RETHINKING THE SOVEREIGNTY DEBATE IN INTERNATIONAL ECONOMIC LAW

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ABSTRACT

Many observers argue that sovereignty is threatened by the ongoing expansion of international economic institutions. This article explores a school of thought that counterintuitively argues that institutions such as the World Trade Organization in fact strengthen sovereignty. These theories collectively highlight an under-explored proposition: that changes in the international system or in domestic politics have already compromised sovereignty and thus international institutions, while rendering the erosion of sovereignty more legible, actually serve as a means to reassert or reclaim sovereignty. These ideas are important for two reasons. First, they challenge prevailing wisdom and thus offer an alternative guide for policy. Second, they suggest that our conceptions of sovereignty are unduly narrow and may be increasingly anachronistic. In particular, scholars must consider more deeply the purpose and role of sovereignty in the contemporary world.

INTRODUCTION

Sovereignty, particularly its relationship to international economic institutions, is a burgeoning topic in contemporary scholarship.¹ It is also enjoying a

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resurgence in political discourse in the US and in Europe. At the same time, street protests against the expanding reach of international economic institutions, often couched in terms of sovereignty and democracy, have proliferated since the ‘Battle of Seattle’ in 1999. The evolving institutions of global economic governance are lauded by some; for others, they threaten state sovereignty and impermissibly erode national governance.\(^2\)

Sovereignty is often defined as supreme and independent power or authority in government as possessed or claimed by a state or community in a defined territory. This conception of sovereignty can be broadly traced to Bodin; ‘Bodin ... developed what is commonly regarded as the first statement of the modern theory of sovereignty: that there must be within every political community of state a determinate sovereign authority whose powers are decisive and whose powers are recognized as the rightful or legitimate basis of authority.’\(^3\) While there are many claims about the relationship between sovereignty and international institutions, observers commonly argue that sovereignty is threatened by the ongoing expansion of global governance. Given the tremendous rise in the number and scope of international institutions in the postwar period, this is an important charge and one that

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\(^2\) ‘It is becoming difficult for international economic organizations to meet without attracting crowds of protestors decrying globalization ... some protestors claim to represent poor countries but simultaneously defend agricultural protectionism in wealthy countries. Some reject corporate capitalism, whereas others accept the benefits of international markets but worry that globalization is destroying democracy.’ Joseph Nye, Jr, ‘Globalization’s Democratic Deficit: How to Make International Institutions More Accountable’, 80 For. Aff. 4, 2 (2001) at 2.

\(^3\) See, e.g., David Held, ‘Law of States, Law of People: Three Models of Sovereignty’, 8 Legal Theory (2002), at 3; Philpott advances the pithier ‘supreme authority within a territory’. Philpott, above n 1 at 16. MacCormick defines sovereignty as ‘territorial in character ... [and] power not subject to limitation by higher or coordinate power’. MacCormick, above n 1 at 127. See also F.H. Hinsley, Sovereignty (2nd edn, Cambridge: Cambridge University Press, 1986). Krasner has developed a four-fold typology of sovereignty; this conception is closest to ‘Westphalian sovereignty’, and ‘domestic sovereignty’. Krasner, above n 1 at 9. Krasner elsewhere disputes the importance of sovereignty as final authority; Stephen Krasner, ‘Think Again: Sovereignty’, Foreign Policy (Winter 2001). Bodin’s ideas about sovereignty gradually gained currency, and by the nineteenth century, a leading international law treatise claimed that each state ‘possesses and exercises exclusive sovereignty and jurisdiction throughout the full extent of its territory ... No state can, by its laws, directly affect, bind, or regulate property beyond its own territory, or control persons that do not reside within it, whether they be native-born subjects or not.’ Wheaton, Elements of International Law, Sec. 78 (8th edn, 1866).
is taken seriously by many commentators — including some members of the Bush Administration.⁴

In this article I explore a line of thinking that rejects the dominant view on sovereignty and institutions. Theories in this school of thought counter-intuitively advance what I term ‘sovereignty-strengthening’ arguments about global governance. Some of these arguments are solely focused on international economic institutions — in particular the World Trade Organization. Others have a broader ambit, but certainly include economic institutions within their purview. Rather than argue that international institutions are a threat to national sovereignty, these varied theories contend that international economic institutions — at least under some conditions — actually enhance sovereignty. The ideas I gather under the rubric of ‘sovereignty-strengthening theories’ differ in many respects. However, they collectively highlight an under-explored proposition: that changes in the international system or in domestic politics have already compromised sovereignty in an irrevocable manner, and thus international institutions, while rendering the erosion of sovereignty more legible, actually serve as a means to reassert sovereignty. These ideas challenge prevailing wisdom and offer an alternative guide for public policy. Moreover, they suggest on a deeper level that our theories of sovereignty are unduly narrow and may be increasingly anachronistic.

In Part I of this article I briefly discuss the concept of sovereignty and the premises that undergird much of the current sovereignty debate. I argue that despite the many claims to the contrary, sovereignty is rarely threatened by international institutions; prevailing sovereignty-based critiques are instead usually disguised arguments about reallocations of power and the creation of incentives and disincentives for policy choices. I then turn to the sovereignty-based defense of international institutions. Part II discusses the first strand of argument, which emphasizes rising interdependence in world politics and argues that international economic institutions are the vehicle through which, in a globalizing world, contemporary states fully realize their sovereignty. Part III discusses the second strand, which focuses on enduring problems of collective action and rent-seeking, and sees international economic institutions as a corrective to the manifestation of these problems at both the international and the domestic levels. Part IV compares and contrasts the two sets of ideas. The article concludes by offering some further thoughts on the evolution of sovereignty in a globalizing world.

I. NATIONAL SOVEREIGNTY AND THE THREAT FROM GLOBAL GOVERNANCE

One of the most striking changes in international affairs in the last century has been the tremendous institutionalization of international relations. International economic institutions such as the WTO, the World Bank, and the International Monetary Fund play critical roles in the world economy. As the reach and scope of these institutions grows, however, they are increasingly subject to critique. This is particularly true for international trade law, which has evolved from the relatively simple structure of the General Agreement on Tariffs and Trade to the highly legalized, powerful, and increasingly expansive WTO system.

Contemporary arguments about the merits of international institutions often make reference to the threat they pose to sovereignty, to their lack of accountability and legitimacy, and to the notion of a mounting 'democratic deficit' in global governance. These are distinct charges, but they share a common core. All share the insight that international institutions are making decisions about matters traditionally addressed domestically. Moreover, these institutions often govern in a manner that deviates from, or destroys, traditional domestic political processes. The result is a shift in governance that, many critics argue, inevitably erodes national sovereignty.

A. Conceptions of sovereignty

What does it mean to say that a state’s sovereignty is eroded by or lost to international economic institutions? I argue here that the concept of sovereignty is often misused, and that the language of lost or eroded sovereignty generally stands in for several less exciting topics. These topics are very important, but they are often obscured by the prevailing rhetorical focus on the threat to sovereignty posed by global governance. Below I discuss why the implicit conception of sovereignty in many critiques of global governance is problematic. I defend some better alternative conceptions of sovereignty, each of which suggests that international economic institutions generally do not affect sovereignty. Because sovereignty means supreme or final decision-making authority and control, sovereignty is affected by international institutions only rarely. Much of the contemporary debate over sovereignty and global governance conflates sovereignty with freedom of action. This conception of sovereignty does not stand up to scrutiny, though the underlying question – is membership in a particular international institution worth the loss of freedom of action – remains an important one. It is not, however, a question of sovereignty.

5 The scope issue comes up most frequently with regard to the WTO; See, e.g., Symposium: The Boundaries of the WTO (Jose Alvarez, ed), 96 Am. J. Int'l L. (2002)
7 See the works in above n 1.
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As John Jackson has argued, nearly all sovereignty debates are instead fundamentally debates about power allocation. They are debates over what level – global, regional, national, sub-national – the power to decide a specific issue is or ought to be vested. Federalism in domestic constitutional systems reflects a theory of power allocation; so does the move to international institutions. Both federalism and the creation of international institutions suggest that power is best allocated across several levels of governance, rather than aggregated at a single level. But while the federal architecture of states such as the US was designed deliberately and more or less in a single stroke, the move to international institutions is far more incremental and not nearly as coherent and cohesive a governance decision.

When critics argue that a nation has lost sovereignty to a particular international institution, they are in essence stating that power over a set of issues has been allocated upward. To couch the claim as one of lost sovereignty is intuitively appealing: indeed, the sovereignty-altering nature of power allocation is, in a very broad sense, also the essence of the social contract. Individuals in a state of nature are 'sovereign', and they 'consent' to governmental control over their behavior in exchange for the ordered liberty the state provides. Vattel drew the connection between individuals in society and state cooperation this way: 'the end of the natural society established among men in general is that they should mutually assist one another to advance their own perfection and that of their condition; and Nations, too, since they may be regarded as so many free persons living

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9 Power can be allocated within a given level of government as well: for example, power can be shifted from the legislative branch to the judicial branch. This horizontal reallocation does not directly raise sovereignty concerns, though such shifts can be both cause and consequence of global governance. Power often shifts to the executive branch from the legislative branch, since the executive typically controls foreign affairs.

10 As Judge Easterbrook has suggested, arguably 'the level of government should be matched to the consequences of legal choices'. Frank Easterbrook, 'The State of Madison's Vision of the State: A Public Choice Perspective', 107 Harv. L. Rev. (1994) at 1333–34.

11 Anomalous in many ways, the EU is perhaps an exception here: an international institution that, while radically elaborated over several decades, reflects a particular and fairly coherent vision of governance that animated founding visionaries such as Jean Monnet.

12 In the social contract tradition the consent of individuals is hypothetical and essentially irrevocable. Jeremy Rabkin has argued to me that sovereignty is fundamentally about the creation of a state that can enforce 'the social contract' against the individuals that 'made' the contract; by contrast, a sovereign by definition cannot create such contracts against itself (e.g. with other states) for to do so would be to surrender what it means to be sovereign. In other words, the key to sovereignty is the power to renegotiate whatever contract is entered into. For example, the American South discovered in the US Civil War that it could not renegotiate the contract that created the US; that war established the proposition that the states are committed to the Union permanently.
together in a state of nature, are bound mutually to advance this human society.13

Unlike the hypothetical consent of individuals embodied in social contract theories, however, expressed consent is the traditional basis of international law.14 International institutions derive their powers from the explicit consent of the contracting states.15 This consent is not necessarily permanent. States may allocate power to international institutions in ways that are revocable or irrevocable. The contingency of the delegation is critical from a sovereignty perspective. While the line between revocable and irrevocable delegation is not always clear – as the European Union experience suggests16 – irrevocable delegations of power clearly implicate sovereignty, whereas revocable delegations do not. To be sure, it may be costly for a state to revoke its delegation of power through exit or renegotiation. But when delegated powers can in fact be withdrawn, by definition states retain the ultimate power to decide an issue or choose a policy. With rare exception – in which exit from an underlying treaty or international organization is expressly barred or clearly intended by the parties to be barred – delegations of power by states to international institutions can generally be revoked or renegotiated as a matter of international law.17 (And in practice states have been known to exit international agreements even if such exit is barred as a formal matter of

13 Emmerich de Vattel, The Law of Nations or the Principles of Natural Law (II Classics of International Law edn, 1916) at 6. As this quote suggests, Vattel believed that human beings were naturally sociable rather than driven to sociality by the harmful consequences of uncoordinated behavior. Nonetheless, the general point – that states were and often are thought of as akin to individuals – is amply illustrated by Vattel.

14 Though not exclusively, customary law being a salient example. And the centrality of consent has long been questioned, see, e.g., the Corfu Channel Case (opinion of Judge Alvarez): ‘we can no longer regard sovereignty as an absolute and individual right of every State, as used to be done ... according to which States were only bound by the rules which they had accepted. To-day [sic], owing to social interdependence and to the predominance of the general interest, the States are bound by many rules which have not been ordered by their will.’ UK v. Albania [1949] I.C. J. 43. See also Damrosch, et al., International Law: Cases and Materials (4th edn, 2001), ch 2.

15 Subject to the doctrine of ‘implied powers’. See, e.g., the Advisory Opinion on the Legality of Nuclear Weapons, 1996 ICJ REP. 66, 79, para 25 (5 July): ‘The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers, which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as “implied” powers. Implied powers nonetheless flow from the specific powers international institutions derive from state delegation.

16 See, e.g., MacCormick, above at 94–95. Regardless of the legalities it is very hard to imagine withdrawal from the EU being met by force.

17 The Vienna Convention on the Law of Treaties limits exit to instances where it is explicitly allowed for in the treaty text or the intent of the parties implies that exit is permitted. Treaties rarely explicitly bar exit; often they permit exit with some degree of notice and even more often they imply are silent as to the rules governing exit. The interpretation of a silent text would likely be construed subject to the principle of in dubio mitissimi.
The key point is that revocable delegations do not implicate sovereignty, though they nearly always represent the acceptance of temporary limits on the exercise of sovereign power. If sovereignty is understood correctly, it becomes clear that it rarely is affected by international economic institutions.

A domestic analogy may be helpful. In the US federal context Congress can allocate the power to implement aspects of the Clean Air Act to the states (as it has in fact done), but that does not mean that the federal government has actually shifted sovereignty toward the states. Congress can rescind that delegation through new legislation at any time. The same is true with international institutions: no one seriously thinks, for example, that Japan or Canada cannot leave the World Trade Organization and thus retract whatever power they in essence delegated to that institution, though it may be costly to do so. In fact, the creation of the WTO illustrates the point. In closing the Uruguay Round and creating the WTO the US and the EU withdrew from the original GATT, its predecessor. Final and supreme authority over tariff levels and regulatory barriers remains with the member states. This is not to argue that international institutions such as the WTO have no impact on state behavior – they clearly do. Rather, influencing or shaping state choices ought not be conflated with compromising sovereignty.

There are two somewhat less strict conceptions of sovereignty worth considering in this context. The first looks to veto power rather than revocability as the key criterion for evaluating the loss of sovereignty to international institutions. In other words, sovereignty may be said to be compromised by international institutions when states create a process that generates rules or decisions that they cannot veto ex post. For example, under the new rules of dispute settlement in the WTO no veto of Appellate Body rulings is allowed. Indeed, it is extremely difficult to overturn an adverse decision since the WTO now employs a ‘reverse consensus’ rule: any member, including the prevailing party, may block consensus on a decision by the member states collectively to not adopt a panel or Appellate Body decision. Under this veto-based conception of sovereignty, unlike the revocability-based conception above, member states have lost sovereignty to

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18 North Korea claims to have exited the International Covenant on Civil and Political Rights despite the opinion of the relevant UN committee that the treaty drafters intended to bar denunciation. Larry Helfer is engaged in a project on exit in international agreements (see www.princeton.edu/~lapa), and I thank him for this example.


21 This structure has led to much criticism; See, e.g., Barfield, ch 4, above n 1.
the WTO because they lack veto power over adverse judgments, even though they can ultimately exit the WTO if they choose. Arguably the bite of this lack of a veto depends in part on whether WTO rulings must be complied with or not. While the dominant view is yes, some analysts argue that the member states have no legal duty to comply but may simply except retaliation as a form of punishment.\(^2\) If the minority view is correct, then rulings in the WTO are not in fact generated without a veto by affected states, since states simply pay a price for ignoring those rulings.\(^2\) But if WTO rulings must be complied with as a legal matter, under a veto-based conception of sovereignty the WTO indeed erodes sovereignty through its dispute settlement system.

A second more expansive conception of sovereignty is drawn from German law. Georg Nolte has argued that under German law sovereignty is diminished (or 'delegated') to the degree that international institutions are given the capacity 'to issue binding norms or orders to individuals without any additional act of implementation'.\(^2\) The ability of international institutions to address individuals directly is akin to what some have termed 'supranational adjudication',\(^2\) though that phrase also encompasses provisions, such as those in most bilateral investment treaties, in which private parties may themselves directly challenge the actions of states. Under the German conception, the EU embodies a loss of sovereignty by member states, since EU law possesses both direct effect and supremacy, whereas the WTO – which currently directs rulings only at states rather than private parties – does not. NAFTA is much more similar to the WTO than to the EU, yet it contains a few grey areas: NAFTA Chapter 19 binational tribunals may, for example, direct procedural rulings against private parties, even though the decisions themselves are not automatically supreme over national law.\(^2\)

One might counter all the conceptions I have put forward by claiming that sovereignty so-construed is too strict and crudely-defined – particularly in the

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23 As a practical matter, of course, rather than as a matter of law, member states may simply accept retaliation for some time, as the EU has done in Beef Hormones.

24 Georg Nolte, 'Constitutional Implications of German Participation in Treaty Regimes', in Franck, above n 1 at 268.


26 See, e.g., NAFTA Chapter 19, Rule 58 (1), which permits the panel to directly issue an order to a participant (including a private party): In respect of a panel review of a final determination made in the United States or Canada, where a participant fails to file a brief within the time period fixed and no motion pursuant to rule 26 is pending, on a motion of another participant, the panel may order that the participant who fails to file a brief is not entitled

(a) to present oral argument;

(b) to service of any further pleadings, orders or decisions in the panel review; or

(c) to further notice of the proceedings in the panel review.
first conception, which stressed the revocability of delegations of power. Indeed, implicit in the prevailing view of the impact of global governance on sovereignty is a much more expansive notion of sovereignty. This notion of sovereignty rejects formal distinctions about legal revocability, veto power, direct effect, and the like. Instead, international economic institutions are said to threaten national sovereignty whenever they create substantial roadblocks for certain outcomes and enable others. When these institutions shift some measure of effective control over policy away from national governments, sovereignty is lost or compromised. This is claimed to be true even if states may exit the regime or continue to possess veto powers over its decisions. One might also argue that exit from international economic institutions, though legally permissible – as it expressly is in NAFTA, the IMF, the World Bank, and the WTO, among other economic institutions – can be prohibitively costly for a state.27 Indeed, one reason states join international economic institutions is precisely to lock-in desired policy outcomes.28 Thus institutions are often designed such that exit is hard, rather than easy.

This expansive take on sovereignty treats conceptualizes sovereignty as basically zero-sum: power shifted to the global level is power lost by the state. It is worth digressing for a moment to note that this vision of governmental power as essentially zero-sum is not unique to the question of global governance. Discussions of federalism in the US, especially of the New Deal revolution, typically assert that the federal government aggregated powers that were in essence ‘taken from the states’. As Stephen Gardbaum has written, however, this view misapprehends the nature of power allocation:

First, it mistakenly attributes the character of a zero-sum game to the issue of the powers of the federal and state governments over the economy: what the federal government gains in power the states lose. Although it is most certainly the case that the [Supreme] Court granted the federal government extensive new constitutional powers during the New Deal era, it is very far from clear that these powers were simply transferred from the states as the nationalist account assumes … what occurred in many areas was not a shift from exclusive state authority to concurrent federal and state authority, but a shift from a regulatory vacuum to concurrent powers … 29

As I will illustrate below, there is a credible argument that the creation of international economic institutions similarly enlarges the depth and scope of

27 NAFTA Article 2304 (permitting withdrawal after 6 months notice); IMF Articles of Agreement and World Bank Articles of Agreement, Sections 1 (permitting withdrawal with no delay); Article 14, Section 1 of the Agreement Establishing the World Trade Organization ("WTO Agreement").

28 This is one interpretation of bilateral investment treaties. A similar argument is made in the human rights context; see Andrew Moravcsik, 'The Origin of Human Rights Regimes: Democratic Delegation in Postwar Europe', 54 International Organization (2000).

government power, rather than, as is commonly asserted, simply absorbing aspects of the pre-existing power possessed by nation-states.

The expansive view of the threat to sovereignty posed by international institutions thus argues that, as these institutions accrue decision-making power delegated from governments, sovereignty is necessarily eroded. A concise summation of this view, with specific regard to the WTO, is the following:

with its rules and compulsory adjudication, [the WTO] will surely constrain in significant ways the ability of the United States ... to make decisions without reference to foreign interests that hitherto could more readily have been ignored. Although it is true that Congress may constitutionally pass legislation in derogation of WTO obligations, just as other parts of the federal government may violate WTO obligations without effective challenge under U.S. domestic law, as a practical matter the WTO’s preference for international standards and the certainty of sanctions for violations will inevitably induce governmental decision-makers to prefer compliance with international standards. The resulting practical devolution of decision-making authority to international institutions is the essence of the loss of national sovereignty.30

This passage neatly captures the expansive, ‘de facto control’ definition presented above: the problem posed by the WTO is said to be the scope of its delegated powers, a delegation that results in a shift in the locus of power and decision-making which is politically costly to alter ex post. This argument is the core of many political critiques in the US, particularly with regard to major trade agreements such as the WTO, NAFTA, and the proposed Free Trade Agreement of the Americas.31 Similar views have been embraced by US presidential candidates on the right and the left,32 as well as by activists and politicians in Europe.33 Under this definition any time a quantum of


32 Patrick Buchanan, for example, has written that ‘[T]he World Trade Organization exercises a supranational authority in conflict with our forefathers’ vision of an America forever sovereign and independent.’ Patrick Buchanan, The Great Betrayal (Boston: Little, Brown and Co, 1998).

33 E.g. Susan George, ‘The Problem Isn’t Beef, Bananas, Cultural Diversity or the Patenting of Life. The Problem Is the WTO’, The Guardian (London), 24 November 1999, (‘Without warning, the WTO has created an international court of “justice” that is making law and establishing case law in which existing national laws are all “barriers” to trade, and is sweeping aside all environmental, social or public health considerations.’). For a detailed description of popular and political critiques of IFIs in France see Philip H. Gordon and Sophie Meunier, The French Challenge: Adapting to Globalization (Washington, DC: Brookings Institute Press, 2001).
effective decision-making power is delegated upwards to an international institution national sovereignty is eroded. Indeed, some observers go so far as to argue that today even the most powerful states ‘should no longer be thought of as supreme and sovereign authorities’.

The ‘de facto control’ argument about the erosion of sovereignty proves too much, however. The creation of international institutions and rules about state behavior inevitably influences the behavior of states by raising the costs associated with certain policies. Every instance of cooperation, every delegation to an international institution, erodes sovereignty thus defined. (If institutions failed to alter incentives, there would be little point in creating them and allocating power to them. Indeed, this is the heart of the institutionalist paradigm in international relations theory.) It is undeniable that power allocated upwards is often hard to take back. And it is true that exiting regimes is often costly in practice. In some cases, such as the decision to abolish national currencies and to create a common currency among several states in the EU, it may be so difficult and so costly to exit or alter that decision that one can fairly say the delegation of monetary policy control is effectively irrevocable in practice, whatever the legal rules may be. But such situations are quite uncommon in world politics, the EU notwithstanding. If sovereignty is ‘lost’ or eroded whenever domestic policies are influenced by international institutions – even when a state could readily exit or resist that influence – sovereignty claims are effectively unbounded. Any successful international institution shifts incentives such that states give up some freedom of action. No exit from an international institution is ever cost-free. Consequently, international institutions will inevitably produce outcomes that would not otherwise have happened. This is the very point of such institutions. If sovereignty is defined such that its

34 Michael Hardt and Antonio Negri, Empire (Cambridge: Harvard University Press, 2000). The preface to Empire suggests that the core of Hardt and Negri’s Marxist reading of globalization is in some surprising ways similar to the arguments canvassed in this article, though the body of the book illustrates that the details are theoretically incoherent and lack empirical support.


36 As Paul Stephan notes, ‘when it comes to international law, the exit option remains always open but deeply disturbing.’ Stephan, 1999, p. 1, at 1582. Perhaps true especially for smaller, weaker states, though Stephan’s point – the impact on international law more broadly – sounds more strongly for the powerful than the weak.


38 Aside from the EMU question, whether a member state can exit the EU is a debated one. As MacCormick puts it, ‘the answer to the question whether the states have irrevocably transferred part of their sovereign power to the [EU], or have done so in a merely conditional and revocable way, may for the moment depend on whether you raise the question in the perspective of the law of a member state or the law of the [EU].’ MacCormick, above at 95. Later, he writes that ‘it cannot be credibly argued that any member state of the [EU] remains politically or legally a sovereign in the strict or traditional sense of these terms.’ Id at 133.
erosion is an intrinsic part of international cooperation – a corollary of the operation of every international institution – the concept loses its meaning.

In short, sovereignty, understood as supreme authority and control over policy, is seldom compromised by the institutions of global governance, though these institutions clearly and often deeply shape the choices states make. That influence is of course very important, but it is not related to sovereignty. Rejecting formal distinctions about sovereignty in favor of the expansive, de facto control conception of sovereignty may be attractive, but has two significant problems. First, it misses the fundamental point that sovereignty is in large part a formal attribute. If sovereignty is merely about relative power or the ability to incur or resist costs, the US would be more sovereign than Russia, which is in turn more sovereign than New Zealand, which is more sovereign than Malawi, etc.: a perfect rank ordering of sovereignty would be possible. That conception of sovereignty makes little sense. Indeed, it is not clear under that definition why states ought to be the only possessors of sovereignty, rather than, say, multinationals such as Microsoft. There is an intrinsically formal element to sovereignty, and that element is critical to its meaning. Second, if sovereignty is understood as de facto control over policy, any power allocation to the international level involves some change in sovereignty so defined. As a result, the important issue becomes whether a particular delegation of power is desirable or undesirable, not whether it constrains sovereignty per se: the answer to the latter will in almost every case be yes. Such an expansive view conflates sovereignty with freedom of action and hence drains sovereignty of its meaning. It would make much more sense to discuss power allocations directly rather than in terms of sovereignty.

In sum, I have argued here that the better conception of sovereignty looks to legal revocability and the availability of exit to evaluate the effect of international institutions on sovereignty. That effect on sovereignty is generally very low because only seldom does an international institution rest on irrevocable delegations of power. But even if one embraces a looser conception of sovereignty, such that a lack of ex post veto power or the delegation of supranational adjudicatory powers is sufficient to impinge upon sovereignty, international economic institutions do not typically affect sovereignty. Debates about sovereignty thus frequently stand in for debates about the delegation of power and the purposive tweaking of the costs and benefits of pursuing certain policies. These debates are critically important; in many cases the various costs of international cooperation will outweigh the benefits. But it would be more theoretically coherent and analytically helpful to acknowledge these issues directly. 'In international relations, and even in international law, [sovereignty] is often a catchword, a substitute for thinking and precision.'

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B. Unpacking the conventional critique of international institutions

The conventional sovereignty-based critique of international institutions that I have described rests on three basic premises. The first is that sovereign power is absolute power and thus reallocations of power represent a zero-sum game. If the power to determine or influence certain regulatory rules, for example, is shifted upward to NAFTA or another regional trade agreement, member states are said to have necessarily forfeited some sovereignty over that set of policies. "By entrusting an authority with a certain task, carrying with it command over the requisite powers and means, a slice of sovereignty is transferred from the old authority to the new." 40 I have already discussed some conceptual problems with this claim. The second premise is that reallocations of sovereignty – especially reallocations upwards to international institutions – are presumptively bad, and the retention of sovereignty is presumptively good. In other words, there is a status quo bias to many discussions about sovereignty. While that bias is perhaps defensible, it rarely is defended.

The third premise links up sovereignty to democracy. It asserts that power allocations to international institutions erode sovereignty but also harm democracy, because democratic processes work better the closer the people are to the government. International economic institutions are said to be unaccountable and distant and therefore to create or strengthen democratic deficits. 41 To be sure, such critiques often relate to specific qualities of particular international institutions, such as opaque decision processes or lack of access for affected parties. 42 But underlying these specific complaints about international institutions is often a broader concern that long chains of delegation simply make for poor democracy. 43

41 E.g. Krajewski, above, at 177 ("The democratic deficit on WTO law is thus multidimensional. The classical pillars of democratic legitimacy, negotiations by accountable governments and consent of democratically elected parliaments, are severely weakened in reality."). See also Eric Stein, 'International Integration and Democracy: No Love at First Sight', 95 Am. J. Int'l L. (2001); Kal Rastia, ‘Sovereignty and Multilateralism’, 1 Ch. J Int'l L. (2006).
42 These are both frequent critiques of the WTO, IMF, and World Bank that one hears from non-governmental organizations. The amicus brief debate in the WTO is a salient example, see Georg Umbrecht, 'An Amicus Curiae Brief on Amicus Curiae Briefs at the WTO', 4 JIEL (2001); Gabrielle Marceau and Matthew Setwell, 'Practical Suggestions for Amicus Curiae Briefs before WTO Adjudicating Bodies', 4 JIEL 155 (2001).
43 Though it is possible to defend global governance from a democratic point of view. For example, David Held argues that 'Deliberative and decision-making centres beyond national territories are appropriately situated when those significantly affected by a public matter constitute a cross-border or transnational grouping, when "lower" level of decision-making cannot manage and discharge satisfactorily transnational or international policy questions, and when the principle of democratic legitimacy can only be properly redeemed in a transnational context.' David Held, 'Democracy and Globalization', Max Planck Institute for the Study of Societies, 1997, www.ciaonet.org (visited 29 October 2003). See also Peter Gerhart, 'The Two Constitutional Visions of the World Trade Organization', U. Penn. J. Int'l Econ. L. (2003). I discuss this idea further below.
This third premise reflects an old debate — indeed, a debate of a quite ancient vintage — over the relationship between size and democracy. Until the eighteenth century, the overwhelming view in Western political theory was that small was beautiful: a democracy had to be a city-state or an equivalently diminutive polity to work properly.\textsuperscript{44} In the US, the Framers debated this issue of size vigorously, and several numbers of the \textit{Federalist} were devoted to the question. James Madison’s rebuttal to the traditional view, which eventually won the day, overturned the conventional wisdom on the problems of large size in an intriguing fashion.\textsuperscript{45}

In \textit{Federalist} 10, Madison reasoned that large size, far from being a disadvantage, was in fact a saving grace.\textsuperscript{46} Madison saw the primary threat to democracy in faction, or the power of special interests. The small, direct democracy of the Greek city-state, he argued, offered no cure for the problem of faction and indeed enabled it. By contrast, a large republic necessarily had a greater variety of interests and parties. Greater diversity made domination by faction less likely. In other words, size provided a cure to the threat posed by powerful factions and hence, counterintuitively, large size was desirable in a polity.\textsuperscript{47} To be sure, Madison did not believe that larger was always better. But he did think that a sufficiently large republic had critical advantages over a smaller republic. In time Madison’s argument, the relative success of the US, and the rise of nationalism generally led to a watershed in thought on the size-democracy relationship.\textsuperscript{48} Large democracies became not only empirically common but intellectually well-defended.\textsuperscript{49} Nonetheless, the traditional notion, that large size inhibited democratic processes, remained an influential line of thinking.

This view continues to have strength today. Contemporary critiques of global governance allude, if obliquely, to the traditional view of size and democracy, and often embrace the retention of national sovereignty on the grounds that sovereignty protects democratic processes from external


\textsuperscript{45} Dahl and Tufte, at 10.

\textsuperscript{46} These points are elaborated in Federalist 63. Madison there suggests that large territorial size, not just population size, is beneficial.


\textsuperscript{48} Dahl and Tufte, Id.

\textsuperscript{49} Though this was primarily a nineteenth-century phenomenon. In the twentieth century, democracies tended to be smaller and unitary in structure. Indeed, states in general shrunk in the twentieth century. David Lake and Angela Mahoney, ‘The Incredible Shrinking State’ (manuscript, UC San Diego, 2002).
influence. Rarely – though as I show in this article, not never – is it argued that the expansion of governance beyond the nation-state strengthens sovereignty and democracy. Yet a Madisonian stance can be read to endorse that position.

There are three chief reactions engendered by the conventional sovereignty-based critique of international institutions. One reaction is to pull back, to suggest that reliance on international institutions ought to be curtailed as a result of these failings. The US rejection of the International Criminal Court is a dramatic version of this reaction. The second reaction is reformist: to continue to employ international institutions but to endeavor to fix them through institutional design, to make them more responsive and accountable. This is the dominant reaction both in the legal and policy literatures. The current practice of 'subsidiarity' in the EU is an example – a policy developed in part as a response to the relatively poor democratic pedigree of international governance in the European context. By consciously trying to shift decision-making downward – by essentially creating a presumption in favor of power allocation to the lowest reasonable level – subsidiarity is intended to diminish the democratic and sovereignty deficits that international institutions create. Subsidiarity reforms international institutions by carving out issues that ought to be addressed locally and leaving only those that are properly addressed at the international level.

The third reaction is to dismiss the entire problem as a category mistake: 'world politics is inherently undemocratic and there is little point in lamenting the obvious.' Efforts to 'fix' international institutions are, in this view, fundamentally misguided. This reaction is most closely associated with realist theory in international relations. Realists believe that international institutions are largely epiphenomenal. That is, realists contend that international


51 Madison himself did not appear to go this far, though he acknowledges that it could be advantageous to have a form of global government; see Federalist 43: 'Happy would it be if such a remedy for its infirmities could be enjoyed by all free governments; if a project equally effectual could be established for the universal peace of mankind!'


53 Nye's title, above, n 2, nearly captures this reaction. See also the extensive discussion in Stein, 2001, above, n 43.

54 Subsidiarity refers all political issues to the lowest possible level for resolution. In that sense, subsidiarity in the EU differs from federalism in the US in that subsidiarity is a decision principle rather than a system. On subsidiarity in Europe see Maione, above n 9; Peter L. Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community', 99 Colum. L. Rev. 628 (1999); Paul D. Marquardt, 'Subsidiarity and Sovereignty in the European Union', 18 Fordham Int'l L.J. 616, 617 (1994); J.H.H. Weiler, 'The Transformation of Europe', 100 Yale L. J (1991).

55 See Keohane and Nye, above n 53, at 2.
institutions do not act or 'matter' in world politics directly; they are purely agents of states and reflective of the interests of the powerful. Attempts at making international institutions more accountable or democratic run counter to the fact that international relations are carried out by profoundly unequal states. More to the point of this article, a state would never agree to institutions that diminish its sovereignty unless it is in its interest to do so or some overwhelming power compels it to. In such situations, again, there is 'little point in lamenting the obvious'.\textsuperscript{56} For realists both the alleged democracy problem and the alleged sovereignty problem are rarely soluble, and to focus on such problems in global governance simply misapprehends the nature of world politics.

C. Reconceptualizing the sovereignty-global governance relationship

These three perspectives – rejection of international institutions, reform of them, and rejection of the alleged problem itself – do not exhaust the set of possible reactions. What I term the 'sovereignty-strengthening' view represents a fourth conceptual alternative.\textsuperscript{57} Rather than argue, as do the realists, that the normative critiques of international institutions involve a category mistake – mistaking international politics for domestic politics – the category mistake is of a different kind: mistaking a detriment for a benefit. Just as Madison argued that large size was desirable, not harmful, international economic institutions can be understood as a positive force for sovereignty, not a threat. Theories espousing this view do not necessarily claim that all international economic institutions are sovereignty-enhancing. Nor do they all endorse the same conception of sovereignty. But they do stress the potential for international institutions to actually advance sovereignty. In short, this move, much like Madison's, provocatively turns the conventional critique on its head.

There are two chief variants of this sovereignty-enhancing claim. The first begins with the claim that the nature of sovereignty and of international relations has dramatically changed in the last century. Whereas in the past states asserted sovereignty as autonomy – the freedom to pursue ends unfettered by other sovereigns – in today's increasingly interdependent world international economic institutions are actually the vehicle through which sovereignty is realized. The second variant of the sovereignty-enhancing argument, which incorporates insights from public choice theory, claims that

\textsuperscript{56} As Thucydides described international relations long ago in the Melian Dialogue, the strong do what they can, the weak suffer what they must.

\textsuperscript{57} Yet another alternative is to deny, as an empirical matter, that the democratic deficit exists in a particular case or at least to argue that it is wildly overstated in that case. The best example is Andrew Moravcsik, 'In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union', 40 J. Common Market Stud. (2002).
international institutions can enhance sovereignty for two related but distinct reasons. Both stress the centrality of rent-seeking by individuals and private actors. International institutions may help to circumvent domestic rent-seeking interests which have captured the state, or international institutions may be used as tools to preserve the sovereign power, and associated rents, of government officials whose regulatory powers are challenged by globalization. I explore these arguments in turn below.

II. SOVEREIGNTY, INTERDEPENDENCE, AND THE STATE

It has become commonplace to argue that qualitative changes in the global economy have weakened the ability of states to pursue autonomous policies — or have at least markedly raised the costs of doing so.\(^ {58}\) International drug trafficking is a commonplace example. States may prohibit narcotics, but in a globalized, integrated, and open economy they cannot effectively keep them from entering their borders.\(^ {59}\) Likewise with global public goods of the sort represented by stratospheric ozone depletion: no state can protect itself from a deteriorating ozone layer, nor can any state single-handedly save the ozone layer.\(^ {60}\) These sorts of effects and externalities in turn create incentives for states to cooperate through international institutions.

The standard argument about the sovereignty implications of this process has been addressed above. The alternative conception of sovereignty I explore in this part draws on this broad transformation in the global political economy to instead suggest that sovereignty is enabled rather than weakened by these cooperative efforts. As one prominent scholar puts it, ‘interdependence does indeed challenge the effectiveness of purely national policy, but not the formal sovereignty of states ... on the whole, international institutions reinforce rather than undermine formal state sovereignty.’\(^ {61}\) This broad conception of sovereignty reinforcement has elsewhere been termed ‘the new sovereignty’.\(^ {62}\) In the words of two leading proponents:

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\(^{61}\) Keohane, 1993 at 91.

The largest and most powerful states can sometimes get their way through sheer exertion of will, but even they cannot achieve their principal purposes—security, economic well-being, and a decent level of amenity for their citizens—without the help and cooperation of many other participants in the system... That the contemporary international system is interdependent and increasingly so is not news. Our argument goes further. It is that, for all but a few of self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in good standing in the regimes that make up the substance of international life. To be a player, a state must submit to the pressures that international regulations impose... Sovereignty, in the end, is status—the vindication of the state's existence as a member of the international system.63

The concept of a 'new sovereignty' builds on a recognition of the many changes in the international system and in domestic politics in the twentieth century. The key change is increasing interdependence: the rise of 'globalization', 'complex interdependence', and a raft of novel transboundary and common problems, such as stratospheric ozone depletion.64 More and more, states cannot 'exert effective supremacy over what occurs within their territories'.65 The broad point is that these developments, which are now deeply embedded, profoundly intertwine the interests and fortunes of states and societies.66 States can no longer fruitfully act autonomously, if they ever could.67 Or, more profoundly, most states no longer desire complete

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63 Chayes and Chayes, id, at 27.
64 The concept of complex interdependence shares some similarities with globalization: 'the notion of globalization differs from that of interdependence in that it refers to qualitatively different conditions. Whereas the notion of interdependence refers to a growing sensitivity and vulnerability between separate units, globalization refers to the merging of units... nevertheless, the causal mechanisms mentioned in connection with the driving forces and the ongoing change in world politics are quite similar in both fields.' Michael Zurn, 'From Interdependence to Globalization', in Walter Carlsnaes, Thomas Risse, and Beth A. Simmons, The Handbook of International Relations (London: Sage, 2002), at 235. See also Robert Keohane and Joseph Nye, Jr, Power and Interdependence (Glenview, IL: Scott, Foresman, 1989); Philip G. Cerny, 'Globalization and the Charging Logic of Collective Action', 49 International Organization (Autumn 1995).
65 Keohane 1995 above n 59 at 176–77.
66 On the dramatic end of the first wave of globalization, see Harold James, The End of Globalization: Lessons from the Great Depression (Cambridge: Harvard University Press, 2001). It is not clear that the current wave is deeper or more significant than the first, though the more widespread view is that it is. For an overview see Richard Baldwin and Philippe Martin, 'Two Waves of Globalization: Superficial Similarities, Fundamental Differences', NBER Working Paper 6904, January, 1999. One clear difference between the two eras is that there are many shared global common issues that raise interdependence concerns (e.g. transboundary air pollution) today—and which give rise to global governance—that simply did not exist on anything like the same scale in the pre-World War I era.
67 Even the most powerful states 'cannot achieve their principal purposes—security, economic well-being, and a decent level of amenity for their citizens—without the help and cooperation of many other participants in the system, including entities that are not states at all'. Chayes and Chayes, 1995 at 27. The core insight of institutionalist theory in international relations is a precursor to this insight: institutionalists argued that states create regimes to solve collective action problems and hence enjoy gains they could not access autonomously. See, e.g., Keohane, 1993, above n 1.
autonomy because autarky cannot provide them with the goods and outcomes they and their societies now require.

The latter formulation points toward a second, closely related change, one particular to the postwar democratic order: the shift in state-society relations in advanced industrial democracies. This shift concerns the nature of the economic and social order and the state's role within it. Political authority represents a fusion of power and legitimate social purpose.68 The legitimate social purposes for which state power could be wielded changed in the West (and elsewhere) after the Second World War. The postwar international economic order reflected what John Ruggie famously termed the compromise of 'embedded liberalism'. This order was multilateral in character, so as to avoid the ruinous economic unilaterals of the interwar period.69 But, unlike the old nineteenth-century gold standard liberalism, it was predicated upon domestic intervention into the economy. There are many arguments about the transformation to embedded liberalism. The important point here is simply that societal objectives and expectations about the government's responsibility to ensure domestic economic and political stability had changed markedly.70 This transformation meant that as a political matter only certain kinds of international legal regimes could be sustained.71 It also meant that those legal regimes were now important vehicles for states to fulfill their new social purposes.

Linking these arguments together helps make sense of the claim that international institutions — in the contemporary context — are in fact the medium through which sovereignty is created or practiced rather than a restraint upon it. In this view, the 'only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system'.72 Isolation from the increasingly dense international context 'means that the state's potential for economic


70 This is not to say uniformly; there is considerable variation in the structure of capitalism and the role of state in the major economies of the world. See, e.g., Peter Hall and David Soskice (eds), The Varieties of Capitalism: The Institutional Foundations of Comparative Advantage (2001).

71 'In sum, efforts to construct international economic regimes in the interwar period failed not because of the lack of a hegemon. They failed because, even had there been a hegemon, they stood in contradiction to the transformation of it in the mediating role of the state between market and society, which altered fundamentally the social purpose of domestic and international authority.' See Ruggie, above n 42, at 208.

72 See Chayes and Chayes, above, at 27.
growth and political influence will not be realized.\textsuperscript{73} Far from being threats to sovereignty, international institutions ought to be understood as instruments that strengthen or instantiate state sovereignty, given a particular, historically-contingent contemporary state of the world. Indeed, as one scholar argues, given the current world economic system 'the United States can better promote economic growth, prosperity, and job creation through international cooperation, specifically the WTO, than it can acting alone. . . . United States sovereignty is not diminished by such participation, and the accountability of democratically elected officials to the people is not reduced.'\textsuperscript{74}

Given a world in which largely irrevocable changes in the global economy have destroyed the ability of states to prosper under autarchy, and in which states must achieve social objectives to be legitimate, international institutions are now the primary means by which states may prosper and achieve social objectives. Consequently, they are the primary means by which states may reassert or express their sovereignty. Institutions actively aid states in this reassertion of sovereignty.\textsuperscript{75} This is a fundamentally transformationalist argument: it rests on the claim that both the international system and state-society relations were transformed by events of the twentieth century. As a result, the nature of sovereignty itself is said to be transformed.

Whatever its other virtues, this argument rightly highlights the importance of economic and political context for conceptions of sovereignty. Sovereignty, in other words, is an evolutionary rather than a static concept. The ancient Greek belief in the virtues of the small city-state was partly predicated on a particular world. In this world, nearly all political decisions could not only be made, but be made effectively, within the sphere of the city-state.\textsuperscript{76} As a result, institutions above the state were basically functionally superfluous. In a highly interdependent world, however, the disparity between political boundaries and economic or ecological boundaries renders effective self-government highly problematic on a purely national scale, even for large and populous nations. Effective government may now not only tolerate but require some institutions above the state. It is this process of rising interdependence leading to decreased national governance capacity that has undermined

\textsuperscript{73} Id.


\textsuperscript{75} Empirically, one could claim that most international institutions are in fact sovereignty-enhancing because they offer a means by which states can manage interdependence and provide desired social goods to their citizens. But the argument can also provide a normative baseline against which international institutions can be critiqued: those that fail to provide such goods are not sovereignty-enhancing and should be avoided or dismantled.

\textsuperscript{76} Dahl and Tufte distinguish two aspects of governance: system capacity and citizen effectiveness. System capacity refers to the ability of the polity to respond fully to citizen preferences. A more globalized, interdependent world by definition is one in which the state's system capacity is diminished, and it is this process that this implicitly reflected in the arguments I analyze here. See Dahl and Tufte, above n 45, at 4.
national policy responses. This – along with a shift to more demands by citizens upon the state – underpins the concept of the new sovereignty and gives it its transformationalist flavor. A corollary of this argument is that sovereignty in this new sense is most pronounced in the liberal West. It is the states of the West, tightly integrated economically and closely tied politically, that best embody the concept of the new sovereignty. The EU represents the apotheosis of this ‘logic of the West’.

There is also an implicit representational element in this conception of sovereignty. On the one hand, the idea of a ‘new sovereignty’ is predicated on the satisfaction of domestic preferences, which implies some principal-agent relationship between society and state. On the other hand, by arguing that ‘sovereignty, in the end, is status – the vindication of the state’s existence as a member of the international system’, proponents suggest that societal demands are secondary; what matters for sovereignty is participation in international society. A state is sovereign when it is an active player in the system, rather than an autonomous and unfettered actor. This line of argument, uniquely among the claims examined in this article, touches on the relational aspects of sovereignty. It highlights the importance of sovereignty as a status that other states in the international system supply. An entity can declare itself a state, print money, and own territory, but if the rest of the states do not recognize it as such it lacks sovereignty.

The focus on the relational aspects of statehood is evocative of the English School of international relations theory, which broadly argued that states live in an ‘anarchical society’. The canonical English School definition of an international society is a group of states that ‘conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions’. States exist prior to international society; international society is a system that waxes and wanes. One can interpret the new sovereignty argument through this prism to mean that, under current circumstances (globalization, economic interdependence), an international society exists. Given an interdependent world, a state that fails to be an active participant in international society fails to be fully sovereign. It will not be recognized as such by its peers.

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78 See especially Hedley Bull, The Anarchical Society: A Study of Order in World Politics (New York: Columbia University Press, 1977). Bull writes that ‘The argument, then, that because men cannot form a society without government, sovereign princes of states cannot, breaks down not only because some degree of order can in fact be achieved among individuals in the absence of government but also because states are unlike individuals, and are more capable of forming an anarchical society.’ Bull at 50–51.

79 Ibid at 13.
The macro changes in the international system – such as increasing globalization or interdependence – that I have thus far stressed are of course not simply exogenously-determined. International economic institutions have shaped and fostered the rise of interdependence even as they help to manage and channel it. In this sense international institutions play a dual role. They are tools that states use to reassert and regain sovereignty; yet they also promote processes that help erode state autonomy and power.

In closing, it is important to underscore that the idea of a new sovereignty does not directly address the accountability concerns that animate much of the contemporary debate over international economic institutions. This debate is often about deficits in the processes of global governance; in creating increasingly powerful international institutions to help us achieve the aims we desire, have we harmed the democratic values that lay at the heart of the modern liberal state? Reconceptualizing sovereignty as membership in good standing in the society of states does not directly address this issue. The move to international institutions can be done in ways that are more or less accountable, more or less transparent and open. However, if state legitimacy is partly grounded in effectiveness, effective international economic institutions may be legitimate – because they are instrumentally useful – even though they lack accountability in the usual sense. (A domestic analogy is central bank independence.) Of course, it is not clear that a lack of democratic pedigree correlates with greater effectiveness, though in the trade context this may well be true.

In short, proponents of a new sovereignty claim that, state-society relations have been transformed in a manner that is significant for conceptualizations of sovereignty. Democratic governance entails responsiveness to growing societal demands. While states could once be relatively autarchic, today interdependence and globalization make it impossible for states, acting alone, to provide the policy outcomes that publics desire. Sovereignty in its traditional autarchic sense is thus lost because of broad changes in the international system as well as broad changes in the demands of citizens. International institutions, far from a threat to sovereignty, are now said to be the means by which states satisfy these new and more extensive demands. International institutions are, paradoxically, saviors of sovereignty.

80 See Raustiala, Sovereignty and Multilateralism, above n 42.

81 As Keohane and Nye note, 'accountability is sometimes treated as a good per se, but it is an instrumental value, subject to being subordinated as well as traded off against other values.' Keohane and Nye, 2001, above, n 53, at 5. They distinguish several forms of accountability. Accountability is sometimes deliberately withheld, as in courts (the counter-majoritarian difficulty) and central banks. (In both cases there is some accountability through processes Keohane and Nye term reputational accountability.) This suggests that we need to approach the accountability question in a more nuanced way.
III. SOVEREIGNTY AND PUBLIC CHOICE

The second strand of arguments about strengthening sovereignty through global governance takes a quite different tack, though there is significant overlap in some respects. There are two variants of this argument. Both build on public choice theory, and hence both begin with the presumption that politics and law are arenas of struggle in which actors seek private gain. Public choice theorists have illustrated the many ways in which public institutions may be used for private ends. Public choice analyzes political actors and activities using the same set of tools and assumptions deployed for economic actor and activities; the theory views politics and economics as shared pursuits, theoretically and empirically.82

Public choice theory 'presumes that governmental policy reflects the equilibrium outcome of a rivalrous process among competing interest groups who try to cause governmental policy to further their own ends'.83 As a result, the state is a normatively problematic entity – perhaps necessary to realize certain aims of a good society, but highly prone to rent-seeking and capture. Though this link is not always made explicit, traditional public choice models of legislation imply that as rent-seeking diverts resources and policies toward special interests, democratic processes – and popular sovereignty – are undermined. Rather than act as faithful agents, state actors will use state power for their own personal ends; to enhance their power or secure private goods.

Public choice theory suggests that international economic institutions may enhance rather than erode national sovereignty in two different ways. First, international economic institutions can strip certain policy choices away from the state, thereby stripping them away from the rent-seeking private actors that accumulate around state power like so many moths to a flame. The result is policy that is, counter-intuitively, more faithful to popular preferences. Sovereignty is strengthened because citizens are understood in this argument to be the repository of sovereignty. The second argument claims that regulatory officials use international economic institutions to preserve sovereignty – and their personal and institutional power – in the face of exogenous and destabilizing change in the international system. In other words, there is both an 'internal' and an 'external' threat to sovereignty that international institutions may ward against.

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82 This can be said of rational choice theories in the social sciences generally; See, e.g., Donald P. Green and Ian Shapiro, Pathologies of Rational Choice Theory (New Haven: Yale University Press, 1994), ch. 1.

A. Majority-reinforcement theories

The first and most significant strand of this branch of sovereignty-enhancing arguments, which I label 'majority-reinforcing', emphasizes the internal threat to sovereignty. It focuses on international economic institutions, in particular trade agreements, and starts with the commonplace observation that these institutions are shifting decision-making away from traditional domestic political processes. The now-familiar conventional critique is that such institutions are worrisome because they are not transparent, lack public participation, and strip away the sovereignty of states. Yet majority-reinforcing arguments claim that this shift away from domestic politics and toward global governance is precisely the advantage of international institutions. By taking decisions out of the national realm, international economic institutions – if properly constituted – may depoliticize policy choices, permitting them to be handled in a principled manner that blunts the power and access of rent-seeking interests. The protectionist bias in domestic economic policy is thus circumvented by going above the state.\(^\text{84}\)

The specifics of the majority-reinforcement argument have been elaborated largely in the context of international trade. For example, Ernst-Ulrich Petersmann argues that given the organizational advantages that protectionist interests possess in domestic policymaking, trade protectionism represents a constitutional failure.\(^\text{85}\) Due to inadequate constitutional safeguards, governments fail to pursue national consumer welfare as the dominant trade policy objective. International trade law, by constraining protectionist policies, is the solution to this dilemma. Other proponents echo this set of claims. Looking at the WTO, they argue that it is a normatively attractive institution because it 'can make national governments more responsive to their constituents' priorities, tastes, and development goals'.\(^\text{86}\) Moreover, properly constituted the WTO can 'actually reinforce, rather than weaken, an important element of sovereignty'.\(^\text{87}\) And, '[t]he WTO does so without weakening other strands of Westphalian sovereignty'.\(^\text{88}\)

The key here is how sovereignty is conceptualized. Sovereignty is understood in these arguments as closely connected to the ability of citizens to choose the policies they desire. If a polity lacks that power, they are not fully sovereign. In Stephen Krasner’s typology of sovereignty, this is closest to what

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\(^{84}\) As Peter Spiro characterizes it (tongue seemingly in cheek), in this vision 'we see the possibility of a paradise regained and magnified, that of free-market, pre-New Deal federalism taken to global proportions'. Peter Spiro, 'New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace', 18 Cardozo L. Rev. 957 (1996) at 957.


\(^{87}\) Ibid, at 529.

\(^{88}\) Ibid, at n 90.
he terms domestic sovereignty: ‘the organization of public authority within a state and the level of effective control exercised by those who hold authority’. Majority-reinforcement theory embraces the hand-tying that flows from the effective delegation of policymaking to the international level because hands-tying produces policies that mimic those we would see if public authorities in fact were perfect agents of the people held effective control domestically. In a perfect world, recourse to the international level would not be necessary. But given the realities of rent-seeking at the domestic level, global governance, by restraining rent-seeking protectionists, reinforces popular sovereignty. Reallocating power upwards permits society to recapture control of important economic decisions.

These arguments build on the insights of earlier trade theorists, such as Jan Tumlir, who first reasoned that economic protectionism is a constitutional failure and thus free trade, enforced internationally, was a beneficial means to correct mistaken and even undemocratic policy choices. Frederick Hayek made similar arguments. International institutions become saviors of sovereignty because they unshackle policymaking from the illegitimate power of concentrated special interest groups. In so doing, this argument goes, they permit the policies the people would actually want—if they were not organizationally unprivileged and rationally ignorant—to be realized. International institutions thus ‘correct’ flawed domestic institutions.

This general argument does not directly depend on a public choice underpinning, though public choice gives it particular bite. (Several scholars of distinct theoretical persuasions have made broadly similar or at least consistent arguments; indeed, the fundamental notion that trade agreements tie the hands of governments and therefore insulate them from the siren-songs

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90 This of course presumes that majority preferences exist and are politically ascertainable, a proposition that has been debated in the rational choice tradition in political science for decades. The seminal text is Kenneth Arrow, Social Choice and Individual Values (New Haven: Yale University Press, 1951).

91 In the words of Robert Hudec, ‘Tumlir argued that removal of the power to discriminate would by itself make a substantial contribution to the reform of domestic constitutional process, indirectly, because discrimination is often the key element in the type of deals made within the “black box” of uncheckd executive power.’ Robert Hudec, ‘The Role of Judicial Review in Preserving Liberal Foreign Trade Policies’, in Robert Hudec: Essays on the Nature of International Trade Law (London: Cameron May, 1999). Special interests may also hijack liberalizing trade rules to their own end. As Jeff Artik notes, ‘The traditional view of capture of domestic trade policy is that local producers engage the national political apparatus to erect protectionist barriers. The more recent view is that multinationals, which have a more universal interest in eliminating barriers, have become dominant in national trade policymaking ... while the direction of influence may have shifted, both the old story (protectionism) and the new (free trade treaties) reflect diminished public participation.’ See Artik, above, n 1, at 11-12

92 Hayek wrote in The Road to Serfdom of the need for international authority to cabin the economic power of special interests. See Petersmann above n 54, at 166.
of protectionist interests is commonplace. The majority-reinforcement argument also applies to domestic institutions. Following this logic, central banks might be an example of sovereignty-enhancing institutions. The very point of central bank independence is to register them immune from democratic control in any immediate sense. Central banks smooth out economic cycles, presumably decreasing both inflation and recession — exactly the sort of managerial macro-economic intervention that post-war democratic societies demand of their governments. They are also largely unaccountable when compared to most executive and legislative institutions, and this lack of direct political accountability is arguably what makes them effective. 

Judiciaries exhibit similar qualities — despite a decided lack of accountability, courts remain legitimate because they perform satisfactorily and because, in many constitutional traditions, courts are explicitly intended to be relatively insulated from democratic politics. (Yet, as is often argued in the US context, courts are meant to be counter-majoritarian institutions. Majority-reinforcement theories of international institutions look to courts because they operate on principled rather than political bases and therefore resist supposedly strong but wrong demands from discrete, insular, and well-organized minorities.) The majority-reinforcement theory, unlike the other two strands of argument discussed in this article, directly tackles the conventional debate over democratic deficits in global governance. International institutions, though on the surface undemocratic — subject to long chains of delegation and so forth — are said to be ultimately more faithful to the preferences of citizens.

Whether one endorses majority-reinforcement of this type as a normative matter, it is debatable empirically whether the development of international economic institutions comports with the underlying causal theory. A key assumption of majority-reinforcing arguments is that rent-seekers dominate and deform domestic political processes. Yet it is not clear why the same rent-seekers do not similarly dominate international political processes, in particular since national governments are the architects of international institutions. In other words, such theories are hazy on how governments successfully put into place majority-reinforcing international institutions that contravene the preferences of powerful actors, when these actors are so influential that they can resist national policies that have a similar effect. It may be that governments can do so in the trade context by successfully bundling many disparate policies into a giant logroll. Or governments may use structural manipulations, such as giving the executive certain agenda-setting

93 E.g. Abbott, above n 84. Abbott doesn’t make a specific sovereignty claim, though he does lay out the dilemma — the choice between satisfying politically powerful procecionists or the larger society — that drives the sovereignty argument I have described. This argument is standard in the trade literature; see, e.g., Barfield, above n 1.

94 I thank Jeff Dunoff for elaborating this point.
powers as in the US ‘fast-track’ or trade promotion authority system. The point here is not to debate the causal story at length, but rather to claim that to be persuasive, majority-reinforcement theories must specify how a government captured by powerful rent-seeking actors can create an international economic institution that trumps the preferences of those same actors.

B. Sovereignty and bureaucratic power
The second strand of public choice sovereignty arguments is less theoretically sophisticated and more guarded about the normative implications of bolstering sovereignty. Like the new sovereignty ideas discussed above, this strand of argument emphasizes the gradual loss of control over transboundary goods and harms. Sovereignty here is understood as the ability to restrain these effects (‘interdependence sovereignty’, to use Krasner’s terms). For example, Enrico Colombo and Jonathan Macey examine international regulatory cooperation in a number of areas. As methodological individualists informed by public choice theory, they focus on the incentives of national regulatory officials rather than of ‘states’. These officials seek to preserve or enhance their power. The thesis is that technological change, market processes, and other exogenous variables may deprive the regulators of a particular country of the power to act unilaterally... When this happens, [they] will have strong incentives to engage in activities such as international coordination in order to survive. Viewed from this perspective, it is clear that the trend toward international agreements and the formation of international institutions are consistent with the basic desire of governmental actors to maintain their sovereignty. Such agreements and institutions ought to be viewed as attempts to preserve as much autonomy as possible in the modern world.

I term this a ‘bureaucratic sovereignty’ argument. Unlike the majority-reinforcement theory, which also draws on public choice theory, here the threat to sovereignty is external rather than internal: located in the international system rather than in the domestic political sphere. The

96 Krasner, above n 1 at 9.
97 See Colombo and Macey, above n 84, at 926.
98 Colombo and Macey somewhat inconsistently use the term ‘sovereignty’. They assert that ‘the concept of sovereignty is central to the notion of the state’ yet also argue, drawing on public choice theory, that regulators engage in cooperation to increase or preserve their own power. They go on to argue that ‘the formation of international institutions is consistent with the basic desire of governmental actors to preserve their sovereignty.’ Since their methodological individualism leads them to reject the idea that states have preferences (‘institutions in general, and governments in particular, do not have preferences, people do.’) it is not entirely clear what they mean by the claim that government actors desire to preserve ‘their’ sovereignty. Ibid, at 925, 926, 931.
animating problem is not rent-seeking by domestic interest groups but technological change and increased interdependence which erode the ability of regulators to achieve their desired ends. For Colombatto and Macey, the rise of complex interdependence challenges national law and renders national regulators increasingly marginal. Indeed, ‘as international borders have become virtually irrelevant in global capital markets, regulators have been forced to enter international agreements in order to remain relevant.’ These agreements represent a reaction to a globalizing world.

An alternative view, not necessarily contradictory, is that states will embrace ‘better’ policies as a result of deepening interdependence and globalization. As a high-ranking official of the US Treasury Department once wrote, ‘the loss of sovereignty by governments to capital markets is a new paradigm that will reward governments with good policies and punish those with bad policies.’ Bureaucratic sovereignty arguments do not take a stance on this question, but instead emphasize the ways in which international institutions can be used by regulatory officials to rein in such external forces or at least blunt their impact. Global governance is the means by which regulators’ relevance is maintained, even if power is seemingly delegated upwards.

When looked at closely, the bureaucratic sovereignty claim shares much with that of the new sovereignty. In both lines of argument it is change in the nature of the international economy – change in the density and velocity of transactions, leading to greater interdependence – that as a positive matter explains the rise of international institutions. Both theories are, in this respect, transformationalist. (Macey and Colombatto are less consistent on this point, in part because sovereignty is in fact a quite under-theorized concept in their argument.) Given a certain set of preconditions – interdependence, global markets, etc. – sovereignty is actually preserved through collaboration, not autarky. But unlike in the new sovereignty argument, the claim here is not that international economic institutions enhance the provision of goods to societies; rather, they enhance the provision of private goods to national regulators. Regulators react to changes in the economy and indeed are forced to compromise – for compromise is inherent in global cooperation – because cooperation is the only way they can regain or retain some measure of control. But the key driving forces are the preferences of national officials, who use international institutions to secure power and rents.

99 Ibid, at 954.
100 Id, at 954.
101 Deputy Secretary Tim McNamar, quoted in Franck, above n 1 at 1.
102 For example, in the conclusion of the article they write, ‘local bureaucracies will enter international agreements that sacrifice some of their national sovereignty in order to avoid the specter of becoming irrelevant.’ Colombatto and Macey at 955.
103 The two are not, of course, mutually exclusive.
As in the new sovereignty arguments, here too international institutions play a double role. They are the means by which regulators protect or reassert sovereignty in the face of international interdependence, but they are also part of the underlying cause of that interdependence. While bureaucratic sovereignty arguments refer explicitly to ‘exogenous processes’ in the global economy as the key variable undermining the ability of national regulators to act unilaterally, these processes are not in fact wholly exogenous. International economic institutions promote the sort of market expansion, relative price changes, and technological innovation that they place under the rubric ‘exogenous’. Nonetheless, the global economy is sufficiently active and autonomous that their characterization is defensible. As globalization expands, and economic activity, in particular capital flows, increasingly moves ‘offshore’, international institutions provide a way for national regulators to reassert their power and regain some measure of lost control.

IV. COMPARISONS

These varied ideas about the sovereignty-enhancing powers of international economic institutions differ in several important ways. For one, they embrace inconsistent underlying theories of governmental behavior. Some scholars presume good faith and largely public-regarding behavior on the part of government officials. The various public choice visions assume that government officials, as well as private actors, are more venal and endeavor to use the state as a vehicle for personal gain.

More importantly, the various strands of sovereignty-enhancing arguments differ as to why international institutions strengthen sovereignty. These differences exist despite the fact that the sovereignty-strengthening arguments all share a critical premise: that the alleged threat to sovereignty posed by global governance is illusory because in fact sovereignty is already compromised and threatened. The conventional account about threats to sovereignty is thus mistaken, they argue: the chief threat is resistance to global governance, not global governance itself. But the reasons given as to why the conventional debate on sovereignty and international institutions is wrong vary based on the underlying causal theory embedded in each of the three approaches I have analyzed.

For example, the new sovereignty view rests on a causal story of deep changes in economic interdependence. The major contention is that rising interdependence has eroded traditional sovereignty (understood as policy


105 Whether this in fact explains the creation of such institutions is another matter.
autonomy of the state). This erosion is, in a sense, broadly akin to that of an irrevocable delegation of power to a global institution: states cannot readily put the genie of globalization back in the bottle. Given this fundamental and largely irreversible set of changes, autarchy is an empty approach. In an interdependent world the policy outcomes citizens demand cannot be achieved unilaterally. Sovereignty in its fullest sense can only be obtained through the rejection of an autonomy-based conception of statehood. International economic institutions, by mediating the high levels of interdependence now prevalent among states, return some measure of control to states even as these institutions make more legible the fact that states increasingly lack the policy autonomy they once possessed. But it is not, in this argument, international institutions themselves that are threatening sovereignty. Rather, the fundamental deepening of economic interdependence in the postwar period has removed the ability of states to be autarchic. Sovereignty, to be recaptured, must be produced through collaboration. Having made the loss of sovereignty legible, international institutions ironically have become the target of sovereignty-based political attack.

The bureaucratic sovereignty argument similarly emphasizes changes in economic interdependence as the key causal factor that permits international institutions to strengthen sovereignty. In this argument the same rising interdependence just discussed places great pressures on national regulatory officials. In an effort to preserve or recapture their waning power and control, these officials respond by creating international institutions. Here, as in the new sovereignty conception, it is fundamental, irrevocable changes in the international political economy that have compromised sovereignty. The turn to international institutions is similarly reactive.

By contrast, majority-reinforcement arguments tell a very different causal story. They stress the role of internal, domestic factors. What is causally significant for majority-reinforcement theory is the rise of the regulatory state

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106 Following Krasner, globalization here is said to reduce ‘interdependence sovereignty’. Krasner is an outlier in this debate as he is quite skeptical about the alleged change in interdependence sovereignty: ‘It is nowhere near as self-evident as many suggest that the international environment at the end of the 20th century has reached unprecedented levels of openness that are placing new and unique strains on states’. Krasner, above n 1 at 13. Keohane exemplifies the modal view that interdependence compromises states’ effectiveness or policy autonomy (which he terms ‘operational sovereignty’), though he, like the other theorists canvassed in this article, argues that international institutions often strengthen sovereignty in its more formal sense. Keohane, above n 1.

107 Again, prior waves of globalization have crashed and there is no reason to believe that this wave cannot end as well. See James, above. But the differences are sufficiently profound between the two waves (see Baldwin and Martin, above) that it is highly unlikely that globalization/interdependence is reversible in any intentional sense — and surely not by the actions of a single state.

108 This focus on interdependence sovereignty is commonplace; even Marxist analyses of globalization take it as a starting point. See, e.g., Hardt and Negri, Empire, above n 34 at preface: ‘the primary factors of production and exchange — money, technology, people, goods — move with increasing ease across national boundaries; hence the nation-state has less and less power to regulate these flows and impose its authority over the economy.’
and its accompanying rent-seeking interest groups. These developments shifted de facto control over national economic policy to private actors. This in turn caused a shift away from majority preferences and toward protectionism and rent-seeking. Given this, international institutions provide a way to recapture a "paradise lost" in the wake of the Great Depression. Changes in interdependence per se play no direct role in explaining why international institutions strengthen sovereignty. International institutions – properly constructed – instead simply permit the instantiation of the policies societies would choose at the national level were their sovereignty still intact. The other causal factor identified by the new sovereignty theorists – the nature of state-society relations – is present in majority-reinforcement arguments only in an indirect sense. The postwar compromise of embedded liberalism led to, and reflected, the rise of the regulatory state and thus indirectly created the conditions which permit international institutions such as the WTO to now play a sovereignty-strengthening role. In other words, but for embedded liberalism, there would be no sovereignty-strengthening international institutions.

Finally, the ideas surveyed in this article differ in terms of the range of international institutions that they suggest will enhance sovereignty. The idea of a new sovereignty implies that nearly all international institutions may strengthen sovereignty. The key issue is the nature of international problems and of societal demands. The international institutions which assist states in instantiating their sovereignty – in realizing the status of sovereign – are those institutions that help states manage the challenges of globalization, address needed public goods, and meet the demands contemporary societies place upon them. This is likely to be a large group, not limited to international economic institutions. In most cases, and for most states, the new sovereignty argument suggests that a rich array of international institutions can strengthen sovereignty.

The bureaucratic sovereignty argument similarly implies that any international institution which improves the ability of government officials to control the effects of interdependence is sovereignty-enhancing. In fact, international institutions which do not are logically precluded by the underlying theoretical assumptions of the argument. If government regulators are "rationally self-interested ... [and] attempt to maximize their personal power and wealth even when these selfish ends conflict with public-spirited goals" then in equilibrium we should rarely see international institutions that fail "to maintain [regulators'] sovereignty." The implication is that many if not all international institutions are sovereignty-strengthening.

109 See Spiro, above n 35.

110 One might hypothesize, however, that rising interdependence would strengthen the incentives to embrace the sort of market-enhancing measures that majority-reinforcing institutions such as the WTO or IMF promote, if so, rising interdependence can be seen to play a minor causal role in the process.

111 See Colombatto and Macey, above n 84, at 929, 926.
By contrast, the majority-reinforcement approach valorizes a much more narrow set of institutions. To reinforce majority preferences, the institutions in question must employ rules which reflect the underlying policy preferences of societies. These preferences are generally assumed or asserted. In the trade context, for example, majority-reinforcement proponents do not demonstrate a preference for free trade as much as deduce it from a series of other preferences, such as the desire for more wealth. This desire in turn entails a preference for free trade if neoliberal economic theory is correct. The latter point is critical to the argument.\textsuperscript{112} But even stipulating that in fact most polities prefer open borders to protectionism, only international institutions that reinforce this preference, rather than various preferences of special interests, will strengthen sovereignty. To remain sovereignty-enhancing, moreover, international institutions must also avoid becoming themselves a medium for rent-seeking. This is not easy – international economic institutions can readily become forums for redistribution, as bureaucratic sovereignty arguments make clear. Indeed, even some majority-reinforcement theorists assert the WTO is in danger of overreaching and falling into this trap.\textsuperscript{113}

Consequently, aside from international free trade institutions that employ circumscribed non-discrimination norms, the majority-reinforcement argument suggests that there are relatively few international institutions which are likely to be sovereignty-strengthening. In addition to properly structured international trade agreements, one candidate is the International Monetary Fund. The purported aim of IMF structural adjustment lending, for example, is to facilitate moves to free markets. These loans allegedly enable governments to resist entrenched rent-seeking interests and to substantially reform their economies. This reform is politically and economically costly; hence IMF structural adjustment lending is a necessary aid. Neoliberal economic theory argues that structural adjustment produces growth and wealth. Like free trade, from a public choice perspective one could consequently deduce that most individuals, were they not subject to collective action problems, would favor a ‘structurally adjusted’ economy over a non-adjusted one. The IMF enables states to circumvent the special interests which prevent this outcome and therefore block the (supposedly) sovereign will of the people.\textsuperscript{114}

In sum, the three strands of sovereignty-strengthening arguments I have examined all share the fundamental premise that state sovereignty in the traditional sense of autonomy is already under attack and already weakened.

\textsuperscript{112} See Petersmann, above, n 54; the same can be said for McGinnis and Movsesian, above, n 87.

\textsuperscript{113} McGinnis and Movsesian, above, n 87.

\textsuperscript{114} The veracity of the underlying causal account is disputed; See, e.g., James Vreeland, \textit{The IMF and Economic Development} (Cambridge: Cambridge University Press, 2003). Vreeland finds that IMF loans generally hurt growth and exacerbate income inequality while aiding certain, politically connected, members of a polity.
They share as well a basic solution: the use of international institutions to restore or strengthen sovereignty. In their details, however, they vary markedly. While it is thus unsurprising that the commonalities among these ideas have not been previously recognized, the commonalities are nonetheless significant. Collectively, they suggest that the conventional account about sovereignty and global governance is conceptually flawed or at least far too limited. The mainstream debate mistakes the solution for the problem: it fails to consider how international institutions may strengthen sovereignty even as they render the challenges to sovereignty more apparent to citizens. Rhetorically, appeals to sovereignty have great political salience and are therefore predictably common; analytically, they tend to obscure rather than reveal the fundamental issues at stake in the incremental evolution of global governance.

Finally, rethinking the relationship between sovereignty and international institutions suggests some important parallel arguments. Like the sovereignty problem allegedly posed by global governance, the problem of democratic deficits in international lawmaking can also be reconceptualized in a way that renders international institutions a corrective rather than a threat. This argument relies on an understanding of the democracy problem at stake in global governance that is different from the conventional critique based on accountability, transparency, and access. The conventional critique focuses on the loss of accountability to citizens within a given polity. The democracy problem at issue here is the lack of representation afforded to actors outside a given polity who nonetheless are impacted by political choices emanating from that polity.

The argument goes something like this: when state A enacts a regulatory policy that in practice blocks certain imported goods from state B, B’s citizens have no say in A’s policy process. Whether or not A or B is internally democratic doesn’t materially alter this fact. If we think of democratic governance in broad terms, as a way for citizens to engage in collective self-rule, then rising economic interdependence poses a challenge to democracy. Self-rule becomes difficult if the relevant causal forces in a particular issue lay beyond the reach of the polity or government. Citizens of B, though deeply affected by a political decision undertaken by A, cannot participate in that decision process. As David Held writes, “national boundaries have demarcated traditionally the basis on which individuals are included and excluded from participation in decisions affecting their lives; but if many socio-economic processes, and the outcomes of decisions about them, stretch beyond national frontiers, then the implications of this are serious, not only for the categories of consent and legitimacy but for all the key ideas of democracy.”

115 Held 1997 at 9.
An international institution can mitigate this democracy problem by providing a way for the citizens of B to be 'virtually represented' in the policy choices of A. The creation of an international institution like NAFTA creates a venue for B to champion the interests of its citizens who are unfavorably affected by A's policies. In other words, the rules of NAFTA constraining the exercise of regulatory power at the domestic level (i.e., constraining A's choices) can be understood as democracy-reinforcing if we take a cosmopolitan vision of the relevant stakeholders. This particular form of the argument, like the majority-reinforcing argument about sovereignty, rests on assumptions about popular preferences: if the policies enforced by NAFTA, for example, are in opposition to the preferences of citizens in B, then those citizens cannot realistically be said to be represented, virtually or otherwise, in the political choices of A. Only if international economic institutions generally or on average encourage policies that reflect the interests of the citizens of B can those institutions perform such 'virtual representation'.

This is not meant to suggest that international economic institutions are designed explicitly to foster democratic governance in this manner, though they may have this effect. The important point is that while the conventional democratic deficit argument looks to the procedural failures of international institutions, there is another sort of democratic deficit created by the rise of economic interdependence. Just as international economic institutions may counter-intuitively strengthen sovereignty, they may also counter-intuitively strengthen democracy.

CONCLUSION: THE FUTURE OF SOVEREIGNTY

The current debate over the nature of sovereignty in part reflects the degree to which many of the critical underpinnings of the Westphalian state appear to be changing. Technological, social, and institutional changes have all transformed the world of the twenty-first century in ways that were likely unimaginable in the eighteenth century. Many of these changes are widely believed to pose major challenges to sovereignty. Nonetheless, it remains true that sovereignty has always been a supple, multifaceted concept. The practice of states – as opposed to normative claims – reveals a long history in which sovereignty has been contested, compromised, and bent to suit political purposes. It is no surprise that the nature and meaning of sovereignty have been debated for centuries, and continue to be debated today.

116 As Gerhart points out, there is a parallel here with the jurisprudence of the dormant commerce clause in US constitutional law. Gerhart, 2003 above, n 44.
Rethinking the Sovereignty Debate in International Economic Law

In this article I have tried to highlight and draw connections among a diverse set of ideas about contemporary sovereignty and its relationship to international cooperation. These ideas challenge the conventional wisdom about the impact of international economic institutions on sovereignty, which views these institutions as inherently sovereignty-subverting. The arguments I have illustrated differ on many issues, yet they justify a synthetic treatment. At a fundamental level, each suggests that inquiries into sovereignty, especially into the alleged threat posed by international institutions, must be more nuanced than they generally have been. More maximally, they argue that the prevailing paradigm about sovereignty and global governance is wrong: the alleged threat to sovereignty posed by global governance is illusory because in fact sovereignty is already compromised and eroded. The best way to counter that erosion is through international cooperation. Thus they claim that resistance to global governance, not global governance itself, is the primary threat to sovereignty today.

These arguments also highlight the suppleness of the sovereignty concept. Sovereignty is used in many different ways in contemporary debate. The theories canvassed here, which turn the mainstream debate on its head, indeed often use the concept of sovereignty loosely or in disparate ways. Despite claims to the contrary, majority-reinforcement theories are not actually about sovereignty in the Westphalian sense, but rather reflect a vision of popular sovereignty rooted in the rise of democracy and nationalism. Bureaucratic sovereignty arguments, as well as new sovereignty arguments, are largely about control and autonomy in the face of economic interdependence, a distinctly different idea of sovereignty than that found in the majority-reinforcement theories. Parsing sovereignty further, or arguing for or against particular conceptions of sovereignty, is not the chief goal of this article. However, I have argued that sovereignty in the formal sense of final and supreme authority or control is rarely at stake in international cooperation because states, in nearly all cases, only delegate decision-making power conditionally. Debates about the threat to sovereignty posed by global economic governance are instead almost always about revocable delegations of power and the creation of costly incentives and disincentives — essential elements in any effective scheme of cooperation. The language of sovereignty often serves to obscure the real nature of international institutions and typically sheds more heat than light.

Ultimately, the claim that international institutions are paradoxically sovereignty-enhancing raises the question of what sovereignty actually means to individuals and societies. What is the purpose or role of sovereignty in contemporary politics? Why is sovereignty desirable? One answer is that sovereignty protects collective decision-making — perhaps democratic,

118 McGinnis and Movsesian, above.
perhaps not— from interference by outsiders. It permits a polity to define and govern itself freely. Increasingly, however, this protective role is criticized on the grounds that sovereignty should not be a shield for states that abuse the rights and liberties of individuals.\textsuperscript{119} In practice, of course, states have long compromised sovereignty by interfering in the internal affairs of other states to protect vulnerable individuals or groups, though the rhetorical attack on sovereignty is more forthright today.\textsuperscript{120} Sovereignty clearly must give way when grave human rights abuses or international peace is at stake.\textsuperscript{121} But sovereignty remains valuable even so because of the deep importance of self-government.

There is nonetheless an irreducible functional element to governance. Government aims to serve interests and to achieve ends. Whether a given allocation of power is effective or not cannot be answered in the abstract or for all time. It is a contextual question; the answer inevitably will change over time. When the original 13 American colonies joined together, and over the course of US history, sovereignty from a state perspective decreased and sovereignty from a national perspective increased.\textsuperscript{122} While the US constitutional order is one of dual (or triple)\textsuperscript{123} sovereignties, it is clear that, the recent federalism revival notwithstanding, the sovereignty of the states has been substantially diminished.\textsuperscript{124} This represents a true loss of sovereignty: the power allocation embodied in US federalism is not renegotiable, except

\textsuperscript{119} Kofi Annan, 'Two Concepts of Sovereignty', The Economist (18 Sept. 1999).

\textsuperscript{120} See generally Philpott, above n 1.


\textsuperscript{122} I am eliciting the question of whether the pre-Constitutional colonies actually had sovereignty in most senses. Some prominent analysts argue they did: 'the so-called "United States" were really separate nations in 1787— much as the so-called "United Nations" are today.' Akhil Reed Amar, 'Philadelphia Revisited', 55 U. Chi. L. Rev. (1988) at 1049. In Curtis-Wright the Supreme Court argued that they did not, but there have been many subsequent debates over Justice Sutherland's history and theory of sovereignty. See generally Sarah Cleveland, 'The Plenary Power Background of Curtis-Wright', 70 Colo. L. Rev. 1127 (1999); Louis Henkin, Foreign Affairs and the United States Constitution (Boulder, CO: Netlibrary Inc, 1996). The Framers themselves had conflicting views about sovereignty and its relation to the American republic; See, e.g., Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge: Harvard University Press, 1967), 201–29. The important point is that whatever sovereignty the states once had, they have much less of it today.

\textsuperscript{123} Indian tribes are unusual sovereigns in US law. In John Marshall's words, they are 'domestic dependent nations'. Cherokee Nation v Georgia, 30 US (5 pet) (1831) at 17.

through constitutional amendment. As a native of New York, one of the original American colonies, I do not bemoan whatever sovereignty was lost by the State of New York, in part because the far more effective and meaningful political unit is now the full United States — singular — rather than the United States, plural. Sovereignty was aggregated in a way that capitalized on economies of scale and scope — economies that grew as the US itself grew more complex socially and economically. Whatever sovereignty New York lost has been amply repaid over time; as an individual I am better off, in the sense of better able to have my political preferences realized, than I would be had New York remained a sovereign state. The power allocation represented by the federal structure of the US is, in short, functionally superior to that of the Articles of Confederation, and certainly superior to that of 50 independent sovereign states.

A similar process of power reallocation has been occurring in Europe in the postwar period, though the revocability of the various delegations to European institutions remains a subject of debate. Contestation over lost sovereignty and democratic deficits in Europe, which is growing, may too frequently ignore the positive side of the ledger. If contemporary Europeans can enjoy all sorts of goods as a result of pooling sovereignty that would not otherwise obtain — because their individual states could not provide them in any other fashion — then pooling (and ‘sacrificing’) national sovereignty may be the best way for Europeans to maximize their sovereignty in the twenty-first century. All this suggests that aggregating sovereignty may be increasingly beneficial — and ever more necessary — as the world grows more closely knit.

On the other hand, aggregating sovereignty in the way that the EU increasingly does may create a confusing and messy system that lacks legitimacy precisely because there is no clear locus of authority that individuals can look to. Put differently, for some observers sovereignty is fundamentally about the political allegiance implicit in the notion of final and supreme authority in a given territory. Such a formulation makes the unbundling of sovereignty along functional lines — the allocation of power to the level that most effectively can exercise it — seem a dangerous mistake because it blurs lines of accountability and allegiance. It is nonetheless the

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125 As noted above, this was unclear prior to the Civil War, which decided the issue decisively.

126 See MacCormick, above n. 1.

127 Or may simply be wrong, in that the EU does not truly have a democratic deficit. See Moravcsik above n 58.

128 Henry Kissinger long ago quipped that when one wanted to speak to Europe, there was no one to call.

129 Jeremy Rabkin has emphasized this point to me in various correspondence.

130 Echoes of this view can be found in US federalism cases such as New York v US, 112 S Ct. 2408 (1992).
case that, as an empirical matter, decision-making power is increasingly being unbundled and reallocated based on functional imperatives. The EU is one example; global environmental protection is another. The explosion of international treaties and organizations in the postwar era is a product of the recognition that many problems simply cannot be governed on a national basis, because they are intrinsically regional or global. The result has been a substantial rise in the institutions of global governance.

It is important to underscore that the future of sovereignty is likely to differ depending on where in the world one looks, because the prevalence of international institutions varies. In the West, policy interdependence is deep and commitment to international institutions – recent US policies notwithstanding – remains strong. These liberal states are more open to the external influences that challenge national policy autonomy and more willing to embrace international institutions as a solution.\textsuperscript{131} With Europe leading the way, an accelerated redefinition of sovereignty seems possible in the West. At a minimum, the West has led the way in reallocating power toward international institutions. In much of the rest of the world, however, sovereignty remains oriented around traditional concepts of non-intervention and domestic autonomy. Concomitantly, there is greater resistance to the allocation of power to international institutions.

International economic institutions are increasingly scrutinized with regard to their impact on sovereignty, and they are often vilified because they are thought to erode sovereignty. While some specific criticisms have merit, the aim of this article has been to rethink the sovereignty debate and to illustrate that the overarching conceptual approach – the belief that international institutions are necessarily a threat to sovereignty – is not the only viable approach. When states seemingly surrender sovereignty, they may in fact strengthen it.