

# Sovereignty and Normative Conflict: International Legal Realism as a Theory of Uncertainty

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*“Realist” critical views on international law discount the idea that external norms determine the behavior and objectives of states. However, they risk replicating the very positions they criticize as a result of two errors. First, they frequently assume that legal norms have clear and uncontested meanings that all observers will agree upon. Second, they assume the preexistence of the state as a rational, self-interested actor. Where interests overlap with norms, then, states will presumably “comply” with the latter. The uncertain content of norms, and the contingency of the state’s own stability and rationality, thus go untheorized.*

*This Article proposes an agenda for further International Legal Realist theory premised on pragmatic analysis of the concept of state sovereignty. To this end, it develops the thought of the legal and political philosopher Carl Schmitt, arguably the most thorough and influential Realist critic of modern international law. For Schmitt, drawing on Thomas Hobbes, the sovereign power of the state is justified by the essential epistemic uncertainty of all disputes over norms and values. Only conscious institution of the sovereign authority could solve the conflict resulting when there is no agreement as to “who decides” how to define and apply contested norms—as is still the case today in many disputes among states.*

*Reemphasizing this centrality of epistemic uncertainty to the institution of sovereignty helps to set a new agenda for Realist international law theory. Neither states nor international norms and their interpreters should be taken as unproblematic elements of a unified order: rather both are heuristic tools that can be evaluated on the basis of their utility in procuring certain judgments on normative conflicts. From nuclear proliferation to Brexit, many of today’s international disputes are best seen precisely in terms of the problem of procuring clear decisions by an effective local sovereign authority and locally-settled definitions of international norms.*

## I. INTRODUCTION

The problem of uncertainty lies at the core of international law. Often, this has been reflected in scholarship as uncertainty *about* international law itself: questioning its relevance to actual state practice,<sup>1</sup> its political entanglements, efficacy, and historical origins,<sup>2</sup> or, in a well-worn refrain, its very

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1. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); compare with Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005); Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1 (2012).

2. See, e.g., ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2007); SAMUEL MOYN, *THE LAST UTOPIA* (2010).

right to be called “law” in the first place.<sup>3</sup> At times, though, scholars have also taken up the problem of uncertainty *in* international law: how does this set of doctrines and practices actually function (or fail) to produce agreed-upon definitions as to legal norms, and how do these in turn give rise to certain applications and judgments?<sup>4</sup>

The former set of approaches tends to be grouped under the rubric of “Realism,” especially when international law is discussed in the fields of international relations or political science, but increasingly within international law scholarship as well.<sup>5</sup> In the latter case, where uncertainty is treated as a problem to be confronted by international law as an intellectual discipline, many scholars explicitly identify themselves as writing against the background of legal positivist theory.<sup>6</sup> In addition, there are various normative theories of international law that generally do not confront the problem of uncertainty because, in their view, there is some underlying set of values (generally those of liberal political theory) that one can turn to in order to resolve all normative disputes and come up with a “right” answer.<sup>7</sup>

This Article suggests that none of the above theoretical divisions has adequately approached the problem of uncertainty. The built-in indeterminacy of international legal norms, with respect to their existence, definitions, and applications, cannot be overcome through any of these strategies. In particular, Realist approaches to international law must avoid taking the sovereign state as an assumed, pre-existing unit of analysis,<sup>8</sup> and instead adopt a more pragmatic methodology focused on explicating the dynamic phenomenon of state sovereignty in relation to international norms.

Most Realists now take the state as a unitary, self-interested, rational actor,<sup>9</sup> and characterize the international setting of interactions among states as taking place in a condition of competitive “anarchy”—a conception that is ultimately (and often explicitly) derived from the state-of-nature reason-

3. See, e.g., José E. Alvarez, *But Is It Law?*, 103 AM. SOC'Y INT'L L. PROC. 155, 163 (2009); John R. Bolton, *Is There Really Law in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1 (2000); Anthony d'Amato, *Is International Law Really Law?*, 79 NW. U.L. REV. 1293 (1984).

4. This theme is examined in, *inter alia*, MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2006). See also JEAN D'ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES* (2011).

5. See Gregory Shaffer, *The New Legal Realist Approach to International Law*, LEIDEN J. INT'L L. 189 (2015).

6. See, e.g., D'ASPREMONT, *supra* note 4, at 26; JÖRG KAMMERHOFER, *UNCERTAINTY IN INTERNATIONAL LAW: A KELSENIAN PERSPECTIVE* 82, 86, 108 (2010).

7. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* at ix (1986) (defending normative theory against the “no-right-answer thesis”); cf. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 31 (2009) (defining the principles of a liberal theory of international law).

8. This is a common critique of reductionist conceptions of the “state” as it is deployed across various social science disciplines. See, e.g., Shu-Mei Shih, *Globalisation and the (In)Significance of Taiwan*, 6 POSTCOLONIAL STUD. 143, 143 (2003) (questioning, *inter alia*, the “presumption about the nation-state as a pre-existing unit of analysis”).

9. An overview of such conceptions is provided in David Singh Grewal, *The Domestic Analogy Revisited: Hobbes on International Order*, 125 YALE L.J. 618, 618–20 (2016).

ing of Thomas Hobbes.<sup>10</sup> It is increasingly common for critiques and variants of Realism in law or international relations to take issue with the way that state “interests” have traditionally been defined, and to suggest that it is in states’ interest to cooperate.<sup>11</sup> Alternatively, critics have focused on the way that the relations among states are not purely anarchic, but are institutionally ordered in various ways.<sup>12</sup> Indeed, these critiques have been so successful that many of those today who write against a background of avowedly “Realist” premises, and who discount any normative agenda, nonetheless reach optimistic conclusions about international cooperation and legal integration based on accounts of states’ rationality.<sup>13</sup> Increasingly, the normative agenda of critiques *against* Realism are smuggled into Realism itself (or its variants “neorealism” or “rationalism”)<sup>14</sup> by means of supposedly neutral descriptions of the rational, self-interested state actors that it takes as its natural subjects.

Although fully sympathetic to these same objectives of cooperation and legal integration, this Article argues that a consistent and thorough Realism cannot take these or any other behavioral norms for granted in its description of international law as it exists in the world. Realism cannot begin with the state as a “rational, self-interested” actor, because the concept of “the state” is just an abstraction of the concrete behavior of individuals. Those individuals can either insist on their own normative frameworks and projects—indeed kill or die for the purpose of advancing their own preferred norms—or they can defer to a neutral, third-party authority: the sovereign.

To this end, this Article begins by turning again to Hobbes, and specifically to a phenomenon that lies at the core of his theory of sovereignty but that is largely ignored in existing Realist accounts of international law: the problem of “epistemic uncertainty” in the state of nature, and the role of the sovereign in ending that condition of uncertainty by instituting binding norms and judgments. Indeed, the “pragmatism” of the approach to sovereignty suggested here lies chiefly in this move: as per the intellectual methodology of American pragmatism, a concept can only be known by its concrete, real-world consequences. What, then, are the real-world phenomena that correspond to the concept of “sovereignty” and allow its presence to be identified in a consistent manner? Explicating and expanding upon the Hobbes-influenced political and legal theory of German jurist Carl Schmitt (1888–1985), this Article identifies the concrete phenomenon of “sover-

10. *Id.*

11. See, e.g., *id.* at 621 n.9 (citing, *inter alia*, ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984)); Hathaway, *supra* note 1.

12. See, e.g., ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS 98, 247–48 (1999); KEOHANE, *supra* note 11.

13. For example, Goldsmith and Posner, who have been perhaps the most influential “Realists” in the field of American international law scholarship in recent years, focus much of their analysis on rational incentives for cooperation. See GOLDSMITH & POSNER, *supra* note 1.

14. See Grewal, *supra* note 9, at 625–30.

eignty” as the achievement of a decision that intervenes into and puts to an end conflicts over irreconcilable normative or epistemic judgments.

This study in the theory of sovereignty is presented here chiefly as a way of demonstrating that a more robust Realist approach to international law must incorporate the “ur-Realist” insight shared by these key theorists of the subject: that the state’s function is not in the first place only to pursue collective goods or promote cooperative behavior, but also to generate otherwise unavailable certain judgments on cases of normative disagreement. This reorientation of Realism, moreover, promises to facilitate productive discourse between this perspective on international law and those of legal positivists, liberals or other normative theorists, and adherents of other views—as well as to contribute to scholarship in the increasingly important field of comparative international law, which implicitly relies upon Realist methodology.<sup>15</sup> The phenomenon of insistence on sovereignty by scholars and state officials in (especially and increasingly, but not exclusively) China,<sup>16</sup> Russia,<sup>17</sup> and the United States<sup>18</sup> is a topic that, in particular, this Article’s reformed model of “Realism” may help to better explain.

A “Realism” of this sort would also, for example, urge the utmost caution against grand attempts at regime change or state-building based on normative concepts of political legitimacy. As shown by “Hobbesian” situations in Iraq, Libya, and Syria after the full or partial collapse of state authorities, sovereignty once lost has no guarantee of being recovered. Nor does the force of normative “rightness” ensure that any other project of applying international law will result in any “correct” outcome. For example, it is undoubtedly true that the peoples of South Sudan are culturally distinct from their Northern neighbors, and suffered considerably under the regime of the unitary Sudanese government until independence in 2011. Yet, as evidenced by the unfolding civil war and threats of genocide that have followed, deserving an autonomous state is not the same as being able to construct one.<sup>19</sup> Conversely, being able to maintain such a state is not the same as deserving one: North Korea is in violation of any number of human rights and other international norms, but there is no assurance that the regime will collapse anytime soon.<sup>20</sup> International legal analysis cannot take for granted that the

15. Lauri Mälksoo, *Comparative International Law: Lessons Learned from Russia*, 109 ASIL ANN. MEETING PROC. 94 (2015) (arguing that Comparative International Law studies must be based on a form of Realist methodology).

16. Jacques DeLisle, *China’s Approach to International Law: A Historical Perspective*, 94 ASIL ANN. MEETING PROC. 267, 271 (2000); Ingrid Wuerth, *China, Russia, and International Law*, LAWFARE (July 11, 2016, 8:30 AM) <https://www.lawfareblog.com/china-russia-and-international-law>.

17. Wuerth, *supra* note 16; see also Mälksoo, *supra* note 15, at 94.

18. Compare Bolton, *supra* note 3, at 3, 15, 26, with Seyla Benhabib, *The New Sovereignism and Transnational Law: Legal Utopianism, Democratic Scepticism and Statist Realism*, 5 GLOBAL CONST. 109, 110 (2016).

19. Cf. Alex De Waal, *When Kleptocracy Becomes Insolvent: Brute Causes of the Civil War in South Sudan*, 113 AFRICAN AFF. 347 (2014).

20. Cf. Young Whan Kihl, *Staying Power of the Socialist “Hermit Kingdom”*, in NORTH KOREA: THE POLITICS OF REGIME SURVIVAL 28 (Young Whan Kihl & Hong Nack Kim eds., 2014).

deserving will be rewarded or that the undeserving will be punished. Sovereignty is a fact in the world, not an ethical axiom.

This Article will proceed in four steps to argue for a Realist approach to international law. Part II seeks to establish the basic terms for a practical project of International Legal Realism, distinguishing such a project from both domestic Legal Realism and from non-legal schools of Realist international theory. This first Part also explains how the concept of sovereignty (or the “public force” that defines disputed norms) is in fact the most important object of Realist analysis along the lines suggested *infra*, though “rational interest” Realism has often taken it for granted. Part III then connects the modern concept of sovereignty with its intellectual origins in the writings of Thomas Hobbes, and compares his account of epistemic uncertainty, and the lack of foundations for normative judgments, with the modern Realist legal theory of Carl Schmitt. Part IV applies this understanding of sovereignty to the problem of concrete decision-making in situations of normative disputes within and among modern democratic states. Part V then shows how the conditions of our current international order still reflect the same basic set of political and legal dynamics that animated both Hobbes’s and Schmitt’s theories of sovereignty. This Part also outlines how important current problems in international law, particularly those tied to the perennial problem of its enforcement, can be viewed more clearly through the Realist lens of sovereignty as the solution to uncertainty.

## II. REALISM AND INTERNATIONAL LAW

### A. Defining “Realism”

Like “Legal Realism” in the American domestic context, there has been no single dominant definition of, or program for, an International Legal Realism. In fact, this diversity of methods and approaches is much more pronounced in the area of international law. There, “Realism” not only extends beyond legal scholarship to comprise views originating in international relations and political science scholarship,<sup>21</sup> but also, even within legal scholarship itself, can feature disagreement about the proper *sources* of law—an issue that most domestic Realists have always agreed upon.<sup>22</sup>

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21. See generally JACK DONNELLY, *REALISM AND INTERNATIONAL RELATIONS* (2000); see also Grewal, *supra* note 9, at 618–20. The relationship between the variants of Realism in these different fields is actually a complex history of cross-fertilization. In particular, the German émigré scholar Hans Morgenthau is regarded as the founder of Realism in American international relations theory, while he was in turn highly influenced by the legal scholarship of Carl Schmitt. See, e.g. Koskenniemi, *supra* note 4 at 613 (“Both Schmitt and Morgenthau held it impossible to distinguish law from politics by any general rule”); for an account of Morgenthau’s thought that places his views in the context of significant interwar theorists of international law including Hans Kelsen and Hersch Lauterpacht, as well as Schmitt, see OLIVER JÜTERSONKE, *MORGENTHAU, LAW AND REALISM* (2010).

22. An example of how sources are problematized in non-Realist legal scholarship (adopting a “formalist” approach) is D’ASPROMONT, *supra* note 4, at 38, 148.

Nonetheless, like American Legal Realism, International Legal Realism can still be usefully summarized by reference to a few shared core insights and methodological approaches. In the former case, influential summaries include those of Brian Leiter, who explains the Realist “Core Claim” as holding that “judges respond primarily to the stimulus of facts [rather than legal reasons],”<sup>23</sup> and the similar but slightly more elaborated encapsulation by Brian Tamanaha, whose rubric includes the positions that: 1) the “law is indeterminate” (to some degree) and is “filled with gaps and contradictions”; 2) that “there are exceptions for almost every legal rule or principle, and that legal principles and precedents can support different results”; and 3) “that judges decide according to their personal preferences and then construct the legal analysis to justify the desired outcome.”<sup>24</sup>

In the American context, despite influential criticisms of these Realist positions, it has nonetheless long been accepted in legal scholarship that, to some extent at least, “we are all Realists now.”<sup>25</sup> Indeed, modern perspectives on the non-legal causes or justifications for specific judgments or doctrines, like those prevalent in Law and Economics and Law and Society scholarship (but also Critical Legal Studies [CLS] and Critical Race Theory, among others), as well as literature on issues such as judicial bias, et al., all owe a significant part of their intellectual pedigree to the Realist focus on how judges “really” decide cases, rather than what doctrines tell judges that they *should* decide.<sup>26</sup>

American Legal Realism itself has usually been seen as largely unconcerned with international law, but it has also been argued that American approaches to international law, which have often been focused on developing policy-oriented schemes of cooperation and community-building, have long operated on at least some Realist assumptions about international law’s relevance to state power.<sup>27</sup> In addition, and much more explicitly, the field of international relations has long been dominated by a “Realist” school of thought in which states are usually viewed as selfish, rational actors, and international law obligations as lacking independent legal validity.<sup>28</sup>

In response to various critiques, including from liberal normative theory and other perspectives, several variants of “neorealism” were then devel-

23. BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 21 (2007).

24. BRIAN TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 1* (2010).

25. See, e.g., Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267 (1997).

26. This intellectual pedigree is briefly examined in *id.*; see also G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW L.J. 819 (1986).

27. See, e.g., Daniel Bodansky, *Legal Realism and Its Discontents*, 28 LEIDEN J. INT’L L. 267, 271 (2015) (discussing, *inter alia*, the “New Haven School”).

28. See, e.g., William E. Scheuerman, *Carl Schmitt and Hans Morgenthau: Realism and Beyond*, in *REALISM RECONSIDERED: THE LEGACY OF HANS J. MORGENTHAU IN INTERNATIONAL RELATIONS* 62–92 (2007).

oped, which tend to continue to focus on states as independent, unitary, rational actors, while making allowances for various forms of cooperative behavior and institutionalization of international norms and other commitments.<sup>29</sup> This broader “neorealist” approach still tends to focus on how the “state interest” determines behavior in relation to international society, and underlies the use of rational choice theory in today’s international law scholarship.<sup>30</sup> Other prominent approaches to international law, including those informed by CLS<sup>31</sup> and postcolonial theory<sup>32</sup> also take something like this model of self-interested states as an analytical basis. As with domestic forms of Realism, these different views all inquire into how non-legal factors (such as self-interest) determine the outcome of legal processes. Because they focus on such non-legal factors, these perspectives are often articulated in terms of how states ignore norms or use them to achieve goals.<sup>33</sup>

More recently, however, there have been increasing calls for a new, more theoretically robust Realism in international law. These have come from various different sources. A recent issue of the *Leiden Journal of International Law*, for example, featured a valuable discussion among legal scholars articulating (mostly) defenses of a newly self-conscious “Realist” approach to the subject, which would “view[ ] international law instrumentally, [be] empirical in orientation, and focus[ ] on the processes by which international law is developed, implemented, and enforced, rather than limiting itself to international law doctrine.”<sup>34</sup> On the other hand, contributors also sought to move beyond the “Neorealist”-influenced perspectives described *supra*, which tend to “reduce international law to other disciplines’ terms, such as material power and interest in international relations Realism.”<sup>35</sup>

Contributors to the same volume mostly agreed on the need for the further development of Legal Realist perspectives on international law,<sup>36</sup> but also suggested that the models proposed by their counterparts were either in fact largely consistent with that of earlier international law scholarship;<sup>37</sup> or suggesting alternative or supplementary models of what a more robustly-outlined Realist approach should focus on.<sup>38</sup> Some concerns are, however, also raised as to the degree that Realist approaches can “de-emphasiz[e] the

29. See, e.g., Robert Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT’L L.J. 487, 490, 500–01 (1997).

30. See, e.g., GOLDSMITH & POSNER, *supra* note 1, at 86, 102; see also ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 62, 115 (2008).

31. See, e.g., KOSKENNIEMI, *supra* note 4, at 592 n.82.

32. See, e.g., ANGHIE, *supra* note 2, at 69.

33. See, e.g., Bodansky, *supra* note 27, at 267–68; Shaffer, *supra* note 5, at 205.

34. Bodansky, *supra* note 27, at 267.

35. Shaffer, *supra* note 5, at 210.

36. See, e.g., *id.*

37. Jakob V.H. Holtermann & Mikael Rask Madsen, *European New Legal Realism and International Law: How to Make International Law Intelligible*, 28 LEIDEN J. INT’L L. 211, 214–15 (2015).

38. Holtermann and Madsen, for instance, point towards alternative influences from European “Law in Context,” historicism, and other intellectual movements to propose a more sociologically focused “European New Legal Realism.” *Id.* at 211, 230.

internal point of view and the concept of legal validity [and] deprive[ ] international law of the very features that make it a distinctive enterprise.”<sup>39</sup> Here, and elsewhere, there are calls for the future development of Realist approaches to international law to engage with and incorporate insights from the most fully-articulated “non-Realist” theory of international law, which focuses largely or exclusively on the internal view of legal norms: legal positivism (which is also closely related to “formalism”-based approaches).<sup>40</sup>

The rise of “Comparative International Law”<sup>41</sup> studies has also featured calls for further development of Realism, in this case dealing with the prevalence of different normative interpretations by different state actors, and the degree to which “the ideology of the universality that international law offers does not seem to explain the reality of international law in a fully satisfactory way.”<sup>42</sup> The same logic is at work in such perspectives as that of the Chinese legal scholar He Zhipeng, who argues that “[b]y establishing a Realist notion of international law, the study of international law in China may deepen its theoretical construction and practical targetalization, and further . . . form[ ] a Chinese theory on international rule of law.”<sup>43</sup>

All of the above perspectives require an inquiry into the non-legal influences upon legal processes. Yet the nature of such influences is very different in various accounts, and in many cases they are limited by the narrow scope of their analytical focus. Traditional international relations Realism, for example, tends to over-emphasize the “self-interest” of states, particularly construed as “power” vis-à-vis other states, to the exclusion of other factors.<sup>44</sup> Rational choice theory approaches adopt a similar view, while allowing for various phenomena of cooperation to be factored into a more sophisticated account of what might constitute a state’s “interest.”<sup>45</sup> Critical Legal Studies and postcolonial theories tend to focus on various forms of ideological determination, or of exploitative behavior, whether among classes, nations, or other social groupings, as the chief non-legal explanatory factor.<sup>46</sup> Meanwhile, many sociologically oriented approaches appeal to con-

39. Bodansky, *supra* note 27, at 280.

40. See, e.g., D’ASPROMONT, *supra* note 4, at 26 (arguing that “formalism” represents “one of the . . . tenets of legal positivism,” while lacking other features of the latter).

41. Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOK. J. INT’L L. 385, 391, 449 (2011); see also Mälkssoo, *supra* note 15, at 94.

42. Mälkssoo, *supra* note 15, at 94.

43. He Zhipeng (何志鹏), *Guojifa de Zhongguo Guannian (国际法的中国观念) [The Chinese Notion of International Law]*, 2015 Renda Falu Pinglun (人大法律评论) [Renmin University Law Review] 201, 201.

44. See, e.g., Keohane, *supra* note 29, at 495–500; Grewal, *supra* note 9, at 618–20.

45. See, e.g., GOLDSMITH & POSNER, *supra* note 1, at 39; GUZMAN, *supra* note 30, at 115; Hathaway, *supra* note 1, at 477–81.

46. Shaffer gives a useful account of the distinction between critical approaches to international law and Realism, which, while still informed by critical perspectives, must be more empirical and problem-oriented in its treatment of legal processes (avoiding reductionist conclusions): “Legal Realism is distinct from a critical legal studies that reduces law to ideology and views law as structurally indeterminate in



cepts such as group socialization, professional “habitus,” or changing social attitudes as explaining the behavior of actors in legal processes.<sup>47</sup> Comparative International Law, on the other hand, would tend to look at the content of different normative commitments of various national communities to explain legal disputes and their outcomes.<sup>48</sup>

All of these different non-legal factors can be highly relevant for Realist analysis: they are all relevant “facts” that can operate as “stimuli”—and sometimes as the chief stimuli—upon legal actors including states, judges, arbitrators, international organizations, and other interpreters of international law. Yet, whether taken individually or altogether, these explanatory factors do not address another desirable feature of a new Realist theory: that it be able to accommodate and even further development of the “internal” perspective on the legal validity of norms, explaining why certain norms are valid within particular legal systems as well as what their actual content is.<sup>49</sup> A more successful agenda for Realist international legal studies should thus both address non-legal sources of influence upon legal processes, and yet also to engage and cross-fertilize with “internal” views.

This Article will proceed to argue that International Legal Realism can accomplish this by taking as its focus the uncertainty of norms and the freedom of sovereigns in defining and applying them. Recent works in positivist international law theory have also explored the theme of “uncertainty,”<sup>50</sup> and it was also the basis for Jeremy Telman’s apt suggestion in the above-noted *Leiden Journal of International Law* volume that uncertainty may be the single most important potential area of overlap between Realist and positivist approaches.<sup>51</sup> The first step in *any* empirical analysis, after all, is acknowledging uncertainty about some aspect of the external world that one can then study via empirical observation.<sup>52</sup>

This project, then, contrasts sharply with Realist theories that base their analyses on the determination of the “rational interests” of state actors. Legal Realism would simply view “interests” as one more norm whose content cannot be assumed *a priori*. As opposed to conceptions of Realism that de-

principle. Critical legal studies is a rich and varied approach, and in international law, scholars such as David Kennedy and Martii Koskenniemi have insightfully opened new ways of understanding international law’s structure and practice. Yet New Legal Realism differs in its attention to empirical study, in its pragmatic problem-solving focus, and in its enlisting of the potential of legal reasoning.” Shaffer, *supra* note 5, at 196.

47. Cf. Holtermann & Madsen, *supra* note 37, at 221 (drawing on Pierre Bourdieu’s sociological theory to describe potential approaches to the study of international law).

48. See Mamlyuk & Mattei, *supra* note 41, at 438.

49. See Shaffer, *supra* note 5, at 2; see also Bodansky, *supra* note 27, at 280. Both note that Realist approaches risk ignoring or even obfuscating this dimension of legal analysis (though neither treats it as a fundamental problem that must be addressed at the initial level of forming a new theoretical approach).

50. See D’ASPREMONT, *supra* note 4, at 184. See generally KAMMERHOFER, *supra* note 6.

51. D.A. Jeremy Telman, *International Legal Positivism and Legal Realism*, in INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 241, 256 (Jean d’Aspremont & J. Kammerhofer eds., 2014).

52. Cf. Leiter, *supra* note 25, at 272 (describing the role of empirical observation in the study of social phenomena).

velop inevitably contestable theories of state interests and attempt to explain or predict how they structure state behavior, Brian Tamanaha's summation of the main presumptions of American Legal Realism is far more apt in doing justice to the problem of uncertainty in legal outcomes.<sup>53</sup>

Thus, future developments in International Legal Realism must admit that 1) international law features many gaps without an applicable norm as well as contradictions between norms, which can lead to its content being indeterminate; 2) that "there are exceptions for almost every legal rule or principle, and that legal principles and precedents can support different results"; and 3) that many judgments on international law norms or disputes depend upon non-legal factors (and, again, that legal analysis can often be subsequently constructed "to justify the desired outcome."). The following section will further clarify how this formulation both draws upon, and yet in important ways differs from, that of Legal Realism in the domestic law context—thus better defining the "law" about which we are "Realists."

### B. Delimiting "Law"

All Realists (in any discipline) must undertake to observe and make reference to some empirically observable "reality," and to privilege this source of information above secondhand reporting or idealistic speculation.<sup>54</sup> But a focus on "reality" does not, by itself, clarify what *aspects* of reality one should pay attention to.<sup>55</sup> As we have seen above, the various definitions of Legal Realism can be so broad as to accommodate a focus on almost any set of "facts" in the world that might have an impact on legal processes. The above three-point definition of an agenda for International Legal Realism tries to solve this problem by supplying a sufficiently constrained target of inquiry, focused on the dimensions of international law that most frequently suffer from (or generate) uncertainty.

Yet this attempt to narrow the focus of International Legal Realism, while leaving its agenda open to an examination of both non-legal facts and the "internal" features (including gaps, contradictions, and other uncertain elements) of international legal doctrine itself, nonetheless runs into another definitional problem. What is to count as "legal" for the purposes of such a Legal Realism? Although the object of this Article is not to provide a(nother) philosophical definition of what should or should not be considered "law,"<sup>56</sup> it is nonetheless necessary to establish at least a pragmatic

53. See TAMANAHA, *supra* note 24, at 1.

54. This is the point of Leiter's formulation focusing on the "stimulus of the facts," as well as his broader argument assimilating Realism to a form of philosophical naturalism. See Leiter, *supra* note 25, at 269.

55. This is a problem that John Dewey frequently brings up in defining his pragmatist elaboration of empiricist methodology. See, e.g., John Dewey, *Experience and Objective Idealism*, 15 PHIL. REV. 465, 472 (1906).

56. This particular ground is already well-trod with respect to international law. See sources cited in *supra* note 3. For an explanation of how this question was traditionally unimportant to Realists, see also

definition of the “legal” for the purposes of International Legal Realist scholarship.

The most important difference between the three point definition of International Legal Realism I have outlined above and the definition Tamanaha uses to describe American Legal Realism is that, here, point three does not refer to “judges” deciding based on their own preferences, but rather to “legal judgments” that depend on non-legal factors. It is crucial for International Legal Realism to avoid the narrow focus on judges, and judicial decisions, that characterized American Legal Realism and that continues to be a prominent feature of much Realist-inflected legal scholarship. While a focus on judges and their judgments is often defensible in the domestic legal context, which has a generally clear hierarchy of legal and judicial authorities,<sup>57</sup> there is no comparable clarity as to the hierarchy of interpreters of international law. Indeed, many international law disputes come down to disagreements over the authority or jurisdiction of tribunals and other legal interpreters.<sup>58</sup> Similarly, it is also a relevant interpretation of an “international law norm” when a single state or jurisdiction decides to define and apply that norm, with or without reference to any external judicial or arbitral authority. Even a social movement calling for a specific form of legal action, or reform, can be seen as a legal phenomenon to the extent that it represents an act of judgment upon existing facts on the basis of legal norms.<sup>59</sup>

Then International Legal Realism must all the more avoid the narrow focus on judges and (official) judging that has also been seen as a weakness of American Legal Realism.<sup>60</sup> Yet the American Legal Realists focused on judges in the first place in order to avoid an excessive devotion to legal texts and other normative, interpretive instruments that could be analyzed to the exclusion of real-life judicial action and its actual effect on or interaction with society.<sup>61</sup> Does the three-point definition of International Legal Realism I have supplied above help us to broaden the focus of legal analysis,

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Leiter, *supra* note 25, at 270–71 (“Hart . . . misread the Realists as answering philosophical questions of conceptual analysis . . . about what particular concepts . . . [such as] ‘law’ mean”).

57. Telman makes this distinction between domestic and international sources as one of the bases for his argument that Realist and Positivist approaches can mutually inform one another. See Telman, *supra* note 51, at 248.

58. The phenomenon of “non-appearance” is a good example of cases where the normative dispute between parties extends even to the question of whether there exists a competent body to hear the dispute. See *infra* Part V.A.

59. Cf. Sally Engle Merry, *Global Human Rights and Local Social Movements in a Legally Plural World*, 12 CANADIAN J.L. & SOC’Y 247, 247, 252 (1997) (describing how social movements can express unique and significant understandings of legal phenomena).

60. Cf. Bodansky, *supra* note 27, at 272–73 (describing the American Legal Realists’ focus on judges and judging, and noting that it is problematic to ignore all other phenomena).

61. See, e.g., Leiter, *supra* note 25, at 272; Shaffer, *supra* note 5, at 192–94.

without getting lost in normative speculations, “transcendental nonsense,”<sup>62</sup> or excessive focus on “other disciplines’ terms”?<sup>63</sup>

To answer that question, it is most helpful to turn to the American Legal Realists’ attempt to define a pragmatic conception of “law” for the purposes of their scholarship, and to examine some of the criticisms of that definition. Oliver Wendell Holmes famously sought in his essay “The Path of the Law” to provide a Realist account of law premised on “prophesying” the action of courts.<sup>64</sup> For Holmes, “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what [is] mean[t] by the law.”<sup>65</sup> To further explain this definition, he turned to the figure of the “bad man,” which is crucial for underscoring the empirical difference between law<sup>66</sup> and normative theory. Norms (such as statutes, constitutional provisions, or common law standards) themselves were not “law,” because by themselves they could not account for courts’ concrete enforcements of those norms, or inform the behavior of actors interested only in the latter phenomenon.<sup>67</sup>

On the other hand, a focus on the actual action of courts when they declare individuals to be violating (or not) a given norm is “legal” because it describes a concrete social phenomenon of law *application* that can be observed and even predicted. The figure of the “bad man” is relevant because such a perspective totally discounts the normative dimension, while still being carefully observant of the empirical dimensions of legal judgments: “a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law.”<sup>68</sup>

Holmes’ definition of law was criticized by H.L.A. Hart for ignoring the “internal point of view” on the validity and justification for legal norms, as well as the “ways in which the law is used to control, to guide, and to plan life out of court.”<sup>69</sup> He also asserted that Holmes’ “bad man” was not necessarily as relevant as, e.g., a “‘man who wishes to arrange his affairs’ if only he can be told how to do it.”<sup>70</sup> In other words, a narrow focus on enforcement of norms against violators misses the various ways in which those norms are justified, interpreted, and elaborated by those who are normatively committed to them, and it also misses the various ways in which

62. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935).

63. Shaffer, *supra* note 5, at 210.

64. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457–58 (1897).

65. *Id.* at 461.

66. *Id.* at 459.

67. As discussed later, this is largely the same account of legal norms provided by Carl Schmitt. See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 33 (George Schwab trans., Univ. of Chi. Press 1985) (1922) [hereinafter SCHMITT, *POLITICAL THEOLOGY*]; see also *infra* note 152 and corresponding text.

68. Holmes, *supra* note 65, at 458.

69. H.L.A. Hart, *THE CONCEPT OF LAW* 40 (3d ed. 2012).

70. *Id.* at 40.

norms are used to structure forms of social interaction, including coordination, beyond the dynamic of violation and enforcement.

As Brian Leiter has noted, it was in summing up the Legal Realist view as a “Predictive Theory of Law” that Hart managed to (apparently) critique it on its own terms and to demonstrate that it constituted a tautology: “a judge who sets out to discover the ‘law’ on some issue upon which she must render a decision is really just trying to discover what she will do, since the ‘law’ is equivalent to a prediction of what she will do!”<sup>71</sup> As Leiter also makes clear, however, this charge is based on a misunderstanding of the Realist enterprise, for Hart “misread the Realists as answering philosophical questions of conceptual analysis, questions about what particular concepts (“knowledge,” “morally right,” “law”) mean.”<sup>72</sup> By contrast, the Realists “were not ‘ordinary language’ philosophers” like Hart, and were not concerned with defining concepts but rather with establishing a methodology for empirical inquiry into law as a concrete social phenomenon.<sup>73</sup>

Still, Hart’s other point, regarding law’s social import as a mechanism for coordination and planning, well beyond the range of mere “bad men” alone, does seem to point to a problem with the narrow Realist focus on “what courts will do.” This is the dimension of Hart’s critique that Scott Shapiro defends and elaborates, against “sanction-centered” theories (as Holmes’ view is usually interpreted). As Shapiro explains, sanction-centered theories are flawed because: (1) “they are myopic in that they ignore [non-sanction-oriented] motivations that people might have for obeying the law”; (2) “they are unable to account for the existence of legal systems”; and (3) “they cannot account for the intelligibility of legal practice and discourse.”<sup>74</sup>

Just as we saw in the previous section with regards to different perspectives on defining “Realism,” an exclusive focus on “external” phenomena (such as the concrete behavior of courts or of individuals fearing sanction) can mean losing the ability to address the “internal” dimension of reasoning, such as how norms are justified, how systems of norms are constructed and consistently operate, or how individuals in society understand each other’s reasoning about the law. Again, this leaves a whole dimension of “uncertainty”—that as to the actual content and practical meaning of legal norms—out of the range of inquiry. Ideally, a Legal Realist perspective must cope with both an internal view of legal norms and their indeterminacy and keep track of external influences upon the law.

Again, recent developments in positivist thought can help to inform a more securely founded Legal Realist perspective. Shapiro’s “Planning Theory of Law,” in particular, offers a good reference point for a pragmatic definition of “law” for the purposes of International Legal Realist analysis.

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71. Leiter, *supra* note 25, at 270.

72. *Id.*

73. *Id.* at 270–71.

74. Scott J. Shapiro, *What is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157, 1158 (2006).

Shapiro explicates and updates Hart's emphasis on "prediction" by reference to "plans":

What makes laws laws is that they are either (1) parts of the master plan of a self-certifying, compulsory planning organization with a moral aim; (2) plans that have been created in accordance with, and whose application is required by, such a master plan; or (3) planlike norms whose application is required by such a master plan.<sup>75</sup>

The term "moral aim" here can perhaps be taken as standing for any normative commitment (i.e., anything that some group of planners thinks "ought" to be the case). Shapiro thus finds a middle ground between the Realist focus on the actions of courts or application of sanctions and the positivist internal point of view on the justifications for, interactions between, and contents of legal norms. His "master plan" of legal authority (e.g. that which is supposed to be embodied in the U.S. Constitution) is a self-conscious project by political/social actors to establish a legal authority in a given jurisdiction, in order to "solve those moral problems that cannot be solved, or solved as well, through alternative forms of social ordering."<sup>76</sup> The relevant other "forms of social ordering" that Shapiro distinguishes include, e.g., "custom, tradition, persuasion, consensus, and promise": in other words, these are norms that one can explicate and analyze from an "internal" perspective, but which, viewed externally, do not reliably and predictably produce sanctions from a "compulsory planning organization with a [normative] aim."<sup>77</sup>

The phenomenon of sanction is thus in fact still central to Shapiro's definition of law, even if it is somewhat decentered relative to the traditional Realist view. Sanction alone need not imply planned authority with a claim to legitimacy<sup>78</sup>—but a plan alone does not imply that authority is *compulsory* (or that social actors, especially "bad men," will ever condescend to treat it as compulsory). From a positivist or liberal perspective, these criteria might be taken to imply that international law's status as "law" can be defended by reference to, for example, the function of "outcasting" among states as an enforcement sanction approximating other historical legal systems.<sup>79</sup>

After recognizing this core point of similarity—the central position of the phenomenon of sanction in identifying certain social interactions as "legal"—it is here that a Realist theory of law must diverge from (while still engaging with) the positivist approach and presumptions that Shapiro calls

75. SCOTT SHAPIRO, LEGALITY 225 (2011).

76. *Id.*

77. *Id.* at 213.

78. This is why "law" can be distinguished from the commands of roving bandits, etc.

79. Oona Hathaway & Scott Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 282-299 (2011). The "outcasting" argument and its relevance to Realist positions on international law will be examined further. See *infra* Part II.C.

upon to establish his “Planning Theory of Law.” While Shapiro does acknowledge challenges to the coherence and determinacy of “law” in the domestic context, his answer—that laws-as-plans can resolve disputes between highly incompatible interpretations via the operation of “trust” in authoritative interpreters by a community that considers itself to be included in and represented by the plan (and “compulsory planning organization”)<sup>80</sup>—raises more questions than it answers in the context of international law. Some interpreters of international law are “trusted” by some states and other actors, but none is “trusted” by the entirety of humankind. Nor is it easy to predict who will trust whom, when. Nor can sanctions (including “outcasting”) always be counted on to be deployed by all states, compatibly by states that do adopt them, or in any reliably predictable manner.<sup>81</sup>

Nor can the exercise of the “sanction” ever be finally attributed to any particular “central planning authority”: the very question as to who *is* such a legitimate sanctioning authority is precisely one of the everlasting normative disputes between different interpreters of international law. “Who interprets the norms and applies the sanctions” is itself a contested norm with many different answers: only the U.N. Security Council? Or an individual state launching a war of humanitarian intervention? The U.N. General Assembly? Regional institutions or transnational organizations? Or simply the “community of nations”? But then who is inside and who is outside that “community,” who decides on its membership at any given moment, and can there be more than one simultaneously-existing “community” with the right to plan and to sanction?

All of these dimensions of uncertainty reflect the various indeterminate dimensions of international law described at the end of Part II.A, and thus indicate why an International Legal Realist definition of “law” should avoid dwelling too much upon the “internal” point of view favored in positivist analysis. Nor, however, can it retreat to the American Legal Realist focus on prediction of what *courts* will do, or to the extreme “external” point of view of the “bad man” alone. Rather, it should maintain the Realist emphasis on prediction, while accommodating positivist insights into the internally-binding character of judgments among actors within effective sanction-regimes (even if these judgments are never permanent or uncontested).

For these purposes, international norms are “law” if 1) any actor has an “encounter with [a] public force” that applies a norm to evaluate that actor’s behavior, taking it as an instance of compliance or violation; 2) does so in a manner that is supposedly rooted in some plan of authority that it calls on

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80. Shapiro, *supra* note 74, at 213, 338 (“The task of institutional design . . . is to capitalize on trust while simultaneously compensating for distrust . . .”).

81. D.A. Jeremy Telman, *Non-State Actors in the Middle East: A Challenge for Rationalist Legal Theory*, 46 CORNELL INT’L L.J. 51 (2013).

the target to “trust” in, on the basis of more than mere coercion;<sup>82</sup> and 3) successfully applies sanctions to deter the behavior deemed to be in violation.

We cannot then simply say as an *a priori* matter what does or does not constitute valid international law. A valid legal norm at the international level is one that we can *correctly predict* will be reliably and consistently enforced against violators in a given situation. In reference to international law, the identity of the sanctioning “public force” in any particular situation is precisely one of the issues that is often in question. This uncertainty of international legal *ontology*—who interprets and applies the law—is the real basis for uncertainties of *epistemology*, or of the law’s content and consequences. As Carl Schmitt wrote, when there is a dispute between two entities, each of which claims to exercise the sovereign power over some matter, the proper question to ask is not who is “right” in some ideal sense, but rather “quis iudicabit”—“who decides.”<sup>83</sup> This is the same as asking what actor can reliably enforce and apply its interpretations of norms.

### C. Constituting the “International”

Who actually enforces international law? As noted in Part II.B, there are many possible answers to this question.<sup>84</sup> Nonetheless, for many modern scholars and practitioners, the implicit answer has long been the vague idea that “the international community” as a whole enforces standards, and that its best representation is something like the War Crimes Tribunals that were erected at Nuremberg.<sup>85</sup> In the attempt to concretize this vision, the 1990s–2000s saw a major revival of this form in tribunals sanctioning state actors in Rwanda and the former Yugoslavia, and then the attempt at an institutionalization of this model in the International Criminal Court (ICC).

As at Nuremberg, the Yugoslavia and Rwanda tribunals relied for their success on the military defeat of the offending state. The successfully intervening powers depicted themselves as a police force defending international norms, and the subsequent prosecution, conviction, and punishment of specific offenders against those norms was a natural outgrowth of this justifica-

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82. This requirement should not be taken as adopting any normative theory of how or why legal norms can or should be “trusted” in. The “call for trust” requirement is relevant here not because it implies *actual* commitment to a sanctioner’s “plan” of legal authority by the enforcement target, but in the more limited sense that it must be *possible* for the target to accept the sanctioner’s norms as a determination of what is legally valid, not an act of coercion. In other words, the justification for sanction must be able to be generalized and invoked in future cases.

83. CARL SCHMITT, *POLITICAL THEOLOGY II: THE MYTH OF THE CLOSURE OF ANY POLITICAL THEOLOGY* 115 (Michael Hoelzl & Graham Ward trans., Polity 2008) (1970) [hereinafter SCHMITT, *POLITICAL THEOLOGY II*].

84. Indeed, the identity of the enforcer is itself a contested norm that can only be cleared up by successful enforcement of a unified definition.

85. See, e.g., Quincy Wright, *The Outlawry of War and the Law of War*, 47 AM. J. INT’L L. 365, 366 (1953) (“The relation of the international community to an aggressor is analogous to the relation of the national state to rebels.”).



tion for military involvement. However, neither today nor at any time in history has every dispute over international law, or accusation that a party is violating it, been accompanied by a major military conflict. Historically, military force could be used to legitimately enforce international law: a state injured by the alleged violation of one of its peers could declare war to enforce the violated norm. But this was a discretionary act, and states could also take various other measures, such as reciprocal actions, suspension of diplomatic and economic exchanges, etc., or indeed they could decline to attempt to prosecute their rights. A weak state, for example, might have very few options in seeking to enforce a norm against a stronger neighbor. Moreover, such wars were affairs among states—they did not extend to criminal liability of individuals, nor were they accompanied by conviction and prosecution of individuals except in rare outlier cases.

For decades, many international law scholars have argued that this all changed with the introduction of the U.N. Charter or with the subsequent convictions at Nuremberg. Others argue that the real turning point should be seen as the 1928 Kellogg-Briand Pact to outlaw war between states.<sup>86</sup> Regardless of the periodization, Nuremberg appears as the first major successful enforcement of a notional international criminal law (ICL) against a state and its citizens.

That model of enforcement is still alive today, though the contrast between Yugoslavia and Rwanda and the ICC<sup>87</sup> shows that absent the element of military conflict, the model's applicability is limited. Another approach, mentioned briefly *supra*, is the use of multilateral "soft" enforcement mechanisms, such as economic sanctions, diplomatic pressure, and other forms of "outcasting," to secure states' compliance with widespread norms.<sup>88</sup> In this view, the primary agents of enforcement would be whatever "communities" of states are capable of using the tools of exclusion or social pressure to secure norm-compliance from a peer. The recent sanctions regime against Iran for its nuclear program, culminating in a multilateral agreement, is an example of such a form of enforcement.<sup>89</sup>

These two extremes—the "hard" enforcement of Nuremberg and the "soft" enforcement of outcasting—have generally been seen as two sides of a single more or less consistent phenomenon: a loose grouping of leading states (generally, the "West" with other highly developed states), with more or less consistent normative commitments on many issues, that is capable of

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86. *Id.* at 369 (noting that out-lawry-of-war was finally effected by the Kellogg-Briand Pact).

87. The ICC has struggled to achieve any successful enforcement outside of a handful of African states and has seen major and rising non-participation in Africa and elsewhere. See, e.g., Benjamin J. Appel, *In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?*, J. CONFLICT RESOL. (Apr. 25, 2016), <http://journals.sagepub.com/doi/pdf/10.1177/0022002716639101>.

88. See generally Hathaway & Shapiro, *supra* note 79 (outlining a view of "outcasting" as the chief form of sanction underlying the international legal system).

89. Bo Ram Kwon, *The Conditions for Sanctions Success: A Comparison of the Iranian and North Korean Cases*, 28 KOREAN J. DEF. ANALYSIS 139, 140 (2016).

using various means to enforce in a universally-applicable way perceived violations of those norms. In this unified view, both wars of intervention (especially if endorsed by the U.N. Security Council) and economic sanction regimes are two consistent and related phenomena. Of course, many have already seen the decay or at least complication of this model with the rise in power of states like Russia and China that, in various cases, question or oppose the universality of prevailing “Western” norms.<sup>90</sup> Within the “West” itself, moreover, there also has been frequent disagreement over norms or their definitions—particularly with regards to issues of enforcement. The United States, for example, has refused to appear before international bodies that it argues would infringe upon its sovereignty by applying and enforcing international norms as to the laws of war.<sup>91</sup>

It is understandable when many international law scholars point to the areas of overlap among a large body of influential states and conclude that, even if enforcement is difficult or impossible in many cases (depending on the strength of the norm to be enforced and the power of the state to be targeted for enforcement as a violator), there is nonetheless enough similarity and consistency to describe a coherent international system. Positivist, liberals, and other normative theorists can reasonably advance the view that this system exists and may be reinforced over time; such arguments amount to making the case for ever-greater enforcement.<sup>92</sup>

But the Realist counters that the above is itself a normative position; it is an argument about how the law *should* be, rather than how it *is*, or *must necessarily* develop.<sup>93</sup> Because the basis of Realist legal analysis is always prediction as to successful acts of defining and enforcing norms, the Realist is more interested in those areas where such acts are unlikely, impossible, or at least unpredictable. Such a perspective finds ample reason to doubt the existence, today, of a single unified and hegemonic international legal system.

North Korea is an excellent example of the above dynamics. Its pursuit of nuclear weapons development has been condemned by the U.N. Security Council—ostensibly the most powerful norm-interpreter in the current international system—in no fewer than five resolutions since 2006. While costly economic sanctions have been imposed, along with other “outcasting”-style forms of soft enforcement, the terms of such resolutions prohibit states “from using force to carry out the obligations of the resolutions.”<sup>94</sup>

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90. Cf. William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INTL. L.J. 1, 2 (2015) (noting a trend towards greater pluralism in both international norms and actors defining those norms).

91. See, e.g., Paul W. Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259 (2004).

92. See *id.*

93. Cf. Holmes, *supra* note 65 (calling for a distinction between the study of law as it is and the project of outlining how the law should be).

94. Kelsey Davenport, *U.N. Security Council Resolutions on North Korea*, ARMS CONTROL ASS'N, <https://www.armscontrol.org/factsheets/UN-Security-Council-Resolutions-on-North-Korea> (last updated Mar. 2016).

Hard, interventionist forms of enforcement—of the kind that the United States nonetheless employed without Security Council approval in Iraq in 2003—are conceivable, but would impose immense costs on any attempted enforcer, not to mention to the people of the region.<sup>95</sup>

Faced with a similar situation in Iraq, the United States launched a war of intervention and acted as an “enforcer” of the prohibition on developing (in that case, non-existent) weapons of mass destruction. With regards to the important question of how exactly the norm prohibiting states from developing nuclear weapons is to be defined, then, the identity of the enforcer, the form of enforcement to be envisioned, and the exact meaning of the norm are all quite unclear. The Iraq example suggests that the mere “well-founded suspicion” of developing such weapons would be enough to prompt a military action to enforce the ban. Yet in North Korea’s case (where, unlike in Iraq, the weapons program has been verified), only outcasting-style enforcement has been employed. It is unclear what “public force” the country faces if it persists in its weapons program: the economic sanctions regime of the Security Council resolutions? U.S. invasion and regime change? Some similar but more modest military coalition action? The latter two possibilities are significant risks to the regime, but it appears to have bet that successful development of nuclear weapons will preclude such outcomes.

Due to the sanctions regime (as well as various major states’ refusal to accord the country diplomatic recognition as a state), North Korea remains in many ways perhaps the quintessential “outcast” from the international system. And yet it seems to be, if not comfortable, quite resigned to this status. Indeed, much of its political identity on the world stage and in the domestic legitimation rhetoric of its regime, have been tied to this very idea. Even the philosophical basis of the state is now promulgated as *Juche*: “self-reliance.” In its arguments for the right to develop nuclear weapons, as in other disputes with foreign states, North Korea insists on its “sovereignty.”<sup>96</sup>

Perhaps this insistence is to be expected: the state came into being by fighting to a draw the forces of a United Nations army (the ultimate “international police”) that intended to suppress its regime as an illegitimate “rebel” organization.<sup>97</sup> Though even to this day the United States has not officially recognized it as a sovereign state,<sup>98</sup> the North Korean regime is by all accounts fully in control of its territory. If it refuses to engage diplomatically to resolve the nuclear dispute, is willing to continue as an “outcast” in

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95. See Seongji Woo, *North Korea–South Korea Relations in the Kim Jong Il Era*, in NORTH KOREA, *supra* note 20, at 240.

96. James F. Person, *North Korea’s Chuch’e Philosophy*, in ROUTLEDGE HANDBOOK OF MODERN KOREAN HISTORY 211, 211 (Michael J. Seth ed., 2016).

97. Un Jong Pak, *The Influence of Kelsen on Korean Legal Philosophy*, 10 J. KOREAN L. 305, 310–11 (2011).

98. See Dick K. Nanto, *North Korea’s Economic Crisis, Reforms, and Policy Implications*, in NORTH KOREA, *supra* note 20, at 118, 135.

the face of economic sanctions, and is not coerced by foreign military intervention (endorsed by the United Nations or not), then it will indeed have demonstrated “sovereignty” as to the local meaning of the norm on nuclear proliferation.

The meaning of this norm, for a Realist, is *identical with the reality of its enforcement*: currently, it appears that states too costly to invade may develop such weapons if they are themselves willing to bear the economic costs of doing so. What is true of North Korea in the extreme case of nuclear proliferation is true in a far more quotidian sense for all other states, but especially for large, powerful states that are veto-holding members of the U.N. Security Council. For these states the issue of passionately insisting on one’s sovereignty often need not even come up, because no U.N. enforcement is possible, and other forms of enforcement are often exceedingly difficult.

While the United States can impose its own economic sanctions on Russia over military activities in Ukraine, success of the enforcement is belied by Russia’s willingness to bear the costs. When the United States seeks to justify “humanitarian” interventions,<sup>99</sup> or China is accused of violating the U.N. Convention on the Law of the Sea,<sup>100</sup> these states have chosen not to submit to review by the international legal bodies claiming to enforce the relevant norms. Who will compel them? The Realist cannot avoid the conclusion that, under the current international order, the ultimate decision as to enforcement of any major contested norm, and thus the power to determine the exact content of that norm<sup>101</sup> most often lies not with any international body, but with sovereign states themselves (who will often disagree with each other). Whether this should or should not be the case is of limited relevance.

As Carl Schmitt explains, mere international law does not create any higher sovereign authority: “The compatibility of states sharing only international legal relations still does not establish a *connection* between these states.”<sup>102</sup> Those connections can never be counted on to be immune to other influences, nor can they assure shared normative judgments:

One can portray general and abstract norms as the “constitution” of the international legal community to the same limited degree that one can find the “constitution” of a family in general norms

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99. See Bolton, *supra* note 3, at 37–38.

100. Cf. Zhang Hua (张华, Eluosi Buyingsu “Beiji Richu Hao” An Jiqi Dui Zhongguo de Qishi (俄罗斯不应诉“北极日出号”案及其对中国的启示) [Russia’s Non-appearance in the “Arctic Sunrise” Case and its Enlightenment to China’s Safeguard of Maritime Rights], 6 Eluosi Yanjiu (俄罗斯研究) [Russian Studies] 19, 29–33 (2014).

101. For example, the meaning of prohibiting nuclear proliferation and the repercussions to the violator, the parameters and consequences for violations of the prohibition on targeting civilians in war, or the decision as to what constitutes unlawful annexation of territory and how it is punished.

102. CARL SCHMITT, CONSTITUTIONAL THEORY 381 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928) [hereinafter SCHMITT, CONSTITUTIONAL THEORY].

such as that “you should honor your father and mother” or “love thy neighbor.”<sup>103</sup>

In such cases, the practical meaning of “honoring” or “loving,” like the practical meaning of “military aggression” or “proportionality,” still rests on the all-important question as to who decides. Despite the best attempt of the international legal community, then, we still live in a world in which successful use of military force (or successful deterrence against potential military foes) is what constitutes the practical meaning of international norms in the extreme case. States also rely internally on the “monopoly on the legitimate use of violence” to maintain their status as supreme enforcers and thus definers of the law<sup>104</sup>; it is precisely because states alone enjoy this monopoly that outside forces, such as foreign states or non-governmental organizations (“NGOs”), cannot in the last instance determine local legal standards.

Things were once quite different. At one time in the West, transnational organizations like churches, feudal clans, trade guilds, and other such bodies were the main determinants of legal judgments.<sup>105</sup> Fluid and organically expanding, these social organizations promulgated and enforced their own normative judgments, as well as waging bloody and chaotic private wars against each other. But their role as final deciders was swept away by the modern state system.<sup>106</sup> As we will see in the following section, the development of that idea can be traced from its first great development in the thought of Thomas Hobbes to its modern exponents, precisely by reference to the problem of achieving certain definitions of contested norms.

After considering this theoretical background in Part III, Part IV will go on to discuss its relevance for the formation of the modern sovereign state and its interactions with the international legal system. Part V will turn to more specific questions of international legal interpretation considered in light of the Realist premises developed throughout this Article.

### III. THE REJECTION OF NORMATIVE UNIVERSALISM

#### A. *The Search for and Negation of Right Reason*

“In the state of nature . . . every man is his own judge.” So writes Thomas Hobbes in his *The Elements of Law*.<sup>107</sup> Due to the lack of any overarching authority to set norms and parameters of judgment, all men in this situation

103. *Id.*

104. *Cf.* Robert M. Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1624–25 (1986).

105. *See, e.g.* HENDRIK SPRUYT, *THE SOVEREIGN STATE AND ITS COMPETITORS: AN ANALYSIS OF SYSTEMS CHANGE* 128 (1996).

106. *See* SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 102, at 98–101.

107. THOMAS HOBBS, *THE ELEMENTS OF LAW, NATURAL AND POLITIC* 180 (J.C.A. Gaskin ed., Oxford Univ. Press 1994) (1650).

of radical epistemic uncertainty<sup>108</sup> differ regarding the most fundamental perceptions of the reality around them, “and from those differences arise quarrels, and breach of peace.”<sup>109</sup>

Nor is the problem only that people disagree regarding their observations or systems of value. Even more dangerous is how individuals in this situation perceive and relate to one another. Hobbes’s famous *bellum omnium contra omnes* [war of all against all] is not, he makes clear, a constant state of actual violent hostility: rather, it is simply the existence of a “known disposition” to aggressive conflict.<sup>110</sup> It is not necessary for his account of the state of nature that we assume all individuals to be inherently aggressive and ill-disposed to one another. The problem is simply that the passions, opinions, and behavior of other individuals are ultimately unknowable, and this gives rise to a circumstance of uncertainty regarding possible threats with the result that “everyone is weak vis-à-vis everyone else.”<sup>111</sup> This mutual weakness and concomitant mutual fear can give rise in turn to preemptive violence, which may even be rationally justified as a response to potential existential threats.<sup>112</sup>

Hobbes’s description of the problem of uncertainty, and his proposed solution in the creation of a sovereign via social contract, inaugurated modern political theory. In doing so, they also inaugurated modern attempts to reconcile the dueling Enlightenment ideals of the rule of law and of political autonomy (or democratic sovereignty).<sup>113</sup> The major schools of political thought to emerge after Hobbes, even those that have sought to escape from the framework of contractarianism, have nonetheless had recourse to his basic conceptual vocabulary. This vocabulary articulated an alienated, artificially formed political authority, which operates to pursue a collective good via the positivistic creation of legal norms and constraints on individual behavior.<sup>114</sup>

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108. The term “epistemic uncertainty” has been applied to characterize Hobbes’s state of nature in, for example, Richard Tuck, *The Dangers of Natural Rights*, 20 HARV. J.L. & PUB. POL’Y 683, 687 (1997) [hereinafter Tuck, *The Dangers of Natural Rights*] (“According to Hobbes, there is in many cases a significant uncertainty about whether our lives are genuinely at risk, and the differing judgments of agents about the circumstances lead to instability and conflict. It is to eliminate this epistemic uncertainty, above all, that a sovereign is needed.”).

109. HOBBS, *supra* note 107 at 180.

110. *Id.*

111. See CARL SCHMITT, *THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS: MEANING AND FAILURE OF A POLITICAL SYMBOL* 31 (George Schwab & Tracy B. Strong trans., Univ. of Chi. Press 2008) (1938) [hereinafter SCHMITT, *THE LEVIATHAN*].

112. See, e.g., Tuck, *The Dangers of Natural Rights*, *supra* note 108, at 687.

113. There is considerable debate as to the extent of Hobbes’s own democratic sympathies. Yet regardless of the issue of his own sentiments on the issue of democracy, his theory necessarily entails acceptance of democratic sovereignty as an immanent feature of all political authority. Even when the “People” do not establish a democratic regime, the moment of contract, and of escape from the state of nature, is one that relies on the decision of a democratic collective. On this point, see generally ANDREAS KALYVAS, *DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY: MAX WEBER, CARL SCHMITT, AND HANNAH ARENDT* (2008).

114. David Hume was an early skeptical voice regarding the social contract. For example, he wrote:

Perhaps because of his transformative role, and the extremely wide scope of potential applications of his theory, Hobbes has proved difficult to place in relation to the later schools of thought that developed in his wake. Some scholars consider Hobbes to be a “proto-liberal,” while others consider him a “proto-totalitarian.”<sup>115</sup> On the international level, Hobbes has traditionally been claimed as the originator of a “Realist” view of states existing in an anarchic, self-interested relationship with each other.<sup>116</sup> Other theorists, however, see him as approximating a “constructivist” or at least “Realist-utopian” viewpoint entailing open-ended possibilities for cooperation.<sup>117</sup>

The foundational but unclassifiable character of Hobbes’s thought is shared in important respects by Carl Schmitt (1888-1985),<sup>118</sup> who also has in common with Hobbes a focus on the problems of the unpredictability of human behavior, the inherent pluralism of ways of understanding and evaluating the world, and how the related phenomena of uncertainty and existential threat structure all political life.

Parts III–IV of this Article will proceed in three steps to argue that both thinkers, despite representing distinct theoretical traditions and writing in very different contexts, share a set of core “Realist” insights regarding the social function and pragmatic significance of political and legal sovereignty in terms of the above-noted problems. First, I will argue that both theorists provide an account of epistemic uncertainty as an immanent, inevitable feature of human social life—in Hobbes’s terms, that “every man is his own judge” regarding accounts of the good, evil, just, true, sublime, and other such value determinations.<sup>119</sup> Second, they each develop upon the basis of this situation of uncertainty an account of the origins and function of political violence and its relation to the state. Third, they largely share a common solution to the problem of uncertainty and the resulting existential danger in advocating the positive, artificial, and collective creation of an alienated sovereign authority with a Weberian monopoly on the legitimate use of violence.<sup>120</sup>

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My intention . . . is not to exclude the consent of the people from being one just foundation of government where it has place. It is surely the best and most sacred of any. I only contend that it has very seldom had place in any degree and never almost in its full extent. And that therefore some other foundation of government must *also* be admitted.

DAVID HUME, *Of the Original Contract*, in *ESSAYS, MORAL, POLITICAL, AND LITERARY* 460 (Oxford Univ. Press 1963) (1770) (emphasis added).

115. See JOHN GRAY, *POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT* (rev. ed. 1996).

116. See generally Grewal, *supra* note 9, *passim* (complicating this traditional view).

117. *Id.*

118. Among many important treatments of Schmitt’s life and thought, see, for example, DAVID DYZENHAUS, *LAW AS POLITICS: CARL SCHMITT’S CRITIQUE OF LIBERALISM* (1998); PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2011); ELLEN KENEDY, *CONSTITUTIONAL FAILURE: CARL SCHMITT IN WEIMAR* (2004).

119. HOBBS, *supra* note 107.

120. *Cf.* MAX WEBER, *POLITICS AS A VOCATION* (1919), *reprinted in FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 78 (H.H. Gerth & C. Wright Mills ed. & trans., 2009).

However, the two theorists do meaningfully differ in the details with which they characterize (and the process by which they arrive at) this outcome, as represented in their subtly different accounts of how the sovereign “monopoly” is formed and how it can construe or maintain the “legitimacy” of its violence. Moreover, each clearly had a very distinct set of cultural, political (in the practical sense), and religious commitments.<sup>121</sup> But such differences mask deeper parallels in topic and method. Each can be regarded as seeking (if unsuccessfully) to use a similar set of “Enlightening” Realist insights to help rationalize the violent and uncertain political settings in which he lived, feared, and wrote.

This is the dynamic that, for example, Richard Tuck describes in his account of Hobbes’s reconception of political authority.<sup>122</sup> Radical skepticism about the ultimate foundations of social norms and values had been prevalent in Western thought since the rise of late Renaissance humanism, as exemplified in figures like Justus Lipsius, and Montaigne (who perhaps best summed up this intellectual outlook with his question: *que sais-jé?*, or “what do I know?”).<sup>123</sup> In the works of such thinkers, purportedly universal standards of moral judgment were called into question or rejected and, as Tuck writes, they “stressed the sheer multiplicity of human beliefs and customs and threw up [their] hands at the prospect of finding any common moral denominator.”<sup>124</sup>

The early Enlightenment authors, on the other hand, did seek to move from the position of doubt and skepticism to one of rationally-founded belief.<sup>125</sup> Descartes, most notably, carried out this transition with regards to basic epistemological and ontological inquiries concerning reality as such.<sup>126</sup> Yet the move was somewhat slower to occur in the fields of political and legal theory. Many social philosophers “retreated to a dispassionate and skeptical stance”<sup>127</sup> in order to avoid endorsement or further incitement of the rampant phenomena of fanaticism and theologically justified violence that characterized the religious and civil conflicts of the era.

On the other hand, one principle *did* appear even to the most extreme of skeptics to have a seemingly universal basis and normative validity: the

121. Schmitt and Hobbes are most clearly opposed in terms of the former’s frequent defense of Catholicism and the latter’s fervent opposition to it.

122. See Tuck, *The Dangers of Natural Rights*, *supra* note 108, at 689 (“There is no doubt that certainty, of various kinds, was the prime goal of all the seventeenth-century writers.”); see also RICHARD TUCK, *HOBBS: A VERY SHORT INTRODUCTION passim* (2002) [hereinafter TUCK, HOBBS]; RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT passim* (1999) [hereinafter TUCK, THE RIGHTS OF WAR AND PEACE].

123. See, e.g., Thomas Mautner, *Grotius and the Skeptics*, 66 J. HIST. IDEAS 577 (2005).

124. TUCK, *THE RIGHTS OF WAR AND PEACE*, *supra* note 122, at 51.

125. This movement and the problem of accounting for its origins are examined in Martin Mulrow, *Eclecticism or Skepticism? A Problem of the Early Enlightenment*, 58 J. HIST. IDEAS 465, 474–76 (1997).

126. See *id.*

127. TUCK, *supra* note 122, at 7.



value of self-preservation.<sup>128</sup> Even if no other standards might be available, skeptics such as Montaigne still held that self-preservation could be invoked as a standard of judgment justifying some acts of violence (or delegitimizing others). This basic idea was then the basis for other authors' attempts at defining further standards, often in the sphere of warfare and conflict among states. Hugo Grotius, most notably, sought to prove the existence of a wide set of natural law norms, partially on the basis of extrapolation from the right to self-preservation and partially due to practical motivations having to do with his own career and the needs of the Dutch Republic to engage in international diplomacy, commerce, and war.<sup>129</sup> At the same time, English and Portuguese authors advanced their own, contradictory "universal" legal norms.<sup>130</sup>

As of the mid-17th century, violent conflicts over normative ideals both within and between the states of Europe continued apace. At the extreme, and most relevantly for Hobbes himself, these took the form of various arguments as to government legitimacy employed by parties to the English Civil War to justify their defenses of monarchy or republican government (as well as other ideological commitments).<sup>131</sup> This is the intellectual setting against which Hobbes made his theoretical innovations. Having seen that even the rational, post-skeptical search for universals could give rise to incommensurate normative ideals that served to justify *further* political conflict, Hobbes opted instead to adopt an even more radical model of epistemic uncertainty in the state of nature.

Like Grotius, he accepted the right of self-preservation as a universal standard for justified violence, but unlike Grotius he also questioned whether different agents in a state of nature could ever be assured of reaching the same conclusions. If there was no universal standard other than self-preservation, then there could be no universal standard as to what actually *constituted* self-preservation, nor could a host of further norms and rules built upon such a shaky foundation ever hope for truly universal status.<sup>132</sup> Instead, Hobbes moved in a different direction. He argued that the combination of a universally-recognized right to violence for the sake of self-preservation, combined with the lack of any universal authority to define that right, implied a state of nature in which all individuals must fear violent death at each others' hands. If "every man is his own judge," then we can make no assumption at all as to when such an individual may judge violence against

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128. See *id.* at 8.

129. An excellent account of Grotius's non-theoretical context and motivations is provided in EDWARD KEENE, *BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS* (2002).

130. See, e.g., Mónica Brito Vieira, *Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas*, 64 *J. HIST. IDEAS* 361 (2003).

131. One classic account of such ideological conflict in the English context is provided in CHRISTOPHER HILL, *THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION* (1972).

132. See Tuck, *supra* note 108, at 684–85.

someone else necessary and justified. The only solution to such a dilemma was the artificial, voluntary creation of a sovereign authority to define norms and standards. Into such an authority would be placed all individuals' pre-existing rights of violence for the sake of self-preservation.<sup>133</sup> As Hobbes wrote:

In the state of nature, where every man is his own judge, and differeth from other concerning the names and appellations of things, and from those differences arise quarrels, and breach of peace; it was necessary there should be a common measure of all things that might fall in controversy; as for example: of what is to be called right, what good, what virtue, what much, what little, what *meum* and *tuum*, what a pound, what a quart, &c. For in these things private judgements may differ, and beget controversy.<sup>134</sup>

Already in this formulation, Hobbes has subtly shifted the grounds of discourse from those pursued by either the skeptics or the jurists who sought to respond to them. Hobbes does not ask what may or may not actually be a pre-existing "common measure" supplied by natural law or human nature. About the existence or lack of such a measure he remains purely agnostic. Rather, he focuses on the phenomenon of "difference" in judgments. Anything that could dependably serve to eliminate or preempt such difference, he argues, would be *de facto* valid as a shared standard, thus justifying political *institution* of such standards:

Th[e] common measure, some say, is right reason: with whom I should consent, if there were any such thing to be found or known in *rerum natura*. But commonly they that call for right reason to decide any controversy, do mean their own. But this is certain, seeing right reason is not existent, the reason of some man, or men, must supply the place thereof; and that man, or men, is he or they, that have the sovereign power.<sup>135</sup>

This same movement, from the rejection of universalism and recognition of uncertainty to the argument for an authority that could serve to clear up that uncertainty, is carried out by the other theorist of sovereignty whose work is developed in this Article. Carl Schmitt was a German jurist most active during the Weimar Republic and early Nazi period (during which he infamously and opportunistically collaborated with the Nazi regime).<sup>136</sup> Like Hobbes, he lived during times of war, social upheaval, and civil strife between adherents of competing ideologies. Also like Hobbes, he argued from a position of total normative pluralism and the rejection of universal

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133. *Id.*

134. HOBBS, *supra* note 107, at 180.

135. *Id.* at 180–81.

136. See, e.g., KENNEDY, *supra* note 118.

values, and sought a solution in sovereignty. As does Hobbes, he takes as his starting point the phenomena of judgment and justification.

### B. *Legal Indeterminacy in the Political Pluriverse*

To understand better the account of uncertainty that links both theorists, as well as the similarities in their proposed solutions, it is necessary to begin with the phenomenon of judgment on disputes and controversies. Both Hobbes and Schmitt were preoccupied with the problem of the indeterminacy of legal standards, and how this in turn implied a free availability of “legal justification” for acts of violence or political competition. For Schmitt, who in some respects sees his legal and political theory as a return to the key insights of the earlier theorist,<sup>137</sup> the key problem with modern liberal political theory is its reliance on the conceit that shared norms *per se* unify or found political communities.<sup>138</sup>

This, according to Schmitt, completely reverses the relationship between normative standards and the existence, or lack, of a political community in which such standards inhere and can be meaningfully enforced. Translating Hobbes’s comments about all judgment into the specific idiom of public legal controversies, Schmitt argues that “all existing legal concepts are ‘indeterminate’ legal concepts.”<sup>139</sup> In other words, while one or more individuals, political groups, or even states might fully agree with each other on the important and binding character of a norm—say “freedom,” “equality,” or “justice”—the actual practical significance of that norm can only be determined in concrete situations. As a result, any discourse regarding norms and values is bound to persist in a condition of profound epistemic uncertainty, for even the same words may have different meanings when uttered by different speakers. Indeed, Schmitt seems to tie his account of epistemic pluralism directly in with the insights of anti-foundationalist philosophy in the traditions of German Idealism and American Pragmatism.<sup>140</sup> Adapting the pragmatic philosopher William James,<sup>141</sup> Schmitt holds that “the political world is a pluriverse, not a universe.”<sup>142</sup>

Unlike Hobbes, however, Schmitt does not explicitly tie this situation of uncertainty in with a notional “state of nature” in most of his theoretical works (the reasons why this might be the case are further explored in Part

137. See, e.g., CARL SCHMITT, *POLITICAL THEOLOGY*, *supra* note 67, at 2.

138. See, e.g., *id.* at 13–14.

139. For a statement from Schmitt’s early work, see WILLIAM E. SCHEUERMAN, *CARL SCHMITT: THE END OF LAW* 16 (1999) (quoting and translating CARL SCHMITT, *Staat, Bewegung, Volk: Die Dreigliederung der Politischen Einheit* [State, Movement, People: The Triadic Structure of the Political Unity] (1933)).

140. Cf. CORNEL WEST, *THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM* 198 (1989).

141. See, e.g., KENNAN FERGUSON, *WILLIAM JAMES: POLITICS IN THE PLURIVERSE* 1 (2007).

142. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 53 (George Schwab trans., Univ. of Chicago Press 2008) (1932) [hereinafter SCHMITT, *CONCEPT OF THE POLITICAL*].

V). Rather, he focuses on how such uncertainty *persists* even in the condition of supposedly orderly political life, appearing whenever a norm or standard must be defined but there is no definite agreement as to which social agent has the authority to decide upon this definition. Thus, Schmitt writes that “[w]e have experienced that every word and every concept immediately becomes controversial, unsure, indeterminate and pliable when . . . different spirits [*Geister*] and interests try to make use of them.”<sup>143</sup> There is no guarantee that mere agreement on norms, *per se*, will result in anything other than potentially intense conflict over the practical significance of those norms.

It is helpful to examine Schmitt’s position on the indeterminacy of norms in dialogue with and in contrast to the accounts of normative validity against which he argued. Among these, many theories sought to incorporate the insights of skepticism, and followed Kant in reconciling an anti-foundationalist perspective, which denied any firm, extrinsic basis for standards of judgment, with an account of how *a priori* categories of thought nonetheless compelled certain conclusions as to the possible objects of human knowledge.<sup>144</sup> In terms of legal and political judgments, such conclusions were expressed in the idiom of a specific strain of “legal positivism” espoused by Hans Kelsen, among other Weimar jurists.<sup>145</sup>

Kelsen’s positivism was positive in the sense that it denied any real-world basis for the validity of certain norms. Adopting a skeptical terminology from Kant as well as David Hume, he acknowledged that the “Ought” of normative standards had no necessary connection with the “Is” of concrete, lived reality.<sup>146</sup> However, he argued, as soon as one entered into the “Ought” of a normative order of any kind, one would nonetheless find that deployment of one norm implied acceptance of another, in a kind of infinite chain bound together by the requirements of logical consistency. At the foundation of such a normative order lay a “*Grundnorm*”—the “transcendental . . . source of all that is normative,” and the “transcendental condition of law.”<sup>147</sup> The human intellectual *activity* of conceiving norms, in other words, has certain *a priori* constraints that can require it to reach certain conclu-

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143. SCHEUERMAN, *supra* note 139, at 120 (quoting and translating CARL SCHMITT, *Staat, Bewegung, Volk: Die Dreigliederung der Politischen Einheit* [State, Movement, People: The Triadic Structure of the Political Unity] (1933)); see also VIBEKE SCHOU TJALVE, *REALIST STRATEGIES OF REPUBLICAN PEACE: NIEBUHR, MORGENTHAU, AND THE POLITICS OF PATRIOTIC DISSENT* 103 (2008).

144. Cf. WEST, *supra* note 140, at 198.

145. On Kelsen and legal positivism in Weimar, see, for example, David Dyzenhaus, ‘*Now the Machine Runs Itself: Carl Schmitt on Hobbes and Kelsen*, 16 CARDOZO L. REV. 1 (1994); David Dyzenhaus, *The Genealogy of Legal Positivism*, 24 OXFORD J. LEGAL STUD. 39 (2004); Stanley L. Paulson, *The Neo-Kantian Dimension of Kelsen’s Pure Theory of Law*, 12 OXFORD J. LEGAL STUD. 311 (1992).

146. See, e.g., Iain Stewart, *The Critical Legal Science of Hans Kelsen*, 17 J.L. & SOC’Y 273, 289 (1990).

147. Kahn, *supra* note 118, at 48.

sions, or at least to take certain forms and make use of certain concepts and categories.<sup>148</sup>

While Hobbes had already argued against the proponents of universal norms that, for example, “one man calleth Wisdome what another calleth feare; and one cruelty, what another justice,”<sup>149</sup> his argument that a common sovereign authority could be created to establish unanimity on such judgments left him open to Kelsen’s position. For this variant of liberal positivism, the moment of the social contract and the institution of a sovereign is taken as given—purely a matter of the “Is”—while that authority’s activity of delineating normative justifications for its actions, or engaging in particular judgments on concrete cases, is by contrast firmly in the domain of the “Ought.” While Grotius, Selden, and others had still sought to assert timeless universals as real, existent binding standards of *natural law*, Kelsen and those writing in the same vein turned instead to the idea that “the basis for the validity of a norm can only be a norm; in juristic terms the state is therefore identical with its constitution, with the uniform basic norm.”<sup>150</sup> This leads to the conclusion that, whenever a norm is actually applied in any given judgment, its binding force must arise from fundamental agreement as to the basis for an entire normative system.

The logical endpoint of such reasoning is that it is normative *agreement* that precedes political enforcement of norms, or the state’s deployment of violence to carry out its concrete judgments.<sup>151</sup> Schmitt argues that this position is completely backwards. For him, the only way any case of normative agreement can ever be inferred is by complicity with and obedience to an existing decision. The primary reason for this is that views like Kelsen’s fail to take into account that ideal norms can *never* translate unproblematically into concrete, empirical manifestations. A norm is always non-identical with its own instance as a set of facts:

Every concrete juristic decision contains a moment of indifference from the perspective of content, because the juristic deduction is not traceable in the last detail to its premises and because the circumstance (*Umstand*) that requires a decision remains an independently determining moment.<sup>152</sup>

Reiterating Hobbes’s critique against a new universalism—the post-Kantian universalism of the “Ought”—Schmitt finds that only an agreement as to the “Is” can supply its foundation. That agreement is as to the

148. See, e.g., Hans Kelsen, *The Pure Theory of Law: Its Method and Fundamental Concepts*, 50 L.Q. REV. 474 (1934).

149. THOMAS HOBBS, *LEVIATHAN*, PARTS I AND II 33 (2005).

150. Compare SCHMITT, *POLITICAL THEOLOGY*, *supra* note 137, at 19, cited in Kahn, *supra* note 118, at 72, with Kelsen, *supra* note 148, at 479.

151. For one defense of such a conception, see Massimo La Torre, *Legal Pluralism as Evolutionary Achievement of Community Law*, 12 *RATIO JURIS* 182 (1999).

152. SCHMITT, *POLITICAL THEOLOGY*, *supra* note 137, at 30.

specific, political sovereign authority who decides, as a concrete matter and with full specificity, not only what norm should be enforced but also what *form* that enforcement must take. Schmitt's emphasis on form is not a rejection of Kant or the idea of *a priori* conceptual categories; rather he argues that "form [is], first, the transcendental 'condition' of juristic cognition."<sup>153</sup> In other words, even if Kelsen and others are correct in asserting that actors' choosing to be bound by common norms assumes some fundamental agreement as to the basis of normative validity *per se*, this still says nothing about their ability to agree on the form that such validity might take. Epistemic uncertainty thus continues as long as the focus is on norms—on the "true" definitions of contested terms, the inherent nature of the "constitutional" agreement, or on the "correct" account of obligation—rather than on the binding character of particular decisions.<sup>154</sup>

Schmitt's focus on decision is not intended to wholly reject the role of norms in the phenomena of judgment and agreement, for "an absolute decision" (sans normative content) represents only "nothingness."<sup>155</sup> But he views the more important aspect of judgment from the perspective of an actual legal system deciding on specific controversies as compliance with the requirements of "regularity" and "calculability."<sup>156</sup> The decision precedes the norm, for not only does any decision have a space of free will available to it, by means of which it can always select or reject one norm in favor of another, or redefine the norm it purports to apply, but also it is only by a preexisting agreement to abide by the decisions of a given interpreter (representing the political sovereign) that a legal system can become in any meaningful sense calculable or predictable: "Because the legal idea cannot realize itself, it needs a particular organization and form before it can be translated into reality."<sup>157</sup>

From the perspective of the need to clear up epistemic uncertainty between actors in society, who are never sure of each other's true normative motivations or, more fundamentally, the way they would concretely apply such norms to reality, the key is not to achieve some kind of profound agreement on an ideal normative order. Rather, Schmitt advocates "the certainty of the decision" in large part because modern, rational actors should be "less concerned with a particular content than with a calculable certainty"<sup>158</sup> as to the source of binding judgments, justifications, and their concrete manifestations in social reality. Only concrete agreement among social actors can defeat uncertainty.

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153. *Id.* at 28.

154. *See id.* at 33.

155. *Id.* at 66.

156. *Id.* at 28.

157. *Id.*

158. *Id.* at 30.

Like Hobbes, Schmitt seeks to provide an account of the need for recognition of a political sovereign (the source of the “decision” that gives rise to the norm for all practical purposes) whose binding character does not rely on preexisting judgments or affiliations. This sovereign is needed because it clears up a situation of epistemic uncertainty that is otherwise insoluble.<sup>159</sup> The sovereign “decides upon the exception”<sup>160</sup> not because of some virtuous quality inherent in political rulers as such, but rather because *any social actor* that can so “decide”—generate obedience to and practical social agreement with a new set of justifications—is *de facto* an authority that has shown itself to define, rather than be defined by, existing norms. When no such authority is present (as is often the case on the international level), the result is normative indeterminacy.

But why don’t social actors just come to naturally agree on a set of standards without the intervention of a sovereign? Surely, in some cases, simple efficiency analysis suggests that shared norms and standards can produce more utility for the community of their users than if everyone is contesting everything and demanding a political decision. For various normative theorists of international law and relations, especially those in the “constructivist” school, it is evident that individuals and groups interacting over time will come to internalize shared standards and establish rules of healthy coexistence.<sup>161</sup> Why not?

This is the question that David Grewal takes up very effectively in his distinction between “sovereignty” and “sociability.”<sup>162</sup> The latter, as he writes, is the sort of mutually beneficial standard-setting that emerges with trade or social ties, that can lead to things like rules for compatibility of electronic devices, shared postal networks, or the use of English as an international *lingua franca* in air travel and business settings.<sup>163</sup> These sorts of norms are indeed advancing with the progress of globalization.

But with regards to norms that groups or individuals will not naturally come to agreement over (such as “Truth,” “the Good,” or “Justice”), only the coercive force of the sovereign state is available as a means of final determination over the content of such norms and the manner of their enforcement. The same is true with the key, operative norms in many important instruments or customary rules of international law, such as the definition of “aggression” in war, or of the “self-determination” of independent peo-

159. In *Political Theology*, Schmitt even compares the function of such decisionistic certainty to the operation of a train timetable, the important point being that such a timetable exists and can be reliable, not what precise time each train is scheduled to arrive or depart. *Id.* at 30–31 (“So that I can accommodate myself accordingly, I am often less interested in how a timetable determines times of departure and arrival in a particular case than in its functioning reliably.”).

160. *Id.* at 5.

161. See, e.g., WENDT, *supra* note 12, at 106.

162. DAVID GREWAL, *NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION* 44–46 (2008).

163. See *id.*

ples.<sup>164</sup> Moreover, further attention to Schmitt should help us see that the matter is even more severe: *any* norm can be raised to what he calls “existential significance,” and thus put on the level of higher, values-level conflict among irreconcilable sides, depending on the degree of importance placed on it by unpredictable human agents. This perversity of human nature—an unpredictable quality that means we can also never predict which norms will become the object of such extreme contestation that only the sovereign decision can dispose of them—underlies to an important extent both Hobbes’s and Schmitt’s theories of sovereignty.

### C. *Natural Perversity and the Right to Resistance*

In the absence of any external arbiter to decide upon the justice of disputes between individuals, only individuals themselves can judge the extent to which they might have to use violent means to ensure their “self-preservation.” Their violence for this purpose is *justified*, as any likely threat (and only the individual him or herself is the judge of the likelihood of any given threat) excuses the force used to counter or preempt it.<sup>165</sup> This is why the individuals in Hobbes’s state of nature are able to use violence against one another at will, while still having their actions be consistent with his reconceived version of “natural law.”<sup>166</sup> Before the institution of the sovereign, the natural rights of the individual—comprising the use of violence for self-preservation—are fully vested in him or her. Only after the establishment of a social contract are those rights relinquished to the newly formed sovereign power.<sup>167</sup>

Schmitt’s theory has been described as being fully opposed to such a contractarian model of natural rights and a positive political authority that serves as the repository for those rights once relinquished.<sup>168</sup> His famous “concept of the political” relies on an *a priori* “friend/enemy distinction” as the ultimate basis for all political activity and, as many interpreters argue, thus provides a more “existential” basis for political identity and conflict that need not be rooted in a Hobbesian social contract. As he himself defines the friend/enemy distinction, these binary terms mark the most “intense” forms of affiliation or opposition between human social groups.<sup>169</sup> To the extent that friendship and enmity are inescapable aspects of social relations, political organizations and their mutual hostilities can be seen as directly

164. See, e.g., KOSKENNIEMI, *supra* note 4, at 560.

165. For further explanation of this problem, see Tuck, *The Dangers of Natural Rights*, *supra* note 108, at 686–89.

166. Hobbes’s mode of argumentation is explained at length in its relation to—or even its deconstruction of—contemporary forms of natural law reasoning in *id.* at 687–88.

167. *Id.*

168. One example of readings of Schmitt which emphasize such a distinction is Jan Smolenski, *Substantive Equality, Popular Sovereignty, and Antagonistic Politics: An Introduction to Carl Schmitt’s Democratic Theory*, 7 CEU POL. SCI. J. 269 (2012).

169. See SCHMITT, CONCEPT OF THE POLITICAL, *supra* note 142, at 37–39.



arising out of a specific social phenomenon (the drawing of friend/enemy distinctions) that may not take the form of mutually fearful, atomized Hobbesian individuals whose justified fear of violence gives rise to a consensual alienation of political authority. The over-simplified version of this thesis (as often interpreted) is that political order is grounded in conflict, not contract.

In crucial respects, however, the opposition of Schmitt to Hobbes with regards to the question of political founding has been mischaracterized or exaggerated. Not only did Schmitt share with Hobbes the characterization of the pre-political state as a condition of radical doubt and epistemic uncertainty, but he also in significant degree concurred as to the pattern by which this uncertainty gives rise to the spread of justified (or at least subjectively *justifiable*) violence, as well as to the need for an artificial, unitary sovereign power to keep such violence in check.

In Schmitt's case, some interpreters' excessive focus on the individual moral implications or motivations of his theory of sovereignty has generated a number of analyses which reduce his theory to a kind of "political existentialism."<sup>170</sup> Regardless of whether or not this is an accurate insight in terms of his personal psychology, or even cultural influences, such readings tend not to illuminate the political and legal theoretical premises underlying Schmitt's justifications for his conception of sovereignty, or his account of its rational function in social life. In some cases, interdisciplinary receptions of *The Concept of the Political* and *Political Theology*, have correctly associated Schmitt with a phenomenological interpretation of sovereignty as the exceptional *Grenzbegriff*, or "borderline concept," which stands in an *a priori* relationship to law as such, just as any normative system can be challenged or partially redefined by exceptions to its norms.<sup>171</sup> Yet even where this concept is thus identified, it has at times been incorrectly construed as *opposing* a Hobbesian account of the transition from pre-political state of nature to political community via artificial, positivistic means.<sup>172</sup> Viewed in light of Schmitt's other work, however, it is more accurately seen as generally *consistent* with a version of such an account.<sup>173</sup>

Several of Schmitt's other writings help to illuminate this correspondence. In particular, his 1932 work *Legality and Legitimacy* proposes a new typology of political regimes for the modern era which takes the question of violence, and its relation to state authority, as central to its analytical project. In this work, Schmitt develops the concept of any regime's political legitimacy as stemming from its relationship to a pre-existing "right to resistance"

170. See, e.g., Richard Wolin, *Carl Schmitt, Political Existentialism, and the Total State*, 19 THEORY & SOC'Y 389 *passim* (1990).

171. See, e.g. *id.*, at 398.

172. See, e.g., *id.* at 404–06.

173. The productivity of Schmitt's theories for understanding the popular sovereignty of modern, democratic states (i.e. Hobbes's "instituted commonwealths") is the main theme of KAHN, *supra* note 118. See *id.* at 26–28.

(*Widerstandsrecht*).<sup>174</sup> Indeed, he develops throughout a comparative analysis of the modern, legalized parliamentary state that focuses on how this conceptualization of political authority is based on the need to “subordinate oneself to the rule of law precisely in the name of freedom, remove the right to resistance from the catalogue of liberty rights, and grant to the [positive legal] statute . . . unconditional priority.”<sup>175</sup>

Yet Schmitt does not limit the possibilities of renouncing the right to resistance to only the erection of a parliamentary state defined by democratic norms and statutory law. As he notes, any positively established state authority must be construed in relation to the pre-existing right to violent self-preservation, for even “the concept of legality [merely] inherits the situation established by princely absolutism: specifically, the elimination of every right to resistance and the ‘grand right’ to unconditional obedience.”<sup>176</sup> Like Hobbes, Schmitt saw in any modern state, regardless of the specific organization of its legal system or its status as a democratic, monarchical, or other type of regime, a vessel for the renunciation of pre-existing rights to self-preserving violence.<sup>177</sup> That regime could be as oppressive as North Korea or as “free” as any liberal democracy—such normative concerns were irrelevant as long the individual citizen actually did obey its authority rather than resist.

Both theorists derive their accounts of the possibility of uncontrollable political violence as arising from the epistemic uncertainty regarding human behavior in its “natural” state, absent artificially-created sovereign authority. Both have subsequently had their views on human nature reductively oversimplified as seeing man as “evil,” but in fact, they are closer to advocating something like a view of human nature as dangerously uncertain.<sup>178</sup> Among the most explicit statements of the two thinkers on the subject are Hobbes’s commentary on the concept “man is a wolf to man” (*homo homini lupus*)<sup>179</sup> and Schmitt’s characterization of man as a “dangerous and dynamic being.”<sup>180</sup> In the former case, Hobbes is actually advocating precisely the idea that man’s nature is fungible and affected by external circumstances and influences. As he writes, “[m]an is a wolf to [m]an” in the state of nature,

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174. CARL SCHMITT, LEGALITY AND LEGITIMACY 87 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2004) (1932) [hereinafter SCHMITT, LEGALITY AND LEGITIMACY].

175. *Id.* at 19.

176. *Id.* at 10.

177. As will be shown in Part V, Schmitt himself draws the connection between his “right to resistance” and Hobbes’s theory of state founding in his study *The Leviathan in the State Theory of Thomas Hobbes*. See SCHMITT, THE LEVIATHAN, *supra* note 111, at 99.

178. That Hobbes’s theory also implies a kind of program of “political re-education” is explored in NOEL MALCOLM, *Hobbes’s Theory of International Relations*, in ASPECTS OF HOBBS 432, 433 (2002). David Grewal explores this theme as well in Grewal, *supra* note 9, *passim*.

179. THOMAS HOBBS, *To the Right Honourable William Earl of Devonshire My Most Honoured Lord*, in ON THE CITIZEN 3 (Richard Tuck & Michael Silverthorne ed. & trans., 1998) (1642).

180. SCHMITT, CONCEPT OF THE POLITICAL, *supra* note 142, at 61.

but within the political condition of a civil commonwealth, the radically different case is *homo homini deus*: “man is a god to man.”<sup>181</sup>

For Schmitt, too, the friend/enemy distinction and its resulting violence arises not because of man’s innate moral evil, but rather because his unsettled character is matched with a *dynamic* ability to invent new identities, or form new judgments, which will inevitably conflict with those of some individuals (“enemies”) and align with others (“friends”).<sup>182</sup> Both pointed out that even shared beliefs and norms, or communal identity, were insufficient to *ensure* the absence of conflict, and that disagreements can lead to struggle even within “in-groups.”<sup>183</sup> Hobbes thus ultimately roots conflict in human passions that cause individuals to esteem themselves above others and to seek to prove this self-worth.<sup>184</sup> For Schmitt, there is no guarantee that any existing friend/enemy grouping will endure in time—rather, *any* difference may suddenly intensify to the point that it leads to existential conflict.<sup>185</sup>

#### IV. THE ESTABLISHMENT OF THE “PUBLIC FORCE”

##### A. *The Principle of “Political Unity”*

In the state of nature, then, no norm can have a certain and clear definition. Hobbes emphasizes this point by describing fundamental disagreement as to “what is to be called right, what good, what virtue, what much, what little, what *meum* and *tuum*.”<sup>186</sup> For Schmitt, it is a condition where no norm can exist because no binding decision is possible. This situation leads not only to the indeterminacy of legal terms and judgments, but also to the more fundamentally dangerous situation in which each individual can validly reason to him or herself (or perhaps to a nascent grouping of “friends”) that some other individual or group constitutes a threat and that violence against them is valid. Such reasoning does not depend on particular social facts or phenomena, for (in the view of both theorists), human nature is sufficiently unstable, uncertain, and potentially dangerous<sup>187</sup> that for such beings to see each other as threats really might *be* fully justifiable. Even if it were not actually justifiable in a philosophical sense, the absence of a sovereign authority means that no one can effectively enforce better reasoning.

The solution is necessarily to institute a unitary authority that can exercise this role of determining the correct reasoning, what forms of violence

181. HOBBS, *supra* note 179, at 3.

182. See SCHMITT, CONCEPT OF THE POLITICAL, *supra* note 142, at 53.

183. One recent interpretation of Schmitt’s theories that allows for this possibility is Stathis N. Kalyvas, *The Ontology of ‘Political Violence’: Action and Identity in Civil Wars*, 1 PERSP. ON POL. 475 *passim* (2003).

184. See, e.g., Tuck, *The Dangers of Natural Rights*, *supra* note 108, *passim*; Grewal, *supra* note 9, *passim*.

185. See SCHMITT, CONCEPT OF THE POLITICAL, *supra* note 142, *passim*.

186. HOBBS, *supra* note 107, at 180.

187. SCHMITT, CONCEPT OF THE POLITICAL, *supra* note 142, at 111–13.

are justified, and which judgments are “right” and “wrong.” Both theorists can be seen as arguing for the necessity of such a development. Yet to better understand what they advocate, and why this must be a specifically *political* authority which enjoys the monopoly on legitimate violence, it is necessary to better understand the account of judgment and justification that each develops. The key distinction here, in both cases, is between *norm* and *decision*. While *norms* exist even in the state of nature, and certainly among states and transnational actors in our globalized world, the *decision* is a function of sovereign states.<sup>188</sup>

As shown in Part III, Hobbes makes quite clear his skepticism that either customary agreement, or the inherent validity of any particular normative system, could ever suffice to institute a lasting set of norms in any given social setting. This skepticism is what leads him to assert that “seeing right reason is not existent, the reason of some man, or men, must supply the place thereof; and that man, or men, is he or they, that have the sovereign power . . . .”<sup>189</sup> For Schmitt, too, the sovereign power represents not just the ultimate political authority, but also the decisive source of norms, standards of evaluation, and other forms of what Hobbes refers to as “common measure.” This point of view invalidates the idea that custom by itself, as demonstrated by state practice and *opinio juris*, can serve as the source for clear and binding universal or international rules.<sup>190</sup>

But at this point we still cannot say why such a power is possible within the framework of a modern state, but not at the international level. Why can’t states come together in joint pursuit of a “common measure”? Unlike Hobbes, Schmitt specifically explores this question by developing the insight that in all practical political life “there is also no hierarchy of norms, but rather only a hierarchy of concrete persons and organs.”<sup>191</sup> This is in fact a reiteration of his frequently repeated point that “the legal order rests on a decision and not on a norm.”<sup>192</sup> For Schmitt, as we saw in Part III, norms do not determine concrete decisions, rather they are determined by and abstracted from such decisions. What this means for international law in the most practical sense is that prior to any instance of interpretation, one can never say for sure what the content of a particular norm will be. This holds true even for the supposedly agreed-upon norms of treaties and other such international instruments. The meaning of the Kellogg-Briand Pact’s ban on “aggressive” war, for example, is ambiguous until the moment it is applied.<sup>193</sup>

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188. Cf. *id.* at 7 (articulating the unique function of the state in producing decisions).

189. HOBBS, *supra* note 107, at 181.

190. See SCHMITT, LEGALITY AND LEGITIMACY, *supra* note 174, at 34–35.

191. *Id.* at 54.

192. SCHMITT, POLITICAL THEOLOGY, *supra* note 137, at 10.

193. See SCHMITT, LEGALITY AND LEGITIMACY, *supra* note 174, at 35.

What this means for the practical problem of instituting normative order is that the indispensable feature is not the achievement of widespread theoretical agreement on a Kelsenian *Grundnorm*—whether it be “customary state practice” or “human rights”—for even *sincere* agreement may prove illusory in the concrete case. All legal standards are subject to competing interpretations, and this cannot simply be overcome by further specification of such norms via judicial decisions, or by extrapolating from a supposed “core” of higher-order norms such as those that might be embedded in a constitution.<sup>194</sup> There will always be a decision as to what norms should be applied, how they should be interpreted, and what their application should mean in concrete, material terms in the particular case that has come up for decision. Only a political authority that is capable of deciding these concrete details—and being obeyed—can ensure that norms thus translate into specific real-world, physical movements of bodies.<sup>195</sup> Again, such an authority is lacking at the international level, but is the defining feature of the modern state.

How then, *does* such an authority come into being? More specifically, how does the “judgment” on any concrete case that is uttered by a would-be sovereign come to enjoy the (notionally) universal obedience that it requires if it is to actually result in homogenous realization of the norm in a concrete social setting? It is in response to this all-important question that Schmitt’s reframing of key aspects of Hobbes’s conception of the institution of sovereignty via social contract can serve its most illuminating role. As illustrated in Part III.C, Schmitt reworks the Hobbesian notion of a “justified violence” of self-preservation in the state of nature into the related, but distinct, concept of a “right to resistance.”

In doing so, Schmitt both detracts from, and adds to, Hobbes’s conception. Whereas Hobbes proceeds by the same methodology examined in Part III.A—the search for universal reason or “natural law” based on universal practices—Schmitt belongs to an age in which natural law is no longer available even in Hobbes’s rationalized form. After all, not all social actors actually behave in such a manner as to will their own self-preservation; they can and sometimes do value other aims more highly. More simply put, Schmitt cannot rely on a rational choice by individuals in the state of nature consisting of the two steps that Hobbes requires: first a conscious acknowledgment of the natural right to violence for self-preservation and then a recognition of the need to give up and pool this right in a third-party beneficiary sovereign.

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194. For the concepts of the “core” and “periphery” of norms in legal interpretation, and a negative appraisal of the ability of such conceptions to overcome Schmitt’s privileging of the concrete decision over the abstract norm, see KAHN, *supra* note 118, at 87–88.

195. Richard Tuck describes Hobbes’s focus on the physical and concrete over the ideal and abstract as a “ballistical” view in his introduction to Hobbes. See Richard Tuck & Michael Silverthorne, *Introduction* to HOBBS, *supra* note 179, at xvii. It could also be called a “materialist” view.

Yet, Schmitt does accept the overall narrative of a pre-existing right to self-preserving violence and its subsequent alienation to the instituted sovereign authority. As he notes in *Political Theology*, Hobbes is the “classical representative of the decisionist type,” who “rejected all attempts to substitute an abstractly valid order for a concrete sovereignty of the state.”<sup>196</sup> Hobbes’s understanding of the concrete and personal nature of normative order was based inevitably in the actions and claims made by human beings in specific situations, not in idealized hierarchies of values. The two agree that “what matters for the reality of legal life is who decides.”<sup>197</sup>

Why, then, does Schmitt elsewhere criticize Hobbes’s conception of the institution of sovereignty? This becomes clear in his work specifically on this topic, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*.<sup>198</sup> Schmitt develops in this work a coherent critique of Hobbes’s social contract. While Hobbes was completely correct in recognizing the precedence of the decision over the norm, of the law-interpretor over the legal system, and of the shared sovereign power over the shared set of values, Hobbes nonetheless made the mistake of claiming that this overcoming of the state of nature was something that had actually *occurred* in history, and was now *accomplished*. In doing so, Schmitt argues, Hobbes perhaps inadvertently sets up a “closed legal system [that] establishes the claim to obedience and justifies the elimination of every right to resistance.”<sup>199</sup>

As a result, “resistance as a ‘right’ is in Hobbes’[s] absolute state in every respect identical to public law and as such is factually and legally nonsensical and absurd.”<sup>200</sup> In short, for any modern reader of Hobbes, the implication of his theory would be that, the social contract having already occurred, he or she as an individual subject no longer possesses the natural law rights of self-preservation and thus “the endeavor to resist the leviathan . . . is practically impossible.”<sup>201</sup> Schmitt by contrast characterizes the “right to resist” as an immanent, psychological experience of one’s own violence being justified. Modern citizens are not “beyond” this psychological experience, because they can still be thrust into the state of nature by any course of events that leads them to reject the norms of their sovereign.<sup>202</sup>

Neither theorist views norms as giving rise to their own validity, either in some ideal sense or as the result of some pre-determined cause. They can only be valid as the result of a political decision to accept a certain sovereign. Thus, to cite the ancient Chinese political theorist Han Fei, who shares

196. SCHMITT, *POLITICAL THEOLOGY*, *supra* note 137, at 33.

197. *Id.* at 34.

198. SCHMITT, *THE LEVIATHAN*, *supra* note 111, *passim*.

199. *Id.* at 66.

200. *Id.* at 46.

201. *Id.*

202. Paul Kahn notes that the modern phenomenon of revolution relies on precisely this conception. See, e.g., KAHN, *supra* note 118, at 33, 34, 55, 71.

important similarities with the Realism of Hobbes and Schmitt: when “norms and measures are established, they are the sovereign’s treasure,”<sup>203</sup> and they require no external normative justification as the basis for their legitimacy. Rather, the necessity of *some* source of normative clarity and certain judgments is itself the key criterion of political legitimation. This is also what the sinologist Yuri Pines has referred to as the shared principle of all China’s Warring States political philosophers: “[t]he ideal of the political unity.”<sup>204</sup> Normative decisions stem from the public force of the unifying authority, and that authority validates *itself* by producing certain and clear normative judgments. Obedience, and the resulting unified order, are their own justification.

For Schmitt, then, Hobbes’s account of the formation of a unitary, norm-generating sovereign authority cannot be correct if it is taken as a description of some event that actually occurred in history. This is, of course, precisely how liberal political theory tends to treat the social contract.<sup>205</sup> Indeed, this misconception is so prevalent that other schools of thought on international law have been affected by it. Even self-described Realists fall into the trap of liberal-influenced normative reasoning by imagining the state as a permanent historical actor whose existence and rational pursuit of self-interest can always be assumed.

As discussed in Part II, Realist understandings of international law have taken as their basic unit of analysis a rational and self-interested state. We are now in a position to identify the fundamental assumptions that must be made in order for such states to come into being. A political authority must exist that ends conflicts among self-justified bearers of the “right to resistance.” Yet, as Schmitt points out, it is wrong to imagine that such an authority comes into being as a historical matter, once and for all time. Rather, this authority is merely a way of describing the behavior of individuals, and it comes into being, if at all, only as a contingent psychological event.<sup>206</sup> Understanding the contingency and fragility of this event allows a much improved analysis of the kind of “rational interest” that should animate the Realist study of international law.

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203. YURI PINES, ENVISIONING ETERNAL EMPIRE: CHINESE POLITICAL THOUGHT OF THE WARRING STATES PERIOD 100 (2009) (translating and quoting Han Fei (韓非), Yang Quan (揚權) [Extolling the Authority], in Han Fei Zi Jijie (韓非子集解) (Wang Xianshen (王先慎) ed., Zhonghua Shuju (中华书局) 1998) (n.d.)). While a thorough evaluation of Han Fei’s thought in light of the themes of this Article (and particularly in comparison with Schmitt) awaits future scholarship, one interesting preliminary analysis along these lines is located in Michael Puett, *Innovation as Ritualization: The Fractured Cosmology of Early China*, 28 CARDOZO L. REV. 23 (2006).

204. PINES, *supra* note 203, at 26.

205. Cf. HUME, *supra* note 114 (articulating skepticism as to the contract’s historicity).

206. See SCHMITT, THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS, *supra* note 111, at 67 (discussing Hobbes’s “transformation of the state into a mechanism driven by compulsory psychological motivations”). Schmitt actually develops a typology of different regime types in *Legality and Legitimacy*, exploring different ways in which citizens can reconcile their “right to resistance” with their own participation and consent in the polity. See, e.g., SCHMITT, LEGALITY AND LEGITIMACY, *supra* note 174, at 29, 39.

“Rationality” is thus useful to international law not chiefly as a description of states defining and pursuing their interests (states can, after all, behave as irrationally as the humans who comprise them), but rather as a description of the rational decision of imperfect, distrusting human actors to set up an alienated state authority in the first place. Particular norms, then, whether internal to a society or stemming from purportedly universal legal rules or institutions, are most reasonably defined by the alienated authority that can enforce judgments. There is no collective “rational interest” that can be reliably defined for all social actors that would override the overwhelming interest in political unity. The political unity maintains its existence only by being the ultimate definer and applier of norms, whether those embedded in international or domestic law. No norm is of more interest than is continued political existence, which is identical with maintaining the source of binding normative judgments among members of a given social collective.

### B. *The “Spark of Reason” and What Obscures It*

Schmitt’s criticism of the received significance of Hobbes’s social contract can be summed up as follows: on the one hand “the state of the Leviathan excludes the state of nature.”<sup>207</sup> On the other hand, the uncertainty and violence of the state of nature can never actually be overcome as matter of historical progress, but remain perennial contingent possibilities.<sup>208</sup> At the extreme, this violence takes the form of revolution against the existing sovereign power, replacing it with another such power or by a state of chaotic civil war. This kind of existential threat invalidates all attempts to fully account for the “rational interests” of states in any given situation. And yet the threat can never be fully eliminated—it is an omnipresent facet of the modern condition.

There can be no international legal “norm” against revolution, because revolution signifies precisely the overturning of the normative order based on one sovereign and its replacement with another.<sup>209</sup> If revolution fails, it is no more than the violation of existing norms. If it succeeds, then it is the decision that generates future norms. This is why new sovereigns do not come about through peaceful applications to some U.N. office, but rather primarily through violent conflict or social upheaval.

Schmitt demonstrates this by offering his own re-reading of the moment of social contract in the following terms: “The terror of the state of nature drives anguished individuals together; their fear rises to an extreme; a spark

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207. SCHMITT, *THE LEVIATHAN*, *supra* note 111, at 47.

208. *Id.* at 49 (Describing the continuation of the state of nature in, e.g., “the relations between great powers . . . [who] wrestle with one another [] in a zone that is continuously in danger,” and where “there are no guarantees”).

209. *Cf.* KAHN, *supra* note 118, at 48 (describing the relationship between norms and revolutions).



of reason (*ratio*) flashes, and suddenly there stands in front of [them] a new god.”<sup>210</sup>

Here, there is no moment of contract that stands between the “spark of reason” causing individuals to realize the need for a common sovereign and the actual appearance before them of that sovereign power. In the moment that the individual is convinced of the necessary character of some sovereign power, that power is also identified as emanating from some concrete social force (say, a constitutional court, an absolute monarch, or a revolutionary committee). Reframing the decisive moment from a “contract” to a “spark of reason” is crucial, for here Schmitt focuses even more than does Hobbes on the crucial question of epistemic uncertainty: precisely what the “spark” resolves.

Yet it is only because this conception retains all of the salient features of Hobbes’s model, especially that of the rational character of the acceptance of sovereign power and of its concrete appearance in a mutually-accepted political authority, that Schmitt can praise Hobbes as “the imperturbable spirit who fearlessly thought through man’s existential anguish, and, as a true πρόμαχος [champion], destroyed the murky distinctions of indirect powers.”<sup>211</sup>

A closer investigation of the problem of these “indirect powers” reveals that both thinkers articulate a conception of the need to artificially and actively create the “spark of reason” that leads to a consensus on the founding of a unitary sovereign power. The consensus on the absolute character of the governing authority must be established, and this is to be done in practical terms by eliminating the intermediary forces between it and each individual subject and by thus clearing up where the decisive sovereign power is located in any concrete case. Schmitt, of course, advocated a practical political program to this effect in his Weimar era writings in favor of executive authority,<sup>212</sup> and Hobbes is often seen as acting to boost the throne amid the English Civil War.<sup>213</sup>

Nonetheless, as is surely clear by this point, neither of these thinkers can plausibly be seen as a mere advocate of untrammled executive authority for its own sake. Rather, each posits the sovereign power of concrete decision as the only way to clear up epistemic uncertainty as to the content and application of norms, and to ensure the persistence of social cohesion in the face of value pluralism. This is what Schmitt indicates when he writes that:

For Hobbes it was relevant for the state to overcome the anarchy of the feudal estates’ and the church’s right of resistance as well as the incessant outbreak of civil war arising from those struggles by

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210. SCHMITT, *THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS*, *supra* note 111, at 92. 211. *Id.* at 86.

212. See, e.g., KENNEDY, *supra* note 118, at 96–98.

213. Hobbes’s allegiances are discussed in more detail in Eleanor Curran, *A Very Peculiar Royalist: Hobbes in the Context of His Political Contemporaries*, 10 *BRITISH J. HIST. PHIL.* 167, 170–72 (2002).

confronting medieval pluralism, that is, power claimed by the churches and other “indirect” authorities, with the rational unity of an unequivocal, effective authority that can assure protection and a calculable, functioning legal system.<sup>214</sup>

The goal for both is not to set up a monarch or any other particular sovereign figure, but rather to establish “rational unity” in the form of an “unequivocal, effective authority” and a “calculable, functioning legal system.” In other words, the whole state apparatus is a *means* to achieve the goal of normative certainty, which as discussed *supra* can only be the result of concrete decisions, not of ideal systems or even of general social agreement in the form of a *Grundnorm*.<sup>215</sup> Both thinkers effectively argue that it is necessary to subdue the “medieval pluralism” of nobles, ministers, factions, and social organizations to a single source of epistemic certainty in the form of a decisive interpreter and applier of norms. For various reasons, both most explicitly associated this sovereign power with the political figure of a unitary, monarchical or monarch-like executive. Yet for both, the executive has no inherent value except as conferred upon it by its subjects—if it were otherwise, they could not be relied upon to experience the spark of reason that produces the new god of sovereign unity. This is a psychological event in the subject of state power, not an objective quality of the wielder of such power.<sup>216</sup>

What, then, are we to make of the (in)famous Schmittian executive? It is of course true that Schmitt wrote in favor of a robust executive authority that is capable of identifying “exceptions” to legal norms, as well as of exercising independent constitutional authority.<sup>217</sup> He did so not only in the most blatant manner during his rhetorical defenses of Hitler’s authority in opportunistic Nazi-era publications,<sup>218</sup> but also in his previous writings on constitutional theory and, notably, in his innovative early study on the legal institution of commissarial dictatorship.<sup>219</sup> Worse still, his arguments about executive authority under Article 48 of the Weimar constitution directly aided in the Nazi assumption of power.<sup>220</sup>

Scholars continue to debate the exact nature of Schmitt’s political objectives, ideological affiliations, and normative commitments.<sup>221</sup> But we have no need of doing so here. The executive that actually resulted from these politics was simply not a successful example of a sovereign that ends norma-

214. SCHMITT, THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS, *supra* note 111, at 71.

215. See *supra* Parts III.B, IV.A.

216. See, e.g., SCHMITT, CONSTITUTIONAL THEORY, *supra* note 102, at 107, 240 (discussing popular sovereignty).

217. See, e.g., JAN-WERNER MÜLLER, A DANGEROUS MIND: CARL SCHMITT IN POST-WAR EUROPEAN THOUGHT 185 (2003).

218. See, e.g., KENNEDY, *supra* note 118, at 20–21.

219. MÜLLER, *supra* note 217, at 21–29 (2003).

220. *Id.* at 35–36.

221. *Id.* at 195.

tive conflict. Rather like today's Islamic State, the Nazi regime persisted only by perpetuating and escalating internal and external conflicts to such an extreme that it imploded. Regardless of Schmitt's intentions in backing its rise to power, it failed to satisfy even his most basic criteria for *effective* sovereignty.

### C. "Peoples" and Republics

It is indeed true that both theorists under consideration explicated their theories in such a manner as to indicate that the sovereign is best conceived as an individual, monarch-like executive figure. For both, such a format seemed to be the most plausible incarnation of an authority that could coherently exercise the power of decision over concrete disputes and enjoy widespread acceptance as well as institutional stability. As discussed above, both were wrong about this issue, if in different ways and to different degrees.

For modern readers, it is important to note that both theorists failed in their attempt to bring about a lasting unitary sovereign. The position of Schmitt's executive, originally developed in his legal scholarship for the conservative President of the Weimar Republic, was in the event captured by Adolf Hitler, who abused the authority of the unitary sovereign to pursue irrational, genocidal, and self-destructive policies.<sup>222</sup> Meanwhile, Hobbes was viewed with suspicion by both sides of the English Civil War, but portrayed himself to Charles II as the defender of a powerful monarch as the executive figure representing his theoretical Leviathan. To the extent that he did see this as the best political settlement of authority, this failed as well, as English constitutional battles in the ensuing decades, including the Glorious Revolution, would firmly ensconce the idea of Parliamentary supremacy.<sup>223</sup>

Yet today's readers would be mistaken to dismiss these theorists, in particular their conception of sovereignty, because of a contingent historical association with failed projects to institute a supreme executive authority. As noted above, viewing the solutions that they proposed in light of the problems such solutions were intended to address—epistemic uncertainty, man's proclivity for violent conflict, and the indeterminate character of supposedly shared norms—implies a focus on the individuals affected by such problems; that is, all the members of the polity. Hobbes's insistence on the higher authority of the commonwealth over the individual and Schmitt's argument for rational unity are not captive to the particular historical causes with which they were associated. Indeed, in many ways they are more accu-

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222. See, e.g., KENNEDY, *supra* note 118, at 165–66.

223. But see Curran, *supra* note 213, at 199 (describing Hobbes as arguing for "the origin of sovereignty in the people," rather than for executive power *per se*).

rately descriptive of today's democratic states, which root their legitimacy in popular sovereignty, than they ever were of yesterday's autocracies.

The domestic and international politics of today's democratized, disenchanting, and increasingly globalized states validate the idea of sovereignty as a "rational unity" that overcomes the uncertainty and danger inherent in the human condition. The American Civil War and the abolition of slavery, for example, stand as examples of how profound normative disagreements are, in the extreme case, not necessarily overcome through rational discourse.<sup>224</sup> Even in terms of the rational discourse of constitutional interpretation, it is only if the U.S. Supreme Court is recognized as the voice of a sovereign subject capable of making final decisions on the concrete application of norms that its rulings can be binding and sure of implementation; in the case of disagreement as to the appropriateness of some specific form of implementation, this can be brought back to the Court for another "final" concrete decision.<sup>225</sup> In the same way, European states continue to put the issue of further EU integration before their populaces in general referenda, and to treat these as the highest instance of sovereign decision on the question of any supranational obligations.

Whereas the individual executive figure, monarch or otherwise, is always susceptible to overthrow, assassination, or rejection, or simply failure based on the quality of his or her decisions (i.e. the "bad emperor" problem),<sup>226</sup> the popular sovereign is not thus susceptible. The political thought of the Enlightenment inaugurated the Age of Revolution, and ever since the practical concept of "enlightened" political rule has implied the action of a popular subject bringing rational illumination to the previous arbitrary and confused operation of power by monarchs or feudal estates. This dynamic of political Enlightenment is one that characterized both sides of the Cold War, for even the most repressive of Stalinist regimes still laid its claim to legitimacy in its status as a "People's Republic." A one party system, just like a federal republic, can and must lay claim to being the outcome of a popular choice for rational unity.<sup>227</sup>

However, the test of this claim comes in the particular case when the representative of the popular sovereign makes a decision on a concrete situation (whether it be a legal dispute or a mass protest in a public square) and its decision is either accepted or rejected by the People as a whole. Rejection

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224. See, e.g., KAHN, *supra* note 118, at 11, 58, 85, 121. ("The popular sovereign sustained itself through the Civil War, and will continue to defend itself against enemies.") *Id.* at 58.

225. See *id.* at 85.

226. See, e.g., Francis Fukuyama & Zhang Weiwei, *The China Model: A Dialogue Between Francis Fukuyama and Zhang Weiwei*, 28 *NEW PERSP. Q.* 40, 46 (2011).

227. See, e.g., Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 *CHI. J. INT'L L.* 1, 12 (2000). It is important to note that this view is a far more persuasive basis for analysis of the legitimacy of one party states, such as China, than is the currently dominant paradigms favored in most Western political analysis which analyze state legitimacy based either on (the absence of) electoral democracy or, alternatively, purely on economic performance.

need not take the form of immediate revolution, of course; it might simply manifest in slow-burn resistance, the organization of new opposition parties, and the like. But it might also manifest in the form of an attempt to profoundly alter the existing political authority such that it behaves according to the normative preferences of the dissenting group or individual. If that is the case, then the locus of sovereign authority is still accepted and we are still within the rational unity, regardless of how profound is the rejection of the particular decision. Thus, the extreme pacifist can continue to accept the legal authority of a U.S. government that engages in military actions abroad that are not sanctioned by the U.N. Security Council. This pacifist may nonetheless try as hard as possible to change the authority's decision. So too can liberals and reformists in one-party states quietly acquiesce to acts of repression against protesting students or the enforcement of oppressive laws, in the hope that they or a future generation can improve the system from within.

Normative theories will not convince dissenters that decisions which they find to be anathema are actually justifiable in terms of some higher order<sup>228</sup> of Herculean interpretive maneuvers.<sup>229</sup> More important is whether or not dissenters continue to recognize the binding character of those decisions. That they might do so despite their disagreement could come from any number of motivations, not least among which is a Hobbesian or Schmittian fear of what might occur if the "predictable" legal order is replaced with the mere chaos of competing universal normative systems. Yet when individuals do consider themselves prepared to risk uncertainty for the sake of possibly setting up a new and better representative of popular sovereignty, they find their right to resistance still readily at hand and immanently available. While this is still an imaginable possibility in modern politics, what cannot be imagined, except as satire, is the suggestion of Brecht's 1953 poem "*Die Lösung*" [The Solution], advising the East German government how to respond to mass protests: that the people's representatives should have "dissolved the people and / elected another."<sup>230</sup>

The "public force" that is the basis for an International Legal Realist account of law can only be based in a "public"—that is to say, a "people "

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228. See, e.g., KAHN, *supra* note 118, at 24. He writes, "th[e] desire to turn the opposition into the mistaken rests on the belief that the normative order of law is the order of reason itself: the completeness of law is the completeness of reason. Resistance is assimilated to irrationality. Believing that the political order should be the expression of reason, liberals have a tendency to believe that politics is or should be over. All that remains is for courts fully to articulate the contents of the law." *Id.* at 74–75.

229. Ronald Dworkin's figure of "Judge Hercules" represents the hope that all legal decisions can be bound together in a single, transcendental normative order. See DWORKIN, *supra* note 7; see also KAHN, *supra* note 118, at 87–90 (arguing that this "asymptotic" conception of normative order is incapable of conceiving of the phenomenon of free will, and so of the sovereign's decisive role as developed in Schmitt's theory, which is thus more democratic in its implications than is Dworkin's). He notes, "Schmitt understands the critical role of the vote: it is the decision." *Id.* at 90.

230. BERTOLT BRECHT, *Die Lösung* [The Solution], in BUCKOWER ELEGIEN UND ANDERE GEDICHTE [Buckower Elegies and Other Poems] 29 (1964) ("Löste das Volk auf und / Wählte ein anderes?").

and popular sovereign—and not in any particular political regime or formal authority. This is why projects to develop a “Perpetual Peace,” world government, or even stable and universal order of legal norms obligatory on all states, confront profound challenges.<sup>231</sup> Though such projects may lead to great achievements, and be worth pursuing, they will always face the uncertainty that stems from their constituent element: the self-determining “public force” of sovereign peoples claiming authority in their own territorial jurisdictions. Nor can there ever be a final catalog of such “peoples,” as they are just the epiphenomenon of groups of unpredictable individuals deciding to so constitute themselves.

## V. REALISM IN CONTEMPORARY LEGAL PROBLEMS

### A. *Disputes Without Decisions*

This section now turns to a provisional account of how an International Legal Realist solution to normative uncertainty can be useful in understanding particular problems and disputes in international law. As noted in the previous section, it is certainly conceivable that states might seek to pursue robust forms of cooperation, and even try to create lasting supranational structures that bind the states’s own authority to interpret norms.<sup>232</sup> Why could they not then go a step further and create a universally binding source of interpretive and enforcement authority for international legal norms in general?<sup>233</sup> The ICC, for example, is an attempt at such an entity.<sup>234</sup>

On the other hand, the consensus among states concerning the need to clear up uncertainty is not necessarily shared by those states’ citizens: the unique success of the EU as a supranational recipient of delegated sovereign decision-making authority should be seen as closely tied to the exceptional situation of post-World War II Western Europe. Such regional frameworks are, of course, not easily transplanted elsewhere. Even where one is created, it is always still subject to disagreement by its constituents as to the “true” locus of sovereign authority, as demonstrated for example in the UK’s Brexit vote. Indeed, in this case, the populace of the UK has not even been able to agree as to whether referendum voters or Parliament better represents the

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231. Cf. Grewal, *supra* note 9, at 620–28 (analyzing arguments for world government).

232. See *id.* at 631, which advances the claim that Hobbes’s theory of the “well-ordered commonwealth” implies states capable of a high degree of cooperation and peaceful co-existence. This Section advances a related and compatible claim: that a concretely meaningful international legal order can only be founded upon the decisions of effective local sovereign authorities that carry out the Hobbesian function of acting as final arbiters of contested norms.

233. Many normative theorists have advanced this conclusion on the basis of Hobbes’s premises. See, e.g., *id.*

234. See, e.g., Appel, *supra* note 87, *passim*.

sovereign authority that could make a final decision on invoking EU Article 50 exit powers.<sup>235</sup>

The anti-Brexit “People’s Challenge” group had framed its arguments in reference to British constitutional norms and those of the EU system, arguing that it is “unlawful for the government to invoke Article 50 without parliament’s authority and full involvement through the legislative process.”<sup>236</sup> A fully positivist, “internal” perspective on this issue would have to look to British constitutional precedent (which has debatable salience to the matter of EU integration) or to specific sources of international norms such as EU treaties.<sup>237</sup> Yet an International Legal Realist view would clearly discern that none of these sources of law are likely to be dispositive of the issue at hand, identifying the socially-contextual representation of the “public force” that will be adhered to by a particular political constituency, in this case the UK population. As in most Western states, the construction of the “public force” in the UK context takes shape above all as a process of constitutional reasoning.

Though not stated in such terms, the UK Supreme Court’s ruling on the matter was carefully attuned to this problem of balancing rational deliberation over international norms with expressions of the democratic will. To abandon either factor would forfeit the chance for certainty and stability, which is attained only via final “decisions” that are generally seen as expressions of a legitimate constitutional system. The Court ruled that EU membership had created rights that could not be revoked without Parliamentary actions, and therefore only Parliament had the authority to invoke Article 50.<sup>238</sup> The ruling did not resolve the question of whether Parliament could have declined to invoke the Article, in defiance of the referendum’s result.<sup>239</sup> In a fashion somewhat analogous to the U.S. Supreme Court’s *Marbury v. Madison* decision, then, the UK Supreme Court accepted a result that was dictated by the non-legal “impulse of facts”<sup>240</sup> (in this case, the political pressure of a popular referendum rather than the decision of a popularly-elected President),<sup>241</sup> while using its own authority to determine the reasoning and justification for that outcome. In doing so, it both cast itself as the ultimate voice of constitutional interpretation for the UK sovereign and the Parliament as its most important political representative. It accurately observed that a single popular referendum could effectively decide one issue,

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235. See, e.g., *Anti-Brexit Group Challenges UK Government Over Article 50 Disclosure*, REUTERS (Sep. 24, 2016), <http://www.reuters.com/article/us-britain-eu-idUSKCN11U08W>.

236. *Id.*

237. See, e.g., Piet Eeckhout & Eleni Frantziou, *Brexit and Article 50 TEU: A Constitutionalist Reading* (U.C. London Eur. Inst. Working Paper, 2016), <https://ssrn.com/abstract=2889254>.

238. *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 [277] (appeal taken from EWHC), <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>.

239. Eeckhout & Frantziou, *supra* note 237, *passim*.

240. *Cf.* Leiter, *supra* note 25, *passim*.

241. *Cf.* PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA*, 118–19 (2002) (discussing *Marbury*).

without replacing all existing institutional embodiments of the sovereign interpretive authority.

In so ruling, the Court helped to further a gradual process of democratic consultation over the status of the UK's relationship with the EU, a process that can only be concluded when the sovereign populace finally acclaims its concrete *outcome*. It is imperative for Realists to acknowledge that a single popular referendum like the Brexit vote is not inherently identical with the "will of the people" or with the "public force."<sup>242</sup> Of course, neither is it clear that Parliament represents that will in some higher sense, and should thus be more directly associated with the overall sovereign power. In the particular context of the UK, issues of such domestic and international importance as EU membership have traditionally been ascribed to Parliamentary authority. The Court did not deny that the referendum was an *expression* of sovereign authority, but it acknowledged that actual concrete decisions on the various complexities of the Brexit process would require more interaction among the various parts of the UK's constitutional system—a message that was underscored by the Conservative election defeat in June 2017. At the same time, of course, the Court denied that the Scottish and Welsh assemblies had any independent veto power.<sup>243</sup> If the inhabitants of those regions are unwilling to comply with this determination and instead insist on an independent role in the formation of the sovereign decision they may take measures as extreme as secession in order to realize that decision.<sup>244</sup> No Court ruling can prevent such political events.

The act of any self-defining "sovereign" people, then, can thrust into uncertainty the binding character of the internal norms of not just the EU, but the UK, as well. And because there is no such thing as an objective "people" out in the world, only in the subjective self-understandings of groups of human individuals, the locus of "sovereignty" will always be fluid, dynamic, and, again, ultimately uncertain. No timeless structure of norms or organizational rules can be built upon this foundation, because the foundation itself is fully subjective.

Are international cooperation, "socialization,"<sup>245</sup> and international law then lost causes? Not at all; nor are they inherently violations of sovereignty. The rules and norms of international law simply are functions of the sovereign power of individual political unities—primarily states—and are effective as long as "peoples" will them to be. Many rules, for example those of international trade organizations and other facets of the global economic

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242. For an understanding of this point, see SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 102, at 221.

243. Peter Lynch, *Why Scottish Nationalists Won't See Article 50 Ruling As a Defeat*, CONVERSATION (Jan. 25, 2017, 8:15 AM), <http://theconversation.com/why-scottish-nationalists-wont-see-article-50-ruling-as-a-defeat-71895>.

244. *Id.* A "certain" outcome to the Brexit process thus will not be reached unless the integrity of the UK's internal union is itself stabilized through careful political compromise.

245. See, e.g., GREWAL, *supra* note 162 *passim*.



system, are invaluable to states because they provide useful “situational certainty” as to the rules and norms that they enable. Such situational certainty of rules and norms can facilitate desirable international activities, such as cross-border investment, combating terrorism or crime, maintaining security of assets held abroad, personal and state security, or the efficient movement of people and goods.<sup>246</sup> Along with organizations such as the World Trade Organization (WTO), the maritime order that the U.N. Convention on the Law of the Sea (UNCLOS) helps to guarantee is a prime example of such economically efficient,<sup>247</sup> rational forums of intra-sovereign cooperation.

And yet UNCLOS is another example of the tension, which Realist approaches to international law must acknowledge, between productive norms of cooperation and the uncertainty-producing overlap among competing norms.<sup>248</sup> The current deadlock in the South China Sea between other concerned states and China, which rejects the findings of the July 12, 2016 UNCLOS Tribunal that invalidated China’s claims to territory in the South China Sea,<sup>249</sup> serves as another example of cases where the uncertainty of international law must be acknowledged along with the need for common, incremental effort towards clearer standards.<sup>250</sup> Today, China’s claims and related activity in the South China Sea face opposition by many states that promote the UNCLOS Tribunal decision invalidating China’s claims. But the existence of another (if smaller) set of states and scholars that do recognize China’s position on the invalidity of the Tribunal similarly suggests that the differences underlying the dispute are not likely to be solved purely by means of legal interpretations or decisions.<sup>251</sup>

Indeed, in the case of the South China Sea dispute, there is not only uncertainty due to “too much law,” but also uncertainty as to the substantive content of mutually-recognized norms and to the existence or not of the jurisdiction and enforcement powers and jurisdiction of the UNCLOS Tribunal. China has argued that the latter was invalid because it improperly touched upon the issue of “sovereignty.”<sup>252</sup> With regards to ostensibly shared norms, meanwhile, there are completely incompatible interpretations

246. See, e.g., JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 8 (2000).

247. Cf. Eric A. Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 AM. J. INT’L L. 569 *passim* (2010).

248. See KAMMERHOFER, *supra* note 6, at 82 (discussing the problem of “too much law” causing uncertainty due to the presence of overlapping standards).

249. See Melissa H. Loja, *The Spratly Islands as a Single Unit Under International Law: A Commentary on the Final Award in Philippines/China Arbitration*, 47 OCEAN DEV. & INT’L L. 309, 311 (2016) (describing how the award redefined the islands concerned not to constitute claimable “territory” in the first place).

250. See, e.g., Martti Koskeniemi, *The Politics of International Law*, 1 EUR. J. INT’L L. 4, 18–19, 28 (1990).

251. See, e.g., Graham Allison, *Of Course China, Like All Great Powers, Will Ignore an International Legal Verdict*, DIPLOMAT (July 11, 2016), <http://thediplomat.com/2016/07/of-course-china-like-all-great-powers-will-ignore-an-international-legal-verdict/>.

252. See, e.g., MINISTRY OF FOREIGN AFFAIRS OF CHINA, POSITION PAPER OF THE GOVERNMENT OF

advanced by each side with respect to, e.g., the two customary norms “the land dominates the sea” (*la terre domine la mer*) and “one cannot bestow what one does not have” (*nemo dat quod non habet*).<sup>253</sup> Although the Philippines used these principles to support the principle of freedom of navigation, the Chinese separately mustered them to support the Chinese position that only after a clear, final disposition of territorial ownership claims could the resulting maritime boundary rights be assigned and adjudicated. If, as here, arguments by states on opposite sides of a conflict are both recognized by some other sets of states, the solution is not that the majority rules. It is simply the case that some states will and others will not recognize certain rules, claims, or doctrines and will make known to each other the degree to which they are willing to allow their own interpretations of international law to impose costs upon themselves and others.

This is an excellent ground to begin conversations on the interpretation of international rules, for such conversations must then start with two pragmatic claims: 1) there is no sovereign, supreme interpretive authority at the international level that could bind both, for example, the United States and China; and 2) there is in each of those two states such an authority, such that the government does in fact enjoy the politically supreme power to locally interpret and apply legal norms, to the exclusion of any other external authority. This might lead us to conclude, for example, that the pragmatic meaning of the UNCLOS treaty is not determined absolutely by the decisions of an international tribunal (nor by majority opinion of states or by the position of any particular state), but rather by each state operating to apply the treaty within its own jurisdiction, subject to its own legal procedures and processes. If other states do not recognize a counterpart’s interpretation, but are also not willing to go to war over the disagreement (or to settle upon a code of conduct or diplomatic solution), then the situation is left ambiguous and fluid.<sup>254</sup>

Acknowledging this situation does not produce easy answers to international disputes, but it can, at least, prevent conflation of the existence of an agreement between states with the idea that the agreement itself—rather than the states themselves as local sovereigns—supplies the practical meaning, definition, and application of its own terms. Where powers do so in a manner inconsistent with each other, as they often do, there is no “legal” or normative voice that may compel them to agree; there remain only the art of

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THE PEOPLE’S REPUBLIC OF CHINA ON THE MATTER OF JURISDICTION IN THE SOUTH CHINA SEA ARBITRATION INITIATED BY THE REPUBLIC OF THE PHILIPPINES (2014).

253. For analysis of these two principles and their conflicting readings, see, for example, JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 327–28 (2012) (discussing the application of the *nemo dat* principle to UNCLOS, especially in terms of its initial drafting process and the problem of “representing” excluded states); Teh-Kuang Chang, *China’s Claim of Sovereignty over Spratly and Paracel Islands: A Historical and Legal Perspective*, 23 *CASE W. RES. J. INT’L L.* 399, 414–18 (1991). On “*la terre domine la mer*,” see, e.g. Guifang (Julia) Xue, “Deep Danger: Intensified Competition in the South China Sea and Implications for China,” 17 *Ocean & Coastal LJ* 307, 319 (2011).

254. See KOSKENNIEMI, *supra* note 250, at 18, 27.

diplomacy and the exercise of various forms of persuasion.<sup>255</sup> Failing those, there is only patience or the attempt to enforce norms via soft (outcasting) or hard (military conflict) forms of sanction.

### B. *Situational Certainty and the Logic of Federation*

But what of the even harder cases, like that of North Korea's nuclear program? In this case persuasion and soft coercion have both failed, and patience is unpalatable due to the gradually rising nuclear threat. Further, full military intervention would be likely to replace a stable (if very oppressive) political unity with a Guernican landscape of bloodshed and chaos, not to mention risking deployment of the very weapons that states now seek to prohibit. A Realist sees these difficulties and puts little faith in either sanctions regimes or even the threat of force in securing compliance from a state that sees its very existence at stake in pursuing nuclear arms.

On the other hand, we have also seen that any political unity is inherently unstable and rests on individuals' perceptions of its necessity as a source of order and clarity. Paradoxically, a less "outcast" North Korea—one recognized as a sovereign state by the United States and Japan, for instance—might have far less reason to pursue its nuclear program, and its residents might also be less convinced that only the ruling dynasty could provide order. In particular, experts suggest that a North Korea more secure in its sovereignty would be likely to pursue significant economic "opening up" reforms after the pattern of China's successful post-1979 growth program.<sup>256</sup> In doing so, the state would not only be opened up to all manner of outside influences and forms of "socialization,"<sup>257</sup> it would in particular be forced to more closely engage with its wealthy and liberal southern counterpart.

One does not have to be a Panglossian to predict that such "opening up" would deter some of the harshest extremes of North Korea's political praxis and in time could even radically transform the regime. The possibility of this outcome cannot be accurately predicted based on currently available information—but neither can that of any other approach, including regime change. A Realist approach to this type of international law dispute—one in which a self-defining sovereign is willing to threaten the entire globe to defend what it sees as a prerogative needed to maintain its very existence—should focus on first exploring the options that carry the least risk of con-

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255. This is the basis of the argument I advance elsewhere regarding the need in the South China Sea for international mechanisms that could be viewed by all sides as non-prejudicial and neutral, such as a voluntary and limited Commission of Inquiry to establish parts of the shared evidentiary and factual basis for various states' competing sovereignty claims. See Ryan Mitchell, *An International Commission of Inquiry for the South China Sea?: Defining the Law of Sovereignty to Determine the Chance for Peace*, 49 VAND. J. TRANSNAT'L L. 749, 752–53 (2016).

256. See John Delury, *Trump and North Korea*, FOREIGN AFF., Feb. 13, 2017, at 46, 49–50.

257. Previous suggestions to this effect have been made by Korea-focused international relations scholars. See, e.g., Gregory J. Moore, *America's Failed North Korea Nuclear Policy: A New Approach*, 32 ASIAN PERSP. (SPECIAL ISSUE) 9 *passim* (2008).

flict.<sup>258</sup> The goal, again, should be to achieve “situational certainty” by means of the rational compacts of mutually respecting sovereigns.

Normative theorists have difficulty justifying any decision to recognize as sovereign a state such as North Korea, which many would see as being in violation of various provisions of international criminal law and also as “illegitimate” in its political system.<sup>259</sup> Yet as we saw throughout Part IV, the Realist approach to politics does not center on legitimacy, but rather on the existence or lack of a “political unity.” All signs indicate that North Korea has such a political unity, regardless of whether it is procured or maintained by unjust and unconscionable means.<sup>260</sup> It is thus a sovereign capable of implementing norms of the international community should it wish to do so. A chaotic void, such as those left in Iraq and Libya after Western interventions and in parts of Syria during its intractable civil war,<sup>261</sup> can produce no such decision to implement a norm. Nor should outside actors promulgate mass chaos and confusion in a territory already possessing nuclear arms.

A Realist must thus carefully consider the possibility of “carrot” approaches to securing normative agreement, such as offering diplomatic recognition even to unpalatable regimes, before pursuing militant claims to universal sovereignty (however just) à la the war crimes tribunal approach. On the other hand, if military intervention is to be pursued as a last resort means of securing compliance with a norm, the Realist should seek the broadest possible coalition and firmest indication of shared commitment to the decision upon enforcement. Military endeavors outside of the scope of the U.N. Security Council should be discouraged not only because of the economic and reputational costs of acting unilaterally and the risk of being pulled into an Iraq-style vortex, but because joint enforcement actions, as at Nuremberg and Tokyo, and to a lesser extent Yugoslavia and Rwanda,<sup>262</sup> offer unique benefits.

What are these benefits? First and foremost, joint enforcement actions offer the possibility of provisionally “constitutionalizing” key norms. Nuremberg was a kind of “constitutional” moment not in the sense that it established a global sovereign authority, but in that it articulated the logic

258. This premise of Realism is also explored in the international relations field. See, e.g., Robert O. Keohane, *Realism, Neorealism and the Study of World Politics*, in *NEOREALISM AND ITS CRITICS* 1 *passim* (Robert O. Keohane ed., 1986).

259. See, e.g., Brendan M. Howe & Jasper S. Kim, *Legality, Legitimacy and Justifications for Military Action Against North Korea*, 11 U.C. DAVIS J. INT'L L. & POL'Y 229, 254 (2004) and *id.* 233–236. For example, Howe and Kim argue, “North Korea would not qualify for de jure recognition [as a sovereign state].” *Id.* at 234.

260. See Roberta Cohen, *Human Rights in North Korea: Addressing the Challenges*, in *TRANSITIONAL JUSTICE IN UNIFIED KOREA* 75 *passim* (Baek Buhm-Suk & Ruti G. Tietel eds., 2015).

261. See, e.g., Raymond Hinnebusch, *State De-Construction in Iraq and Syria*, 57 PVS POLITISCHE VIERTELJAHRESSCHRIFT [PVS Political Quarterly] 560 *passim* (2016).

262. For a useful overview of facts regarding these tribunals in a comparative context, see MADOKA FUTAMURA, *WAR CRIMES TRIBUNALS AND TRANSITIONAL JUSTICE* (2008); WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS* (2006).

of what Schmitt, in his treatise on *Constitutional Theory*, refers to as the “federation.” As opposed to a mere international organization that promotes certain normative language or confers certain mutual benefits, a federation is a constitutionally-constructed group entity. Its establishment is fundamentally different from other types of international legal endeavors, entails different costs and benefits, and offers distinct opportunities.<sup>263</sup>

For Schmitt, a true federation is no mere “international legal community” promoting vague and abstract, general norms. Rather, “[t]he federation . . . is the bearer of its own public law powers in regard to the federation members, and the relations between the federation and member states have a public law character.”<sup>264</sup> That is to say, a true federation must preserve the capacity for independent decision upon some set of shared international norms: “[B]ecause the question of political existence can emerge differently in various areas . . . it is possible that the decision concerning a particular type of such question, for example, questions of external political existence, lies with the federation.”<sup>265</sup>

In other words, both the component state and the federation of which it is a constituent member can simultaneously exercise sovereignty as to different matters—different “question[s] of political existence.” For example questions of external political existence (such as identifying targets for military enforcement of shared norms) may lie with the federation, while “the preservation of public security and order inside of a member state” could remain with that member state.<sup>266</sup> There is no “division of sovereignty” in such a case, “because . . . the decision in the individual case is always *entirely* attributed to the one or the other.”<sup>267</sup> Moreover, the will to remain a member of such an entity always lies with the individual state, and it can always seek to leave the federation at will (though this move may be opposed).

But the indispensable requirement for states to be able to enter into such a relationship with one another in the first place is a striking and important one: what Schmitt refers to as “homogeneity.”<sup>268</sup> By this, he does not necessarily indicate any ethnic, religious, class-based, or other particular forms of similarity among states. Rather, the key question is simply whether states and their peoples view themselves as having the kind of homogeneity required to produce and obey shared decisions on the definitions of norms, whatever these may be in the particular case. That is also to say that when states join together to enforce legal norms as at Nuremberg, they employ the rhetoric of a federation with a homogenous political content and conditions for membership (e.g., a ban on certain behavior). Whether or not they

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263. See SCHMITT, *CONSTITUTIONAL THEORY*, *supra* note 102, at 114.

264. *Id.* at 397.

265. *Id.* at 395.

266. *Id.*

267. *Id.* at 395 (emphasis in original).

268. *Id.* at 392 (“[E]very federation rests on an essential presupposition, specifically of the *homogeneity of all federation members . . .*”) (emphasis in original).

internally abide by such rules, or ever actually accede to a supervisory role for a federation governing body (as the Security Council has generally failed to be despite the intentions of its inventors), any state excluded from this grouping is faced with the possibility of being its target.

Rather than today's United Nations, the best examples of a federation in recent history would be the European Union. The EU is an attempt at the constitutionalization of shared norms by means of iterative integration. While we have already seen that its shared norms and structures are susceptible to sudden revocation by any internal sovereign member, this does not make its process of integration any less meaningful. Within such a structure, because "questions of external political existence" are seen to be at stake, shared definitions of important norms can be coerced by reference to the importance of maintaining a shared homogeneity for the sake of preserving the larger political unity. In this process, "neither the federation in regard to the member states nor the member state in regard to the federation plays the sovereign . . . [for] [t]he existence of the federation rests fully on the fact that this case of conflict is existentially excluded."<sup>269</sup> That is to say that a federal entity such as the EU exists and exercises authority over its ostensibly sovereign members only so long as a shared basis of unity is accepted to be important enough to outweigh the desire for local autonomy.

This is different from an economic cost/benefit analysis. It is rooted not in the pursuit of temporary and shifting self-interests among states, but in Schmitt's concept of the political as the definition of existential friends and enemies.<sup>270</sup> In other words, a federation, like a sovereign state, is a function of political unity. Unlike the sovereign state, a federation is not an absolute unity involving vowed deference to the sanctions of the sovereign, but rather a conditional arrangement in which various peoples commit to processes and institutions of joint decision-making or mutual deference. The EU and its predecessor, the European Economic Community, were the basis for decades of coordinated economic and social policies, as well as, most importantly, contributing to maintaining peace on the European continent.

The EU, especially when considered in conjunction with the military compact afforded by the NATO alliance, has created the world's most striking example of situational certainty being pursued among similarly situated independent sovereign powers. Much scholarship is devoted to the question of whether the EU will further integrate, transforming eventually into a "United States of Europe," or whether it will disintegrate under populist pressures within member states like those that lay behind the Brexit vote.<sup>271</sup> Yet movement in either direction misses the special character of the body.

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269. *Id.* at 395.

270. Cf. SCHMITT, CONCEPT OF THE POLITICAL, *supra* note 142, *passim*.

271. See, e.g., Jan Zielonka, *The International System in Europe: Westphalian Anarchy or Medieval Chaos?*, 35 J. EUR. INTEGRATION 1, *passim* (2013).

Any federation in Schmitt's sense is a unique entity that comes into being through the choice of autonomous sovereigns to deeply integrate themselves in pursuit of situational certainty as to specific political and economic conditions. It requires commitment to abide by shared norms and to designate a shared mandatory body for the interpretation and application of those norms—as is the case with the ECJ and ECHR.<sup>272</sup>

To incorporate any such “federal enforcement” activity into the United Nations as an enduring feature, thus constitutionalizing some key norms and their enforcement against behaviors that are viewed as collective threats, would not be in any sense a diminution in the sovereignty of members. It would simply be an agreement that, under current conditions, the peoples of the organization's member states view the enforcement of such norms as indispensable elements of their own respective political existences. It would be in the interests of the five permanent Security Council members to more closely specify the exact terms of homogeneity they are interested in maintaining within the organization and the kinds of “questions of political existence” that justify its mobilization to enforce agreed upon norms.<sup>273</sup> Such forms of enforcement may be fully reasonable measures in response to credible threats to international order from the commission of genocide or the development of nuclear or biological weapons, for example. At the same time, collective enforcement efforts of this type should have clear, limited aims and be dissociated as much as possible from attempts at regime change, for 1) existentially threatened regimes are less likely to pursue cooperation or integration; and 2) there is no guarantee any given regime can be replaced with a better one, rather than a worse successor or mere civil war and chaos.

Movement in this direction would also offer situational certainty to outsider powers such as North Korea, which could behave much more rationally if assured that they would be free from the threat of military force as long as they abided by a limited set of clear, already-defined federation rules. Understanding the exact criteria under which one is considered a potential “enemy” is crucial if one is to move towards becoming a “friend.”

### C. *Domestic International Law and the Construction of a World Interior*

On the basis of a Realist understanding of international law, orderly and stable political regimes are a requirement for the establishment of any cooperation between states. Situational certainty can only be achieved when the parties reaching a certain mutual understanding really are effective sovereigns. If they are effective sovereigns, then they are the ultimate arbiters of

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272. See, e.g., Marco Tabarelli, *The Influence of the EU and the ECHR on 'Parliamentary Sovereignty Regimes': Assessing the Impact of European Integration on the British and Swedish Judiciaries*, 19 EUR. L. J. 340, *passim* (2013).

273. This would be in keeping with the original design of the institution, albeit not generally speaking the reality of its performance to date. See, e.g., DAN SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY* 33, 179 (1999).

how norms will be defined and applied in their respective spaces. But, as the discussions in Part V have already noted, this does not mean that international legal practice is irrelevant to the pursuit of either particular states' interests or normative visions for regional or world order.

Part V.A demonstrated the limits of international legal normativity given this Realist perspective. It is simply the case that, as long as sovereigns are not willing to pursue destructive and extremist policies of mutual invasion and overthrow, there is no guarantee that they will *ever* reach agreement as to the definition of international norms. This holds even for such venerable and supposedly "universal" norms as the "freedom of navigation," the right of "self-determination," or "freedom of belief," among others. Even when states sign explicit treaties with one another, such as for instance the legal instruments underlying EU integration, they are ultimately free to reinterpret those instruments later on should they choose to do so and be willing to bear the costs of potential reprisals. None of this, on the other hand, means that states should not pursue cooperative dealings in which they reward each other for maximizing their respective interests. They cannot be counted on to do so, but they will do so as long as they have decent leaders.

Further, as Part V.B pointed out, it is also possible for states to integrate themselves in such a manner that meaningful and important instances of sovereignty are shared in supra-national forums. States vowing to adhere to ECJ or ECHR decisions are obviously only able to make such commitments if they are already in full authority over their own territories and citizenry. Yet the choice to integrate in this manner, and to create a federated legal structure in which future centrifugal action will be costly and uncertain, *does* affect the conditions for the exercise of sovereignty by particular state authorities. Within the context of such a structure, regardless of whether it moves towards its own unitary sovereign statehood, international norms can be effectively associated with concrete sanctions and can, indeed, be effective as "law." Of course, federations exist in a perpetual state of tension, and can always move in either direction towards further unity or dissolution.<sup>274</sup>

This Part discusses briefly a final promising dimension of international legal norms in a Realist world: what I will refer to as "domestic international law."<sup>275</sup> This term can be taken to include all of the various doctrines and processes by means of which international legal norms are adopted into domestic legal systems and made the basis of internally binding norms with clear sanctions that apply to foreigners to the extent that they come into

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274. Cf. G.W.F. HEGEL, OUTLINES OF THE PHILOSOPHY OF RIGHT, § 259 (T.M. Knox trans., Oxford University Press 1967) (1821) ("Several states may form an alliance to be a sort of court with jurisdiction over others, there may be confederations of states, like the Holy Alliance for example, but these [projects] are always relative only and restricted [in scope].").

275. These kinds of legal processes and decisions are of course much studied, but generally are not taken as they are here to represent the most dynamic and vanguard dimension of international legal practice. See, e.g., Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501 *passim* (1999).



contact with said legal systems. The extension of universal jurisdiction principles via the ICC (or parallel universal jurisdiction statutes enacted in national legislatures) are one clear means of such importation of norms.<sup>276</sup> The use of the Alien Tort Statute in the United States to enforce liability for international law violations via civil actions is another such mechanism.<sup>277</sup> So too are multilateral economic sanction regimes developed to target individuals and assets linked with alleged international law violations.<sup>278</sup> Finally, immigration policies that distinguish applicants based on international law principles (such as refugee status, likelihood of persecution, or having committed torture or other norm violations) can effectively introduce international legal principles into domestic legal systems.<sup>279</sup>

Perhaps more than any other, this aspect of states' legal practice deserves closer attention and study as a means of advancing particular visions of international law as it "should" be. A tension seemingly exists between the Realist perspective privileging the sovereign state as the only agent of certainty and the idea that the courts (or other legal authorities) of one state should be able to make international law determinations about another state. Yet this tension is only apparent. It is precisely because the individual sovereign is the ultimate interpreter and applier of norms and is free to redefine them, that it can develop its own framework of international law and give this framework legal validity and the force of sanction—as far as its judgments may reach. A Realist would hold that individual sovereigns are fully capable of imposing domestic liability for foreign actors in line with whatever vision of legal normativity they wish to impose.

In this view, current versions of international legal doctrines pushing in the other direction, such as the principle of "sovereign immunity" which prevents liability in foreign courts for official acts of a recognized government,<sup>280</sup> exist only at the behest of each particular state. If the particular sovereign is the basis for and interpreter of the norms of international law, then it is free to allow its own interpretation of international legal obligation, via its own judicial system, to extend as far as it may deem appropriate, and indeed to cover various acts by other self-defined "sovereigns." The same holds true for the more technical question of extraterritorial jurisdiction and the application of domestic law to acts occurring outside of a state's territory.<sup>281</sup>

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276. See, e.g., Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57, 58 (2011).

277. Cf. Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 *passim* (1989).

278. Cf. Shapiro & Hathaway, *supra* note 79, at 311–44.

279. See Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 *passim* (1990).

280. See Joan Fitzpatrick, *The Claim to Foreign Sovereign Immunity by Individuals Sued for International Human Rights Violations*, 15 WHITTIER L. REV. 465 *passim* (1994).

281. See Anthony J. Colangelo, *Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT'L L. 65 *passim* (2013).

Far from abhorring domestic courts' "judicialization" of international relations, Realists should at times welcome such processes as one more aspect of each sovereign state's authority to freely define and apply international norms, though some may also argue for various degrees of deference when political branches of government seek to protect their monopoly over such areas of policy. Economic sanctions, diplomatic reprisals, and other forms of "outcasting" are an equally available, and often effective, means for advancing international legal norms as defined by particular states.

Even if there is no "true" definition of the international legal norm prohibiting "wars of aggression," for example, any individual state is capable of using its sovereign authority to interpret the norm per its own preferred definition, and to impose legal penalties on alleged violators including economic sanctions, freezing of assets, and civil or criminal liability. Especially for large, wealthy, and influential states, such as China, EU members, Japan, the United States, and others, the establishment of domestic forms of liability for the violation of international legal norms could be very effective in both deterring the targeted conduct of foreign states and in establishing useful precedents for third states, and domestic legal authorities, in advancing preferred definitions of the norm in question. However, a Realist must also be aware that different states can and will advance different definitions of these norms, often conflicting ones, and there is no guarantee that these definitions will ever coalesce.

Parts of this phenomenon are quite familiar to international law scholars who discuss the "internalization" of norms, constructivist "socialization," or the development of international law enforcement strategies such as "outcasting."<sup>282</sup> Like each of those theories, a Realist explication of domestic international law suggests that states' absorption of international legal norms, and domestic enforcement of those norms via its own sanctions, can advance international law more generally. Yet where it diverges from each of those alternative points of view is in declining to extrapolate on this basis the unfounded claim that all states so behaving are pursuing the same objectives, or that states thus defining their own visions of international law will necessarily come to more closely resemble each other over time.

"Socialization" and increased similarity through mutual interaction are processes stemming from sociable interactions, i.e., those which are undertaken in a cooperative fashion for the pursuit of mutual or respective benefits. But domestic international legal interpretations, like other exercises of sovereign authority, are not "sociable" in nature.<sup>283</sup> They are characterized by the "jurispathic" function in which some norms and definitions are de-

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282. See, e.g., WENDT, *supra* note 12, at 246-312; Hathaway & Shapiro, *supra* note 79; Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

283. Cf. GREWAL, *supra* note 162, at 50-52.

stroyed while others are brought into being.<sup>284</sup> The kind of international law that is projected by the United States via the Alien Tort Statute, by Spanish law's recognition of universal jurisdiction, or by ICC members is not "universal": rather, it reflects a heightened degree of the exercise of a particular sovereign authority. Like other forms of state practice, there is simply no need to posit that this one will add up to a unified whole at any point. Rather, each state constructs its own version of what the contemporary German philosopher Peter Sloterdijk has described as a "world interior" (*Weltinnenraum*),<sup>285</sup> that is, a model of the exterior world that is made visible and can be acted upon only on the basis of a certain internal constitution.

This is not to say that the phenomenon of domestic international law does not lead to greater homogeneity among international legal practices. The definitions favored and enforced by large, wealthy, and powerful states will indeed tend to have an inordinate influence. Yet, it is not hard to imagine a situation in which China, Russia, and the United States, for example, each use their domestic courts and sanctions to actively advance different visions of international law on all those falling within their jurisdictions. This dynamic is already quite apparent with respect to major global governance issues such as, for example, policing of corruption, environmental regulation, administration of the Internet, anti-terrorism efforts, or the handling of refugee issues.<sup>286</sup> Each of these areas of political action transcends the capacities and territory of the individual state. But that does not necessarily imply that states will inevitably cooperate to deal with such issues.

Rather, when confronting even truly global policy matters, each sovereign acts as its own final interpreter and applier of norms. Domestic international law falls into the same category of action. For example, when a Spanish court sought to apply universal jurisdiction to a former Chinese leader over allegations of severe human rights abuse,<sup>287</sup> China's protests successfully secured a change to Spanish law.<sup>288</sup> Domestic applications of international law hold sway within the borders of particular sovereigns, but also affect each other as different world interiors overlap by means of commercial, cultural, and dip-

284. Robert M. Cover, *The Supreme Court, 1982 Term—Nomos and Narrative*, 97 HARV. L. REV. 4, 40–44 (1983).

285. PETER SLOTERDIJK, IN THE WORLD INTERIOR OF CAPITAL: TOWARDS A PHILOSOPHICAL THEORY OF GLOBALIZATION 96 (Wieland Hoban trans., 2013) (describing how modern globalization is a cultural phenomenon that "negate[s] the externality of the external"). Sloterdijk cites Rainer Maria Rilke for the first relevant use of the phrase "world interior." *Id.* at 197. More fancifully, but with insight still relevant to the self-centered perspective of the autonomous modern sovereign state, Sloterdijk refers to the process of constructing a "world interior" as "a repetition of the foetal sensation in an external scene," and as the phenomenon in which "surrounding space loses its foreign quality and is transformed as a whole into the 'house of the soul.'" *Id.*

286. Cf. Timothy M. Shaw, David R. Black & Sandra J. MacLean, *Postscriptum: Prospects for the Next Decade*, in A DECADE OF HUMAN SECURITY: GLOBAL GOVERNANCE AND NEW MULTILATERALISMS 201 (Timothy M. Shaw, David R. Black & Sandra J. MacLean eds., 2006).

287. See Mario Esteban, *Spain's Relations with China: Friends but not Partners*, 1 CHINESE POL. SCI. REV. 373, 380 (2016).

288. *Id.*

lomatic interactions. As this Sino-Spanish case suggests, transnational interactions per se can as easily lead to heterogeneity and limitations on jurisdiction as to an increasingly homogenous legal order. What such clashes do mean is that each domestic application of international law will hold sway within its borders, and that this will affect the action and interpretations of other states just like any other global governance policy.

The precise same dynamic holds true for the Alien Tort Statute and other applications of international law to foreign actors within the jurisdiction of the U.S. court system.<sup>289</sup> It also, notably, holds true with respect to the incorporation of domestic international law justifications for interpretations of the laws of war. Early 21st century U.S. definitions of unlawful enemy combatants as lacking the right to due process and other legal protections, for example, faced no overwhelming external pressure. This interpretation changed and detained combatants were subsequently granted legal protections due to domestic legal interpretations, such as that by the U.S. Supreme Court in *Boumediene v. Bush*.<sup>290</sup> Such actions by domestic courts are, of course, part of the individual state's exercise of sovereignty. Even today, however, the United States continues to pursue significant numbers of targeted killings and other such practices within its world interior.<sup>291</sup>

Some scholars claim that there is an inherent internal logic to legal interpretations such that an inherent rationality in international law will become increasingly universally applicable.<sup>292</sup> But even given a body of universally acknowledged norms, there is no guarantee they would ever be defined uniformly. Any concrete case can lead to major divergence between different sovereigns. Such sovereigns can nonetheless extend their internal reception of international law as far as their jurisdiction and influence will allow. The situational certainty of such dynamics lies in the knowledge that large eco-

289. See Anthony D'Amato, Editorial Comments, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 63 (1988).

290. *Boumediene v. Bush*, 553 U.S. 723 (2008).

291. The idea of an international police power being exercised by the United States on a global scale was the second of three possible forms of near-future world order contemplated by Schmitt in CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM*, 355 (G. L. Ulmen, trans., Telos Press 2006) (speculating "that England's former domination of the oceans [might] be expanded to a joint domination of sea and air, which only the United States is capable of doing. America [would thus be], so to speak, the greater island that could administer and guarantee the balance of the rest of the world"). The other two possibilities he suggests are, first, a genuine world state being established by one or the other Cold War blocs or, third, the potentially more stable arrangement of "[a] combination of several independent Großräume [great spaces] or blocs [that] could constitute a balance, and thereby could precipitate a new order of the earth." *Id.* Schmitt's three alternative scenarios are especially relevant to international law, as the concrete application of its norms relies to a large extent on where and against whom enforcement is being sought. While Western international legal institutions like the International Criminal Court or Permanent Court of Arbitration claim the entire globe as their "world interior," implying a faith in the first scenario, the reality of enforcement perhaps increasingly points to Schmitt's third form of world order.

292. Cf. Jeremy Waldron, Comment, *Foreign Law and the Modern Jus Gentium*, 119 HARV. L. REV. 129 (2005). The theory outlined here does, however, fully support the idea that foreign or international law is an invaluable interpretive resource for domestic judiciaries.

conomic and political systems exist within the borders of sovereign states and extend outside of these borders along with the scope of each state's economic and political activities. There is no assurance that the world interiors constructed by Chinese or U.S. interpretations of international law or that of ICC member states, will ever truly prevail over the entire globe. But as a function of particular sovereign authorities, these world interiors do afford the situational certainty that those falling within their jurisdiction will be subject to a reliable source for the interpretation and application of norms.

This is certainly preferable to the lack of such authorities. Further, it suggests a perhaps unlimited range for individual sovereigns to develop their own theories and practices of international law and to extend these within their own jurisdictions. They would, of course, be wise to avoid imagining that their reach can actually encompass the entire world or that the world interiors constructed by other states should not be taken into account.

## VII. CONCLUSION

The "jurispathic" function<sup>293</sup> of a sovereign authority capable of rejecting certain norms and applying others is essential to the functioning of any legal order capable of producing concrete decisions on particular cases and compelling compliance with such decisions. But the need for such a function is only evident when one accepts the problem that it is intended to confront: the condition of epistemic uncertainty and the resulting inability of rational discourse as such to ensure normative agreement. As soon as one abandons the assumption that there are innately valid normative judgments that will necessarily compel any discursive partner, or one ceases to engage in the search for such universals, one is confronted with the need for a pragmatic source of "final" judgments as the only alternative to endless conflict and dispute. Itself beyond justification, this arbiter brings about the predictable, rational world of law that is the condition for all subsequent justifying discourse.

Most critiques of this concept of an absolute sovereign power today do not take the form of "natural law" speculation, as in Hobbes's era, nor even the form of the speculative Kelsenian variant of positivist normative theory that Schmitt argued against. Rather, today's arguments tend to assert the existence of a unified system of "international law" based on such factors as a set of binding Customary International Law and *jus cogens* norms that operate so as to restrict states' behavior, as well as asserting the binding and coherent character of various international law determinations by interna-

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293. See Cover, *supra* note 284, at 40–44. See also KAHN, *supra* note 118, at 150 ("Liberal theories . . . do indeed have a problem with the moment of decision that terminates the conversation. This is the moment that Robert Cover described as 'jurispathic.'").

tional courts, tribunals, U.N. officials or affiliates, or treaty-created bodies.<sup>294</sup>

The implication of the theory of sovereignty developed in this Article is not that such arguments are false, but simply that the practical, concrete judgment in a specific case or controversy as to whether they are true will be made by individual states. The sovereign power to define the norm and the exception thus remains in any particular case with the authority making such a determination—the particular state (or federation as the case may be). However, this does not preclude agreement and cooperation; on the contrary, states operating upon this understanding have more reason to seek the wide promulgation of their own interpretations of international law than they would otherwise, as they should rationally seek to get as many other states' to share their interpretations and acts of recognition as possible.

Agreement among states can lead to a great deal of certainty as to norms on the international level, as is obvious from the examples of the EU or WTO, but such agreement cannot be assumed as a theoretical matter. Moreover, it exists only based upon the decision of particular states and peoples to recognize a shared standard. That act of recognition relies for its enforceability on the decision by a sovereign to define and apply the norm in a manner consistent with some group of its peers. Per Schmitt, "what matters for the reality of legal life is who decides."<sup>295</sup> In the case of international law norms, their definitions, and their applications, the paramount "decision"-making subject is still the sovereign state within its territory as well as within the world interior circumscribed by its extraterritorial influence.

That this is the case suggests that states should work to achieve shared standards and to maximize agreement, precisely based on full acknowledgment of each other's ultimate prerogative to "recognize" different sources and interpretations of international law. Ambiguous situations at the international level are not cleared up by pretending that a global sovereign exists and is capable of defining its own norms. The uncertainty of international disputes is best cleared up by all sovereign parties' acceptance of an equal local supremacy as sovereigns and of the concomitant need to establish an evolving situational *modus vivendi*, even with regards to such difficult issues as the "exit mechanism" to international organization like the EU or the relationship between territorial claims by states and the classification of territorial types in international treaties such as UNCLOS.

While positivistic approaches to international law seek to *reduce* uncertainty in such situations via scholarly exegesis,<sup>296</sup> one great contribution of a

294. For a clear exposition of the implicit telos of such views, see, for example, RUTI TEITEL, *HUMANITY'S LAW* 4 (2011) (arguing that international legal norms represent a new "law of humanity . . . that spans the law of war, international human rights, and international criminal justice").

295. SCHMITT, *POLITICAL THEOLOGY*, *supra* 137, at 34.

296. See, e.g., d'Aspremont, *supra* note 4, *passim*; Kammerhofer, *supra* note 6, *passim*. Certainly, the attempt to establish clarity as to the formal aspects of existing doctrines and precedents is crucial to the crafting of convincing judgments in particular controversies. The concept of sovereignty, however, has a

Realist perspective is that it allows involved parties to take the uncertain content of norms as a shared assumption, and to work out context-driven, pragmatic projects of legal ordering upon this foundation.

The subjective element—the agent that must “will” recognition for a legal rule to be effective—is still the particular sovereign, instituted based on its own particular domestic context. As this Article has argued, that sovereign does not appear as some kind of direct embodiment of a certain nation, ethnos, set of interests, body of values, or “civilization.” Rather it must be artificially created and maintained precisely because no “natural” form of political identity is sufficient to end normative conflict. Every instance of contestable interpretation or application of a norm is a possible cause for antagonism, which can be ended only by an effective third party adjudicator. No normative theory can substitute for this function of the state, which remains, in this respect at least, “the absolute power on earth.”<sup>297</sup>

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substantive significance that can never finally be reduced to the relative terms of any hierarchy of norms, such as those concerning “domestic jurisdiction” in Article 2(7) of the United Nations Charter. Rather, it stands for human subjectivity itself, which is both an inescapable obstacle to any final objective account of social reality and itself a positive value without which “freedom” would be of no or little meaning. Cf. Martti Koskeniemi, *What Use for Sovereignty Today?*, 1 *ASIAN J. INT’L L.* 1, 68-70 (2011) (“When questions of economic distribution, environmental protection, security, or human rights are conceived of as essentially global, best dealt with by the best forms of functional expertise available globally, then no room is left for communities to decide on their preferences . . . International law does not contain ready-made answers to problems about how the world should be governed. But it could be used as a vocabulary for articulating alternative preferences and for carrying out (strategic) manoeuvres in order to limit the powers of global executive classes and expert groups. This would mean, inevitably, highlighting the importance of the vocabulary of political sovereignty as the expression of local values and preferences as well as traditions of self-rule, autonomy, and continuous political contestation . . . sovereignty points to the possibility, however limited or idealistic, that whatever comes to pass, one is not just a pawn in other people’s games but, for better or for worse, the master of one’s life.”).

297. HEGEL, *supra* note 274, § 331 (emphasis omitted) (The “state is spirit in its substantial rationality and immediate actuality and is therefore the absolute power on earth.”).

