysis in the previous sections, we can now see that a key question is *how* to allocate power among different human institutions. It is probably not surprising that this question is very complex. Many factors must be considered, some of which are discussed below. To some extent, they center on a common question of "power," and therefore, in some ways, this question relates to virtually all of government and political science studies, as well as, e.g., international relations, economics, and law.⁵⁷ When one has to develop the landscape of this policy analysis, one recognizes that a huge number of specific substantive policies play a part, as well as what we might call "procedural" or "institutional" policies (how to design the appropriate institutions).⁵⁸ Some of these policies typically do not converge in the directions they would suggest that allocation of power should take. That is, differing policies often pose dilemmas for policymakers, where they must engage in a certain amount of balancing.

Indeed, the policy landscape is so complex that one may question whether it is possible to arrive at any worthwhile generalizations. It could be argued that because of this complexity each case has to be decided *sui generis*, or on a "case by case" basis (to use a phrase often indulged in by juridical institutions). Nevertheless, this article will attempt some restrained and constrained generalizations, more in the manner of a road map or inventory/checklist of the type of subjects and factors that are to be considered.

Outlines of the Landscape and Its Dimensions

As mentioned above, over time there developed a number of so-called sovereignty fictions, which have never really represented what goes on in the real world. One of these fictions is the notion that absolute power is concentrated at the head of a nation-state, and we have seen extensive literature criticizing the myths and anomalies regarding that. In analyzing how to allocate power, we have mentioned different dimensions such as vertical versus horizontal allocations. With respect to the horizontal allocation, we would look at important concepts such as the separation of powers in the U.S. Constitution, whereby power is allocated among legislative, executive, and judicial branches.⁵⁹ Similar considerations apply at the international level, between functional divisions within an international organization and between different international organizations.

The characteristics of institutions are very important to handling the issues of allocation, and must be examined carefully. The nature of the issues involved must also be examined. What types of information and expertise are needed for certain kinds of substantive issues? Is the institution to which power will be allocated, regarding those issues, capable of finding and processing that information? Does it have adequate means at its disposal to carry out its mission? And if not, what roles will other levels of institutions play?

⁵⁷ See *supra* note 44.

⁵⁸ Coglianese, *supra* note 45.

⁵⁹ Another aspect of opposing categories comes into play here, although I will not develop that very much in this article; that is, the allocation of power as between government institutions (at all levels and among different horizontally equal institutions), on the one hand, and nongovernment institutions (private enterprises, nongovernmental organizations, pro bono institutions, etc.), on the other hand. This portion of the analysis would push one into questions of market-oriented economic structures and their value, as well as their limitations.

The capacity of a treaty-based international institution to implement activities designed to achieve internationally agreed-upon *goals* will clearly also be part of an analysis as to where to allocate power. If an allocation to the international institution is not accompanied by adequate means to operate effectively, this deficiency could suggest reasons for not so allocating power. But the reverse could also be true (as mentioned in the introductory pages above): nation-states may find that economic or other exogenous circumstances render nation-states that act unilaterally ineffective, thus manifesting a greater need for international approaches.

In addition, many of the issues about democratic legitimacy come into play when one is allocating power at different levels and to different horizontally equal institutions. Issues that may call for different kinds of allocations include, e.g., taxes, expenditures for public goods and services, and regulation of private sector agents.

Comparing International Institutions with National and Subnational Institutions: The Devil in the Details

There are a series of factors that policymakers trying to develop an appropriate allocation of power must consider about international institutions. The following is just a beginning checklist:

(1) Treaty rigidity, namely, the problem of amending treaties and the tendency of treaties to be unchangeable, although actual circumstances (particularly in economics) are changing very rapidly.

(2) International organization governance questions, particularly with respect to choosing officials of the international organization. Governments tend to push favored candidates, to claim “slots,” and to disregard the actual quality of the individuals concerned or the nature of the tasks they are to assume.

(3) International organization governance in the decision-making processes. What should the voting structure be? Should consensus be required? What are the dangers of paralysis because of the decision-making procedures? What are the dangers of decision-making procedures that are likely to be considered illegitimate or out of touch with reality?

This factor relates to the fiction of “sovereign equality of nations” and the problems of a one-nation, one-vote system. It can be argued that these two concepts, or fictions, are very antidemocratic, as compared to a system that would recognize the populations or other weights concerned in the representation and the organization. Is it fair that a ministate of less than fifty thousand inhabitants should carry the same weight in a voting structure as giant governments of societies that have more than one hundred million constituents each? Does giving the ministate such weight accentuate possibilities of “holdout” bargaining, what some call “a ransom”? Is it fair that a voting majority of United Nations members today could theoretically encompass less than 5 percent of the world’s population?⁶⁰

(4) International diplomacy techniques. To what extent is it appropriate or necessary that there be special privileges for diplomats, such as tax freedom and other immunities? Do such privileges in the context of international organizations’ decisions tend to result in actions that are out of touch with citizen beneficiaries?

(5) International diplomacy as it operates substantively, sometimes in contrast to or in diminishing a rule-oriented structure, through power-oriented bargaining.

⁶⁰ When my assistant and I examined a list of all the United Nations nation-states and ranked them from those with the smallest population to those with the largest population, and then counted from small upward until we passed the midpoint, so that we had a majority of the UN nation-states, we learned that the total population of that majority (ranked from the smallest upward) amounted to less than 5% of the total population of all of the nation-states that are UN members. Likewise, when we do this with a slightly larger list of all nation-states and include some that are not UN members, we get the same result. I wish to acknowledge the able assistance of Ms. Woojung Kim, J.D. candidate, Georgetown University Law Center, for the study relating to this footnote.

(6) International governmental issues that relate to the allocation of an international organization's resources, such as a "headquarters mentality," devoting large amounts of the budget to the perquisites and comfort of the headquarters personnel.

(7) The impact of a dispute settlement system and its jurisprudential techniques such as those used to "interpret" international agreements.

(8) The constitutional "treaty-making" authorities of different levels of government. One can also examine the effect of the "direct application" or "self-executing nature" of treaties, and ask whether the treaties were made with a legitimate amount of democratic input, such that they should be allowed to trump nation-state-level democratic and parliamentary institutions.⁶¹

(9) Comparison with governance questions at the nation-state or local level, such as how officials are chosen, the amount of transparency and participation allowed, and the resources available to undertake tasks.

Finally, it must be mentioned that, in many cases, individually insignificant details are involved in how institutions perform their tasks, which, however, when added up, or utilized by a large number of participants, can have a degrading effect on the efficiency or fairness of operations.

Legitimization in the Power Allocation Analysis

By now the reader may have an inkling that some important fundamental principles of legal and normative legitimization are relevant to the power allocation analysis. Arguably, almost the entire analysis of power allocation outlined in this part so far *could* be based on traditional sovereignty and nation-state-consent principles. The detailed questions on power allocation leave open perhaps the most important question, Who (what entity) should *decide the power allocation*? It is possible (and probable) that today many will say that the nation-state will decide in each case, for itself, whether it is willing to allocate "its own sovereign power" either up the scale or downward. (In the latter case certain checks are likely to be retained in the hands of the sovereign.) After all, for any treaty-based rule, it is plausible to say that each nation will decide, and if it decides to accept the treaty obligations, its consent has legitimized its obligation.

The issue of *customary* international law is more ambiguous, of course, and thus, often more controversial.⁶² Certainly, rather extravagant claims are frequently made about what new customary norms have come into being, as compared with the traditional international rules of such norm formation (e.g., practice plus *opinio juris*), which more strongly emphasize state consent. Questions arise in either case. Is the ultimate decision about allocation put in the hands of an international juridical or diplomatic institution? Does such an institution have certain biases or conflicts of interest? To pursue this line of analysis as a basis for a new allocation of power, however, may stretch some of the traditional international law concepts of state consent. Some examples of the outer limits of consent include:

(1) A nation finds that its trade or financial welfare *requires* it to accept a major complex treaty because most of the rest of the world has done so (e.g., via the WTO or IMF).

(2) The UN or other major charter is deemed so fundamental that its interpretation of obligations (considering treaty rigidity constraints against amendment) "evolves" or is influenced by developing "practice under the agreement" in unexpected (or impossible to expect) ways. Specific decisions of the institution may "validate" this evolution, either explicitly or impliedly, although the decisions may not always be broadly accepted

⁶¹ See, e.g., Jackson, *supra* note 4.

⁶² See, for example, the powerful criticisms of customary international law by Bradley & Goldsmith, *supra* note 5; Goldsmith & Posner, *supra* note 5; Kelly, *supra* note 5.

(or acceptable), or could in fact be “bad policy” by relatively objective standards. Elites may weigh heavily in certain of these processes, as may certain special interest groups (business or nonbusiness, sometimes with single-issue objectives).

(3) Voting rules and procedures may result in anomalies that lead to decisions that do not reflect a membership as a whole. Various pressures may be placed upon voting nations through favors or “vote buying.” An individual nation-state may have no particular interest in the vote on an issue, and thus be willing to “hold out” (ransom its vote) or swap its vote on this issue for one on some completely different and irrelevant issue. The votes of many small nations may control in a situation of little interest to them. Votes of nations belonging to certain groups may be controlled or guided by single institutional mechanisms, which thereby have great weight. The European Union, for example, has fifteen (going on twenty-five) votes in the WTO, and many more that it can influence through pressures related to its association agreements.

In reflecting on the experience of many national or international human institutions, one finds there is nothing new in the examples mentioned above. What is new, however, is the degree to which these international institutional circumstances have an impact on nation-state governments trying to deliver the fruits of their important achievements to their constituents. The other side of these considerations is that they may be outweighed by the “coordination” benefits realized through the cooperative action of international institutions. Indeed, in this context scholars and other observers have argued that the nation-states participating in such institutions have *enhanced* their sovereignty by leveraging it through joint action.⁶³

Clearly, in some cases, however, the “state consent” theory extended in the above paragraphs will not carry the legitimization far enough to be broadly persuasive. This limitation could apply in particular to issues of humanitarian intervention (especially in cases of inaction by relevant international institutions), and potentially to some issues regarding terrorism and weapons of mass destruction. A core of cases is being recognized by world leaders and scholars as not satisfactorily solved by “consent doctrines.” This is where the sovereignty revisionist theories have teeth, and where, in this author’s opinion, confusion and uncertainty reign, and possible “auto-determination” by overreaching unilateral nation-state decisions poses a serious risk to some traditional concepts of sovereignty, as well as to “rule-based” objectives for international relations.

IV. EXAMPLES OF DIFFERENT POWER ALLOCATION PROBLEMS

The analysis outlined in the previous parts can also be applied to various subjects and endeavors, keeping in mind, however, the caveats that were also mentioned above.

Thus, it is logical at this point to provide examples applying some of the principles presented. An extensive discussion of a long list of examples would be possible elsewhere, but time and space requirements permit only a few illustrations for purposes of this article. I will focus here on predominantly economic subject areas, and follow those examples with some general summary comments about the potential for more extensive elaboration in other contexts and fora.

Economics and Markets

As a “thought experiment,” consider the following.⁶⁴

Advocates of market economics argue that the most efficient process of decision making in an economy is reliance on the private sector to handle most of the choices, and to keep the

⁶³ Brus, *supra* note 9, at 18; see also ICISS, *supra* note 43, SUPPLEMENTARY VOLUME, at 129.

⁶⁴ For a previous article on the economic analysis of power allocation, see John H. Jackson, *Global Economics and International Economic Law*, 1 J. INT’L ECON. L. 1 (1998).

government out. However, there is the well-recognized exception of “market failure,”⁶⁵ and thus it becomes necessary to analyze what such failure entails.

Often, categories of market failures include monopolies and competition problems, lack or asymmetries of information, public goods and free rider problems, and externalities. In each of those cases, one can see how the economics of a globalized, economically interdependent world operates. It is quite likely that in some cases, an analyst could make one kind of judgment about the existence of market failure by looking only at the nation-state level, but come to a different conclusion when appraising the global or international level. Monopoly judgments will depend somewhat on how one defines the “relevant market.” Are borders truly open, and thus does a single producer within a nation-state really have to face competition? Does that producer not have monopoly power? Asymmetries of information are found across national borders, particularly where the cultures and languages are different.

Even if a judgment is made as to the existence of market failure, leading to a government response, the kinds of government responses possible at the nation-state level differ dramatically from those at the international level. Most often, the international-level institutions do not have powers that can effectively tax, subsidize, or materially alter market mechanisms (such as by setting up tradable permits). Another governmental response is to maintain rules and prohibitions. This is virtually the only available government response at the international level, and it raises an important practical question as to whether a particular rule or prohibition will in fact be effective (i.e., followed), and therefore operate efficiently to correct the market failure.

International Rules on Competition Policy: An Active Debate

There has been much bitter fighting, at least in discourse, about whether an international competition policy or set of rules—an international competition policy for things like monopoly and antitrust—should be put in place. Quite a disconnect separates the United States and the European Union on this question. In Europe, the Brussels institutions, at least, have expressed a strong desire for policy at the international level (EU member states may be less interested in this). In the United States, the idea has provoked considerable opposition. Originally, the United States said there was no real need for it. Subsequently, however, even the United States has appeared to be softening, as evidenced by the constitution of a special commission several years ago (the International Competition Policy Advisory Committee, or ICPAC) to study this issue. ICPAC issued a nuanced report⁶⁶ that said at least one thing clearly: each year, more and more U.S. antitrust cases involve an international aspect. This development, together with the emerging trend that suggests a need for a response to market failure, leads some to argue for at least minimal policy coordination at the international level.

The WTO and Its “Constitution”: Impact of Institutional Detail

The World Trade Organization can become a major illustration of principles outlined in this article.⁶⁷ Certainly, one of the more intricate and elaborate (and some say controversial) examples of power allocation principles can be witnessed in relation to the WTO. Globalization and the problems that accompany it are forcing institutions to adapt or the creation of

⁶⁵ See, e.g., RICHARD LIPSEY, PAUL COURANT, DOUGLAS PURVIS, & PETER STEINER, MICROECONOMICS, pt. 4, at 207 (12th ed. 1998).

⁶⁶ INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST (2000), available at <<http://www.usdoj.gov/atr/icpac/finalreport.htm>>.

⁶⁷ See WTO Agreement, *supra* note 34. See also the following works by this author: THE GATT AND THE WTO, *supra* note 13; THE WORLD TRADING SYSTEM, *supra* note 13; *Dispute Settlement*, *supra* note 13; *The WTO “Constitution” and Proposed Reforms*, *supra* note 7.

institutions that can cope. Clearly, many of these problems relate to treaty clauses that penetrate deeply into a nation-state's "sovereignty" decisions about economic regulation. Thus, any international cooperative mechanism will, of necessity, clash with national "sovereignty," and with special national interests whose own economic well-being will be affected by the international decisions. Not surprisingly, therefore, the WTO not only is a candidate for filling institutional needs to solve current international-level problems, but also is a target currently under attack.

Nevertheless, as noted in previous parts of this article, increasingly often nation-states cannot regulate effectively in the globalized economy, and this inability is particularly relevant to economic factors that are global and mobile (investment, monetary payments, and monetary policy, and even free movement of persons). As outlined by very eminent economists in recent decades (such as Douglass North and Ronald Coase⁶⁸), markets will not work unless there are effective human institutions to provide the framework that protects the market function. Therefore, the core problem is the globalization-caused need to develop appropriate international institutions. If a thorough analysis led to the conclusion that the WTO is a good place in which to concentrate some of these cooperation activities, one could see the WTO becoming essentially an international economic regulatory level of government. This prospect, of course, is scary to many people.

The WTO plays two major, and somewhat conflicting, parts with respect to the power allocated to it. On the one hand, it moderately enhances the institutional structure for negotiating and formulating rules, and changing them as needed for the conduct of international trade and certain other economic activities at the international level. On the other hand, the WTO operates an extraordinarily powerful dispute settlement system, which is basically unique in international law history. This system has rare characteristics for an international institution: mandatory jurisdiction and submittal to its procedures, as well as an appellate process that was established to try to achieve a higher degree of coherence and rationality in the rules of the massive treaty clauses applying to the WTO's subject competence. One can immediately see a series of power allocation issues, not only as between nation-states and the WTO, with regard to its two different parts, but also allocation as between those parts. In addition, intricate details⁶⁹ can have very substantial effects on the real power allocation impacts that occur.

The Broader Agenda

As indicated earlier in this article,⁷⁰ the possible number of applications of the principles noticed above is myriad. I briefly mention a few here, to stimulate thinking about them, but also to point out that the analysis suggested is applicable to many different subject areas (and different levels of government).

(1) Environmental policies deeply engage many of the policy principles. Certain "global commons" issues cannot be successfully managed at the nation-state level. On the other hand, certain localized environmental problems involve delicate trade-offs in allocating scarce resources and are possibly best managed locally.⁷¹

⁶⁸ RONALD H. COASE, *THE FIRM, THE MARKET AND THE LAW*, ch. 5 (1988) (reprint of 1960 article); DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* (1990).

⁶⁹ See, e.g., BRINK LINDSEY & DAN IKENSON, *ANTIDUMPING EXPOSED: THE DEVILISH DETAILS OF UNFAIR TRADE LAW* (2003).

⁷⁰ See note 44 and text at notes 42–44 *supra*.

⁷¹ DOUGLAS IRWIN, *FREE TRADE UNDER FIRE* 53 (2002) (and citing Gene M. Grossman & Alan B. Krueger, *Economic Growth and the Environment*, 110 Q. J. ECON. 353 (1995)); see UNITED NATIONS, *REPORT OF THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT*, UN Doc. A/CONF.199/20 (2002), UN Sales No. E.03.II.A.1, available at <<http://www.johannesburgsummit.org/html/documents/documents.html>>. Readers will note that no organization was established. See also Steve Charnovitz, *A World Environment Organization*, 27 COLUM. J. ENVTL. L. 323 (2002).

(2) Human rights are closely related to the policy matrix and, arguably, different human rights may call for different power allocations.⁷²

(3) Many of the large number of United Nations activities can be a subject for the power allocation analysis, and even peacekeeping missions and uses of force could at least partly benefit from such analysis.

(4) The debates in Europe on a new constitution are riddled with power allocation arguments.⁷³

(5) The U.S. government (at all levels) is constantly struggling with the issues of power allocation, as Supreme Court cases and congressional debates testify (regarding control of education, environmental regulation, and regulation of commerce, to mention only a few).⁷⁴

V. PERCEPTIONS AND REFLECTIONS: CHANGING FUNDAMENTALS OF INTERNATIONAL LAW

The proposition tentatively put forth in this article is that for the “core sovereignty” concepts, which mostly involve the nation-state’s monopoly of power and its logical derivative of state-consent requirements for new norms, the power allocation analysis, when explored more profoundly, can help overcome some of the “hypocrisy” and “thought-destructive mantras” surrounding these concepts so that policymakers can focus on real problems rather than myths. This analysis can thus help policymakers weigh and balance the various factors to reach better decisions on questions such as accepting treaty norms, dispute settlement mechanisms and results, necessary interpretive evolution of otherwise rigid treaty norms, and even in some cases new customary norms of international law.

Such an analysis recognizes that there are desiderata in sovereignty concepts other than the “core” power allocation issues, and that even as regards the core issues there are clearly cases that the world must resolve by explicit (or well-recognized implicit) departures from traditional sovereignty concepts. Taken together, these considerations can be labeled “sovereignty-modern” and suggest that further analysis and discussion would help build some new “handholds on the slippery slopes” looming just ahead of certain issues not resolved by traditional sovereignty, as the world faces major risks of uncertainty, miscalculations in diplomacy, and overreaching by certain nation-states.

The follow-up question becomes: What are some theories or principles that could reach beyond the traditional sovereignty parameters but offer some principled constraints to avoid the risks just listed? Several can be mentioned.

One possibility would be to recognize certain international institutions as the legitimate entities to decide on some of these parameters. This approach would require that such an institution seriously discuss these limits and modes of activity (without a tilt toward that institution’s “turf”), and that it develop these limits with enough precision to be useful to national and international decision makers. This seems to be more carefully done in juridical institutions, which might well be an argument for more reliance on such institutions. However, “checks and balances” are needed regarding those institutions, lest they go wrong through

⁷² FRANCIS JACOBS & ROBIN WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (3d ed. 2002). “Margin of appreciation” is close to a concept of “deference” to another (lower?) level of government. Sometimes this operates as a “standard of review,” particularly in court proceedings. *Id.* at 210. The U.S. Supreme Court’s “*Chevron* doctrine” in judicial review of administrative determinations is another example.

⁷³ See, e.g., Pascal Lamy, *Europe’s Policymakers Live in the Real World*, FIN. TIMES, Oct. 28, 2002, at 5 (editorial); Daniel Dombey & George Parker, *Plan for a New Europe ‘Will Last 50 Years,’* FIN. TIMES, Oct. 7, 2002, at 4; *The Future of the European Union: Can These Bones Live?* ECONOMIST, Nov. 2, 2002, at 51; British Prime Minister Tony Blair, *A Clear Course for Europe*, Keynote Speech, Cardiff, Wales (Nov. 28, 2002), transcript available at <<http://www.number-10.gov.uk/output/Page1739.asp>>.

⁷⁴ See, e.g., *Bush v. Gore*, 531 U.S. 98, 111–12, 141–42 (2000).

faulty analysis, lack of adequate empirical information, or their frequent remoteness from the real world activities that are relevant to reasoned and just opinions.

Another possibility is to follow a chain of reasoning, developed by some scholarly analysis, that traditional "sovereignty" concepts themselves must evolve and be redefined. This avenue might also be pursued by juridical institutions, with the same caveats as mentioned above and throughout this article. "Sovereignty of people," rather than governments, is sometimes mentioned in this context.

Another, and probably more heroic, possibility is to develop a general theory of sources of international law based on what some authors have called the "international community."⁷⁵ To some this implies a sort of "*acquis communautaire*."⁷⁶ It could well imply participation by nongovernmental persons and entities, and it could embellish the more traditional concepts of "practice" under agreements or *opinio juris*, to stretch those frontiers. The risk and problem is the imprecision, and thus the controversy, that can develop about the use of this approach in specific instances. It has been invoked in some situations, such as the Kosovo crisis,⁷⁷ with the phrase "overwhelming humanitarian catastrophe."

Yet another approach is to use the concept of "interdependence," often most associated with economic policy and activity, to justify certain new norms. In many of these cases, this concept can probably be used in tandem with more traditional sovereignty and nation-state-consent approaches to persuade nations to give such consent. Frequently, a key question, however, is the holdout state, which in some economic circumstances is given added incentives to hold out when other states are constraining their reach for policy and economic advantages.

The approach of this article has been to respond to the many extensive challenges and criticisms of the concept of "sovereignty" by urging a pause for reflection about the consequences of discarding that concept in broad measure. Since sovereignty is a concept fundamental to the logical foundations of traditional international law, discarding it risks undermining international law and certain other principles of the international relations system. Doing so could challenge the legitimacy and moral force of international law, in the sense of what Professor Franck terms the "compliance pull"⁷⁸ of norms backed by characteristics of legitimization. It seems clear that the international relations system (including, but not limited to, the international legal system) is being forced to reconsider certain sovereignty concepts. But this must be done carefully, because to bury these concepts without adequate replacements could lead to a situation in which pure power prevails; that, in turn, could foster chaos, misunderstanding, and conflict, like Hobbes's state of nature, where life is "nasty, brutish, and short."⁷⁹ In the alternative, this vacuum of legitimization principles could lead to greater aggregations of hegemonic or monopolistic power, which might not always be handled with appropriate principles of good governance.⁸⁰

Thus, one of the recommendations of this article is to disaggregate and to analyze: break down the complex array of "sovereignty" concepts and examine particular aspects in detail and with precision to understand what is actually at play. A major part of this approach is to understand the pragmatic functionalism of the allocation of power as between different levels of governance entities in the world. To the extent feasible, this should be done in a manner not biased either in favor of or against international approaches. Indeed, as time moves on

⁷⁵ Don Greig, 'International Community', 'Interdependence' and All That . . . Rhetorical Correctness? in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE, *supra* note 8, at 521, 563–66.

⁷⁶ Greig, *supra* note 75, at 563–66.

⁷⁷ *Id.*

⁷⁸ Franck, *supra* note 29, at 51.

⁷⁹ THOMAS HOBBS, LEVIATHAN 100 (Michael Oakeshott ed., Collier Books 1962) (1651) ("[In a state of nature there are] no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.")

⁸⁰ Robert O. Keohane, *Governance in a Partially Globalized World*, 95 AM. POL. SCI. REV. 1 (2001).

and the world continues to experience trends toward interdependence and the need for cooperative institutions that can also enhance peace and security, the substitute for portions of nation-state sovereignty will probably be international institutions that embrace a series of legitimizing "good governance" characteristics, such as some of those recommended by Robert Keohane⁸¹ and other thinkers and philosophers. Among those characteristics one can expect a broader set of participants than just nation-states, but also nonstate and nongovernmental bodies and individuals, including economic (business) actors; moral, religious, and scholarly entities; and international organizations. Those characteristics will likely include elements of "democratic legitimization" and some notions of "democratic entitlement," not only for nation-states, but *also for international institutions*. Validating characteristics will also likely include elements of efficiency and the capacity to carry out appropriately developed institutional goals and to build in techniques for overcoming "treaty rigidity" so that the institutions can evolve to keep up with the changing world. It is more and more probable that a juridical institutional structure of some kind will be seen as a necessary part of any such international institution, and that the use of force or other concrete actions impinging on local societies will be constrained by the institutional and juridical structures. This is, in essence, a "constitutional" approach to international law. Thus, international lawyers must "morph" into constitutional lawyers.

To cope with the challenges of instant communication, and faster and cheaper transportation, combined with weapons of vast and/or mass destruction, the world will have to develop something considerably better than either the historical and discredited Westphalian concept of sovereignty, or the current, but highly criticized, versions of sovereignty still often articulated. That something is not yet well defined, but it can be called "sovereignty-modern," which is more an analytic and dynamic process of disaggregation and redefinition than a "frozen-in-time" concept or technique. Even then, a "sovereignty-modern" power allocation analysis may not always be the only appropriate approach to analysis of the many problems listed in this article. It needs to be considered a valuable analytic tool, but not one that can always lead to an appropriate resolution to such problems. When used in tandem with other policy tools, including realistic appraisals of the political and legal feasibility of various policy options, it can be a valuable means to sort through elaborate and complex policy "landscapes." There is much thinking yet to do, and no one ever said it was going to be easy.

⁸¹ *Id.*