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

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

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

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

52. Hans Kelsen, Organization and Procedure of the Security Council of the United Nations, 8 I.L.REv. 1087, 1087 n.1 (1946) ("The Security Council, like the General Assembly, consists of representatives of states which are ‘members’ in the sense of being authorized to be represented by certain individuals. These individuals are appointed by the ‘member’ states, not by the United Nations, as are, for instance, the Secretary-General and the members of the International Court of Justice. They are bound to act in conformity with the instructions given to them by the competent organs of their states."). The list of the current members of the Security Council can be found at http://www.un.org/en/sc/members/. The list of current permanent representatives to the United Nations can be found at http://www.un.int/protocol/documents/HeadsofMissions.pdf.


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

55. See id.

56. For example, the WTO panel Appellate Body members have an obligation to remain independent from their home countries. Annex 2 of the WTO Agreement, Dispute Settlement Understanding, art. 17 para. 3, http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#17 ("The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government . . . .").
Traditionally, IOs did not directly exercise sovereign powers. Instead, the obligations of states were to be carried out through national domestic legal process. An international arbitral tribunal, such as the U.S.-Mexico Claims Commission, might require a party to pay damages for mistreating citizens of a foreign country. But the nation-state, via its own domestic law processes, has the final word on how and whether to comply with the decision. This fits within the traditional Westphalian principle that a state’s consent was necessary to any diminution of its sovereignty.

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

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

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

59. Posner & Yoo, supra note 37, at 57-62.
International human rights law, we think, denies this basic premise. It maintains that harming an individual’s international human rights, even by her own government, remains a violation of international law.  

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

The second hallmark of the new international law is that the processes for creating, interpreting, and enforcing international law have changed. Traditionally, the interpretation and application of international law relied heavily on the practice and opinion of nation-states. A nation-state that refused to follow a customary rule or refused to recognize it as a legal rule, could not be bound. With respect to treaties, a nation-state controlled whether or not it signed. Acceptance of state consent by the new international law has become less onerous because of the existence of jus cogens obligations and international human rights law. Jus cogens obligations consist of those clear and well-established international obligations, such as the prohibitions on genocide, torture, and piracy, which bind nation-states even without their consent.

81. See, e.g., Paul B. Stephan, International Governance and American Democracy, 1 Chi. J. Int’l L. 237, 241 (2000) (“[Human rights law] asserts that certain humane values, through a process of international dissemination and support, have become binding rules that constrain what states may do to both their own and other countries’ citizens.”).  
the U.S. government might possess powers, at least with respect to foreign relations, which arise out of America’s status as a nation. Curtiss-Wright can be understood as an expression of Westphalian sovereignty, but it remains unclear whether it accurately describes the transfer of authority from the people to the government through the Constitution. This aspect of Curtiss-Wright has not been developed by subsequent decisions, and scholars have long criticized Curtiss-Wright for its extra-constitutional search for sovereignty.

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

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

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