CITIES IN INTERNATIONAL LAW: RECLAIMING RIGHTS AS GLOBAL CUSTOM

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INTRODUCTION

Cities are the foundation of humanity's collective social life as a governed community. In the modern world, the proportion of the global urban population has reached a tipping point such that, for the greater part of humanity, life is intimately linked to their city. Two thirds of the world's people will live in cities by 2050 and a majority already live in cities today.[1] However, cities' status in international law remains ambiguous. Not quite private entities like non-governmental organizations ("NGOs"), and

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[1] *2018 Revision of World Urbanization Prospects,* UNITED NATIONS DEP'T OF ECON. & SOC. AFFAIRS (May 16, 2018), https://perma.cc/FK4W-XHJU.

yet not quite states, cities occupy what could be described as an intermediate place of mixed quasi-sovereignty that puts them in a twilight zone in international law between sovereign and not sovereign.[2]

Cities have been analyzed for a long time by legal scholars and historians as both units of history and as entities of international law. Thucydides' *History of the Peloponnesian War* describes the epic battles of sovereign cities in ancient Greece, where cities and leagues of cities such as Athens and Sparta comprised a great part of international sovereigns.[3] However, since the Early Modern Era, 1500-1800 C.E., city states like those in Ancient Greece and in the mixed sovereignty of Medieval Europe have been gradually absorbed into Westphalian states and consequently superseded by the unified nation state with its concentration of power into the metropolitan center, all at the expense of the sovereignty that small regional powers traditionally held.[4] Today, cities fall for the most part into a different category of sovereignty from their ancient predecessors, and the centralized state denies modern cities the sovereign powers of Athens or Sparta. However, cities still manage to maintain a distinct existence from national governments across the world.

City states did not disappear with the Treaty of Westphalia.[5] They still exist. Today, Singapore, Luxembourg, and the Vatican City are all

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[2] LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW 70 (6th ed. 2014) (discussing how non-governmental bodies can contribute to a legislative practice while not constituting state practice); Helmut Philipp Aust, *Shining Cities on the Hill? The Global City, Climate Change, and International Law*, 26 EUR. J. INT'L L. 255, 256 (2015); Janne E. Nijman, *Renaissance of the City as Global Actor: The Role of Foreign Policy and International Law Practices in the Construction of Cities as Global Actors*, *in* THE TRANSFORMATION OF FOREIGN POLICY: DRAWING AND MANAGING BOUNDARIES FROM ANTIQUITY TO THE PRESENT 210 (Gunther Hellmann et al. eds., 2016).

[3] THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR 27-28 (Richard Crawley trans., 2009) (ebook); *see* RICHARD NED LEBOW, A CULTURAL THEORY OF INTERNATIONAL RELATIONS 116 (2008).

[4] PETER WILSON, HEART OF EUROPE: A HISTORY OF THE HOLY ROMAN EMPIRE 171 (2016); *see* Nijman, *supra* note 2, at 211, 214. The Westphalian state is often the name given to modern states that have a singular, unified claim to sovereignty sharply exclusive of any other overlapping claim. For Westphalian statehood as it is traditionally understood, the key feature of the Sovereign is this singularity: there can only be one legitimate claim to sovereign statehood for any particular territory. Of course, in any large or diverse country with a need for independent local government, authority never looks this simple, and in reality it is often shared as a matter of constitutional practice—take, for example, the United States' federalist system. As the scope of state power has expanded to encompass more sovereign functions, tension between the sovereignty exercised by the city and that by the state has grown.

[5] *See generally* Nijman, *supra* note 2, at 215-16 (discussing the shift from an international economy controlled by sovereign territorial states to a global economy controlled by so-called global cities).

recognized by the international community as fully sovereign states.[6] Yet, these city states are just that—cities that happen to be more or less co-extensive with their own state. They are *de facto* states and are seen as such by the Westphalian delineation between state and non-state. In contrast, cities as most people understand them are very different. Almost all cities exist within the confines of a state's sovereign power,[7] and the role these cities play in international law[8] is the focus of this article.

City life as it is experienced by its *citizens* implies a collective social existence that is at once legally recognized through councils, mayors, and city boards, and rejected by the law as a form of real sovereignty—unlike that exercised by the state. Cities are sovereign, yet not quite *The Sovereign*. They are not a government unto themselves. Nonetheless, cities still can enjoy legal benefits of common law associated with the Sovereign, such as qualified immunity from certain tort claims.[9]

In many ways, the state relies on the city as its foundational unit. A modern state without the city is unthinkable. It would be more of a tribe than a Westphalian state.[10] Cities possess a collectivity of relationships between non-related people who occupy the same temporal and geographic space. Even the earliest states in Mesopotamia, Sumerian city states like Ur, and later Babylon at the center of the Babylonian Empire (circa 1900-539 B.C.E.), were based on the city whose authority spread outwards.[11] The very language of citizenship, important to legal understandings of jurisdiction, alienage, constitutional rights, and state legitimacy, implies an etymological origin in membership of a city.[12] Language reflects this city connection: the ideals of citizenship and the

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[6] *Vatican City*, ENCYCLOPÆDIA BRITANNICA, https://perma.cc/6X7E-THK5 (last visited Dec. 22, 2019); Véronique Lambert et al., *Luxembourg*, ENCYCLOPÆDIA BRITANNICA, https://perma.cc/8A2J-XXC8 (last visited Dec. 22, 2019) (noting that Luxembourg has sovereignty over a limited area beyond the city); Jim Lim, *Forgotten Independence: Singapore at 53 (Or Is It 55?)*, INTERNAL REFERENCE (Aug. 7, 2018), https://perma.cc/QK4L-9K49.

[7] *See* Nijman, *supra* note 2, at 214 n.13. Because global cities exist within the confines of a state's sovereign power, they lack city-states' level of self-sufficiency.

[8] *See* HENDRICK SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS 109-11 (1994). Germany provides an example of city-leagues that formed for protection against feudal lords within the structure of the Holy Roman Empire. The city-leagues collected revenues and regulated economic activity in the midst of the development of multiple overlapping German authorities leading to fragmentation as the model of the sovereign state was adopted.

[9] *See* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 411 (2016); Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (holding that qualified immunity applies to local police officers facing suits brought under 42 U.S.C. § 1983 when the officers make a decision that "reasonably misapprehends the law governing the circumstances confronted.").

[10] *See* Nijman, *supra* note 2, at 217-18.

[11] *See* ADAM WATSON, THE EVOLUTION OF INTERNATIONAL SOCIETY 24-30 (1992).

[12] *See Citizen*, ONLINE ETYMOLOGY DICTIONARY, https://perma.cc/BP7S-RMPG (last visited Dec. 23, 2019).

concepts of civil rights and of civil law all refer to the rights of the people in the state but derive linguistically from the word for city. *Civil rights* in English, *Bürgerrecht* in German, and *les droits du citoyen* in French all imply in this way a relationship to the state derived, at least conceptually, from the historically supported relationship that people have with the city as its citizens.[13]

Furthermore, it would be wrong to assume that the city's status in international law disappeared with the development of the nation state. Indeed, cities' sovereignty should continue to be recognized given their emergence as global actors.[14] The model of a city government—and its chartered reciprocal rights with the city's inhabitants as citizens—serves as a forerunner of the social contract theory of reciprocal legal obligations which people have with the sovereign state.[15] Moreover, in many places, the historical context of the development of the constitution is related to the civil rights which people enjoyed in cities[16]: the special rights given to members of the city against arbitrary power,[17] and the protection from rural serfdom which cities extended to their citizens even in the Middle Ages.[18]

The connections that people develop with others in and between cities also emphasize cities' international character and therefore their importance and necessity as apparent subjects of international law.[19] Cities are often the cosmopolitan seats of international interactions and are increasingly indispensable actors. Many international legal concerns—such as international shipping, property disputes, the effects of climate change, and human rights—take place in the context of international economic relations and social connections sited between different cities.[20] Since Westphalia, the tendency among nation states has been to position the state's institutions within a single metropole,[21] creating a dominant city like London or Paris which in the Early Modern Era dwarfed all other

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[13] *See* WILSON, *supra* note 4, at 498-503; Peter Blickle, *Communalism, Parliamentarism, Republicanism*, 6 PARLIAMENTS, ESTATES & REPRESENTATION 1 (1986).

[14] *See* Nijman, *supra* note 2, at 211; *see also* Barbara Oomen & Moritz Baumgärtel, *Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law*, 29 EUR. J. INT'L L. 607, 609-10 (2018).

[15] *See* Nijman, *supra* note 2, at 214-15.

[16] WILSON, *supra* note 4, at 636, 660.

[17] *Id.* at 636.

[18] *See id.* at 504, 507; *see also* KARL KAUTSKY, COMMUNISM IN CENTRAL EUROPE AT THE TIME OF THE REFORMATION 10-11 (J.L. & E.G. Mulliken trans., Augustus M. Kelley 1966) (1897).

[19] *See* Nijman, *supra* note 2, at 211.

[20] *See* Oomen & Baumgärtel, *supra* note 14, at 609-13; *see also* Aust, *supra* note 2, at 257-58.

[21] This is a capital city or administrative center such as Versailles.

cities in the state by an order of magnitude. For instance, London had 400,000 inhabitants by 1625, twenty times more than any other English city.[22] Nonetheless, even the most centralized traditional nation states have given autonomy to their cities in the form of independent mayors, such as in London.[23]

Despite cities' massively important role in people's daily lives, their historical importance, their established relationship with sovereign rights, and their immediately apparent form of state power expressed through police, collection of local taxes, powers given to mayors, and freedom to provide local legal and social services, cities' joint agreements with each other remain ambiguously understood in international law. Given the paradigm of expanded visions of sovereignty through which both the individual and the NGO can be seen as giving expression to a type of non-state sovereign authority, cities similarly should qualify for having limited quasi-sovereignty and should be seen as competent actors in international law.[24] By considering sovereignty as more of a continuum and less of a binary, cities' rights should clearly prevail over claims of unassailable centralized sovereignty by the state.

This article argues that the global community should recognize the important role cities can play in international law as sovereign actors, especially as cities are likely to become a key unit of decision making in a number of important areas, such as immigration and climate change.[25] This is because many problems of international law directly implicate areas such as the environment, transportation, housing, water, and planning, which cities have traditionally held competence over and which address problems that transcend the traditional boundaries of what is considered a purely local, national, or international issue under the Westphalian system.[26] As the level of urbanization increases, cities' scale and the connections of globalization further link cities' interests to the world beyond the confines of their nation-states and the regions and rural hinterlands they find themselves in.[27] Thus, cities are inevitably becoming necessary ac-

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[22] Maurice Glasman, *The City of London's Strange History*, FIN. TIMES (Sept. 29, 2014), https://perma.cc/YP8R-ZHN9.

[23] *See* MAGNA CARTA cl. 9 (1225); Glasman, *supra* note 22; *Development of Local Government*, CITY OF LONDON, https://perma.cc/AER7-UNFV (last visited Dec. 23, 2019).

[24] DAMROSCH & MURPHY, *supra* note 2, at 70, 92; Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 8 (1999).

[25] Aust, *supra* note 2, at 257-58.

[26] *Id.* at 260.

[27] *2018 Revision of World Urbanization Prospects*, *supra* note 1.

tors of international law that perform indispensable functions in the international system.[28] In keeping with Louis Henkin's theory of sovereignty held by those traditionally considered below the sovereign state,[29] customary international law—the law of what the world does—should follow the developments of cities as organizations and individuals performing functions of sovereignty.

Cities operate parallel to the actions of national governments in areas where they have competence. For example, many of the most important practical determinations made in international agreements regarding climate change, such as the Paris Agreement, involve questions of efficient energy use in power generation, transportation, land use planning, and other areas which fall under cities' jurisdiction.[30] In furtherance of these goals, the measures which the United States is obliged to fulfill under international law to enforce the Paris Climate Agreement can be locally accomplished. Therefore, to achieve environmental and economic standards agreed upon by the international community, cities can play a crucial role in solving global issues at a local level.[31]

Parts I and II of this article consider the history of and philosophical basis for mixed forms of sovereignty surviving Westphalia via customary international law. Part III addresses cities' role as subjects in customary international law and discusses the critical questions of national government supremacy and preemption, the role of constitutional law in the powers retained by cities, and the functions cities have performed thus far on an international scale. Part IV discusses cities' potential to be international actors for some of the most important questions today, including their role in international law for both climate and immigration.

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[28] Aust, *supra* note 2, at 256, 261; *see also About C40*, C40 CITIES, https://perma.cc/Y36P-6CP4 (last visited Dec. 23, 2019) (describing coalition of cities committed to addressing climate change through land use planning, public transportation, flood control, and other methods).

[29] Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 32-35 (1996). Customary international law is one of the primary sources of international law and is said to be the law of how international subjects behave. DAMROSCH & MURPHY, supra note 2, at 57, 60. City relationships in the international economy have greatly expanded, and cities have entered into legal relationships which evidence a greater degree of contact with international institutions than before. This creates an interplay between international and domestic constitutional law but does not create a contradiction, as entities like the European Union already have such a blend. Paul Craig, *Constitutions, Constitutionalism, and the European Union*, 7 EUR. L.J. 125, 132-34 (2001).

[30] *See* Paris Agreement (Dec. 12, 2015), *in* U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties on its Twenty-First Session, Addendum*, Annex, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter Paris Agreement].

[31] *See* ELINOR OSTROM, THE FUTURE OF THE COMMONS 70, 81-82 (2012).

I. PHILOSOPHICAL BACKGROUND

In his *Idea of a Universal History on a Cosmopolitical Plan*, Immanuel Kant explored, among other topics, the tendency of people to form a state and the problematic arrangement of state sovereignty that involves the subversion of imperfect humans to the will of another imperfect human.[32] Kant's theory of law embodies the idea of a law of interdependent states seeking the good in perpetual peace.[33] Kant believed that "[t]he highest problem for the Human Species, to the solution of which it is irresistibly urged by natural impulses, is the establishment of a universal Civil Society founded on the empire of political justice."[34] The potential for abuse of power in sovereign states where the sovereign had interests divergent from those of the people was obvious to Kant—and remains obvious today.[35]

Kant believed that all things humans create are subject to the human condition,[36] and that the vertical power structure of the all-powerful sovereign ultimately exhibits the same imperfections of lawlessness and uncontrolled liberty that people exhibit.[37] This suspicion of Kant's can certainly be confirmed by the political experience of many nation-states. So, despite the advantages of cities and states' sharing consistent policies and laws, the deficiency of subsuming a city's power for international cooperation to the trust of a higher sovereign such as a state or federal government is that the city's particular interests continue to be difficult to resolve while their room for experimentation is often minimized. The best international system promotes the common good of humanity with the maximum political representation to determine the common good. Cities, like

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[32] *See* Immanuel Kant, *Idea of a Universal History on a Cosmopolitical Plan in* THE COLLECTED WRITINGS OF THOMAS DE QUINCEY 428, 434-35 (David Masson ed., 1897).

[33] *See generally* IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH § 2 (1795) (ebook), https://perma.cc/PG9J-4YUU.

[34] Kant, *supra* note 32, at 433.

[35] "But, on the other hand, in a constitution which is not republican, and under which the subjects are not citizens, a declaration of war is the easiest thing in the world to decide upon, because war does not require of the ruler, who is the proprietor and not a member of the state, the least sacrifice of the pleasures of his table, the chase, his country houses, his court functions, and the like. He may, therefore, resolve on war as on a pleasure party for the most trivial reasons, and with perfect indifference leave the justification which decency requires to the diplomatic corps who are ever ready to provide it." KANT, *supra* note 33, § 2.

[36] This includes states. "To what purpose is labour bestowed upon a civil constitution adjusted to law for individual men, *i.e*. upon the creation of a Commonwealth? The same antisocial impulse which first drove men to such a creation is again the cause that every commonwealth, in its external relations,—i.e. as a state in reference to other states,—occupies the same ground of lawless and uncontrolled liberty; consequently each must anticipate from the other the very same evils which compelled individuals to enter the social state." Kant, *supra* note 32, at 435-36.

[37] *Id*. at 436.

other polities, are best able to represent themselves under this logic, and this sentiment largely inspires the idea of federalism in the United States.[38]

Parallel to Kant's idealism, Hugo Grotius envisioned a system of international law which is largely ancestral to the practice of international law today and which arose in the same time period as the Westphalian state. This system, which relies on norms, is the basis for the notion that the constitutions and customs which humans create should be freely followed in all of their forms. As a founder of the tradition of natural rights in international law, Grotius turned to the fundamental instincts towards self-preservation and sociability in human nature.[39]

Grotius' conceit was generally accepted by the global community as the basis of international law. Indeed, Sir William Blackstone rooted the law of nations in natural law: "The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world" in which "the individuals belonging to each [state]" were relevant in the intercourse of independent states.[40]

Much of the theory that places sovereignty as a single undivided edifice is ultimately rooted in a particular time and place of the Early Modern Era, yet outside the earliest conceptions of international law. In many ways, this theory contrasts the concerns of many early international legal theorists like Grotius. For instance, Jean Bodin, French jurist and political philosopher of the mid to late sixteenth century, responded to the religious chaos in France at the time by contending that sovereignty was a singular Sovereign.[41] Bodin is credited with introducing the concept of sovereignty adopted in later theory, and many of his ideas specifically opposed contemporary Medieval European ideas of an ultimate universal sovereign that lay above the state, like the Pope or the Emperor.[42] However, this conception of sovereignty was itself ahistorical to the ways in which different powers actually exercised sovereignty as Bodin was writing.

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[38] George Clinton, Letter, *Extent of Territory Under Consolidated Government Too Large to Preserve Liberty or Protect Property (Cato Essay No. III)*, NEW-YORK J. (Oct. 25, 1787), *reprinted in* THE ANTIFEDERALIST PAPERS 46-47 (Bill Bailey ed., 2012) (ebook), https://perma.cc/N46M-HCSW.

[39] Martti Koskenniemi, *Imagining the Rule of Law: Rereading the Grotian 'Tradition,'* 30 EUR. J. INT'L L. 17, 34 (2019). Grotius came to a less idealistic but similar conclusion as Kant, that the basis of the international order should be grounded in human rights.

[40] 4 WILLIAM BLACKSTONE, COMMENTARIES *66.

[41] Edward Andrew, *Jean Bodin on Sovereignty*, 2 REPUBLICS LETTERS 75, 78 (2011).

[42] *Jean Bodin,* ENCYCLOPÆDIA BRITANNICA, https://perma.cc/326R-MGHQ (last visited Jan. 19, 2020).

Bodin's theory of sovereignty is thus often interpreted more as a prescriptive model for centralized states with absolute sovereigns than as a description of the "way states behave."[43]

In today's reality, with international problems that transcend the scope of a single sovereign's power and a multiplicity of international obligations, international norms can best be upheld by a broad range of different actors at different levels around the world. In the absence of John Austin's supreme sovereign to enforce rules,[44] all arrangements of international law require a voluntarist consensus of sovereign opinions.[45] This favors many of the natural law conceptions of the state that were in fact original to international law and disfavors the supreme sovereign paradigm that Bodin and positivist theories adopted. There is no global sovereign, yet rules are accepted as part of international custom. Whether this happens on a smaller level with cities or exclusively with nation states, adherence to the law requires some form of consent on one level or another by a governing body.[46] Cities have been subsumed under the power of national laws in the name of considerations of physical location, optimizing cultural influence, and military strategy.[47] Given that international norms by definition require parties' faith and confidence and have no external "policemen," supreme "sovereign," or even a hegemon to enforce the means of accountability, cities should act where the Sovereign has failed to enforce a monopoly on power.[48]

Given history and custom, this article thus supports and furthers Henkin's analysis of sovereignty as in retreat since the beginning of international conventions on human rights and the establishment of international institutions, and that local sovereignties, which may have been stripped away by degrees by the advance of absolutism and the European State system, never really went away.[49]

II. HISTORICAL ANALYSIS

The role cities play in international law has changed over time. With the growth of the centralized national state since the Treaty of Westphalia

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[43] Andrew, *supra* note 41. Many states have recognized varied notions of sovereignty. Even today, legal fictions such as "one country two systems" represent modern confusion over sovereignty's strict lines. Louis Henkin posits that sovereignty has been in retreat since the beginning of international conventions on human rights after Nuremberg and the establishment of international institutions. Henkin, *supra* note 29, at 31-32.

[44] DAMROSCH & MURPHY, *supra* note 2, at 3-4.

[45] *Id.* at 59; *see* Koskenniemi, *supra* note 39.

[46] *Id.*; *see* DAMROSCH & MURPHY, *supra* note 2, at 59.

[47] WILSON, *supra* note 4, at 585.

[48] Aust, *supra* note 2, at 265.

[49] Henkin, *supra* note 29, at 31-32.

1648,[50] the wide autonomy of cities and other sub-national territories, which had existed since the Middle Age, began to be curtailed.[51] Cities became seen as subsumed under the state. However, this was a change from preceding historical reality. While our modern image of the city-state comes from Greek antiquity,[52] later examples of powerful cities set their own policies with other cities within the framework of a larger state, particularly in Medieval and Early Modern Germany.[53] This phenomenon is the subject of this section.

A. The Holy Roman Empire

The Middle Ages in Europe, 500-1500 C.E., featured much looser systems of internationally recognized sovereignty than those currently recognized in the modern world. The typical medieval European state structure featured a king or queen, a supranational church, lesser nobility like dukes and counts with a degree of sovereignty over their demesnes, and often independent cities.[54] *De facto* control over territory often rested with these lesser powers who swore allegiance to a lord. Sovereignty as it is now understood was therefore divided: similarly to how the theory of property rights is interpreted even today as a bundle of rights, sovereignty could be seen as a public bundle of rights,[55] which in the Middle Ages was divided between different concurrent and overlapping sovereigns that did not each command a monopoly on all sovereign power.[56] Instead, sovereignty overlapped between different authorities such as kings, popes,

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[50] The Treaty of Westphalia ended the Thirty Years War in 1648, a war that had raged in different phases since the Bohemian Revolt in 1618. This devastating war attracted foreign intervention by France and Sweden and killed up to one-third of the population of Germany. The treaty is considered to have granted each German principality *landeshoheit*, which has been interpreted as state sovereignty, and is seen as enshrining unified sovereignty more broadly. *See* WILSON, *supra* note 4, at 500. However, the treaty never ended the previous constitutional arrangement or the sovereignty of the Holy Roman Empire throughout Germany, which remained until 1806. WILSON, *supra* note 4, at 171, 174, 500.

[51] Nijman, *supra* note 2, at 215.

[52] LEBOW, *supra* note 3, at 116.

[53] WILSON, *supra* note 4, at 568-73 (discussing how the cities of the Hanseatic League in particular formed truly international legal agreements spanning beyond Germany).

[54] *Id.* at 524-25, 528-29 (discussing how cities often exercised chartered rights).

[55] Andrew Blom, *Hugo Grotius*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, https://perma.cc/7TYN-AKNP (last visited Dec. 14, 2019); David A. Lake, Memorandum on Delegating Divisible Sovereignty 3 (Mar. 3, 2006), https://perma.cc/38DS-VHZ4 (quoting Hersch Lauterpacht to note that, "from the point of view of international law, sovereignty is a delegated bundle of rights . . . [and] therefore divisible, modifiable, and elastic").

[56] WILSON, *supra* note 4, at 172.

counts, dukes, cities, and even communes.[57] This system created rights and obligations which could flow from multiple sufficient authorities.[58] For instance, a state's control over all lands within its borders was not exclusive and the state's monopoly over legitimate authority within its borders was not internationally recognized. This is most obvious when considering the enormous power and property of the medieval European church. The ensuing dispute over who held legitimate sovereignty contributed to Bodin's advocacy for a monopoly on sovereignty.[59]

However, this particular paradigm of absolute sovereignty was not internationally recognized as the only source of legitimate authority. Multiple authorities could exercise different powers through chartered rights which had been agreed upon and which divided traditionally understood functions of sovereignty among them. This system persisted most strongly in Germany because of the constitution of the Holy Roman Empire, but was also present throughout Europe, including England.[60] The paradigm of chartered rights is implicit in one of the common law's foundational documents, the Magna Carta. For example, the Great Charter confirmed the rights of the City of London, which were recognized as ancient custom from the time of Edward the Confessor.[61]

The Holy Roman Empire (800-1806 C.E.) was a peculiar continuation of Charlemagne's kingdom, claiming wide sovereignty as the highest sovereign recognized by the Catholic Church and also featuring wide autonomy for local princes, particularly after the Golden Bull of 1356.[62] In fifteenth-century Germany, free imperial cities (*Freie Reichsstädte*) developed as effectively quasi-sovereign entities in symbiosis with the surrounding areas and with the Emperor.[63] Their particular form of sovereignty coexisted with that of the Emperor, who was their only *de jure* sovereign. German free cities were granted rights and freedoms that were

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[57] *Id*. Vassals could often be more powerful than kings, or even more powerful than another country's sovereign within the other country's borders (as was the case with King Edward III of England, who held territory in France as a nominal vassal of the King of France before the Hundred Years War). *See generally* G. Templeman, *Edward III and the Beginnings of the Hundred Years War*, 2 TRANSACTIONS ROYAL HIST. SOC'Y 69 (1952).

[58] SPRUYT, *supra* note 8, at 60.

[59] Lake, *supra* note 55, at 1-2. This is a key difference from a modern era of states, where a nation-state exercises monopoly on sovereignty over its localities.

[60] *See* SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES 220-22 (Ernest F. Henderson ed., trans., 1905 ed.).

[61] *See* D.A. Carpenter, *King Henry III and Saint Edward the Confessor: The Origins of the Cult*, 122 ENG. HIST. REV. 865, 880 (2007).

[62] WILSON, *supra* note 4, at 40-41.

[63] *Id.* at 514, 517.

recognized by law and custom within the community of principalities in the empire.[64]

Unlike Italy, where some mercantile city states such as Venice functioned in certain ways as miniature versions of larger, emerging centralized states like France or England,[65] and where even many of the modern features of statecraft—such as permanent ambassadors—were developed,[66] Germany's model was widely understood to constitute mixed sovereignty.[67] Part of what distinguished the Holy Roman Empire from other states was that the nominal sovereign of the Emperor recognized the *de facto* autonomy of states in the Empire.[68] While famously convoluted and byzantine in its structure and complexity, law in the Holy Roman Empire relied largely on established historical rights and charters granted by the sovereign to other localities, including cities, to exercise independent authority over a particular area.[69] Cities, as well as other units of the Holy Roman Empire, thus possessed a degree of shared sovereignty as the pretense of centralized imperial authority deteriorated in the Late Middle Ages, never to return.[70]

While prior to the Treaty of Westphalia in 1648, the Emperor was properly considered the sovereign in Germany and imperial legal decisions set precedent for the accepted law over much of the Empire,[71] the Emperor did not exercise widely-accepted definitions of sovereignty, such as control of borders or land outside of the lands which he directly controlled, after 1648.[72] Before and after 1648, the Emperor had largely indirect authority in Germany that was complemented not only by smaller regions' large degree of autonomy but also by areas of at least *de facto*

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[64] *Id.* at 517-19, 524.

[65] SPRUYT, *supra* note 8, at 149.

[66] *See* Daniel Goffman, *Negotiating with the Renaissance State: The Ottoman Empire and the New Diplomacy, in* THE EARLY MODERN OTTOMANS: REMAPPING THE EMPIRE 61, 62 (Virginia H. Aksan & Daniel Goffman eds., 2007).

[67] WILSON, *supra* note 4, at 279 ("This countered Bodin's either/or approach with its insistence that sovereignty was either wholly wielded by the emperor or exercised through the Reichstag, [sic] Instead, power was diffused through the Empire's different authorities, making them interdependent.").

[68] *Id.* at 278-79. The emperor was widely acknowledged as the "Sovereign" but sparingly exercised sovereignty.

[69] *See id.* at 630, 636. Rights in the Empire were primarily seen as a corporate patchwork based on charters, which resembled contractual rights. Many cities today with no origin in the Middle Ages maintain similar charters.

[70] *Id.* at 630, 636; *see generally* SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES 220-22.

[71] WILSON, *supra* note 4, at 636.

[72] *See id.* at 389-92.

regional sovereignty.[73] In many instances, states in the Holy Roman Empire exercised this *de facto* sovereignty for centuries before their status was formally recognized internationally. For example, the Dutch Republic and Switzerland were both recognized as sovereigns emerging out of the Holy Roman Empire in the Treaty of Westphalia, even though they exercised many of the post-Westphalian ideas of sovereignty while still being a part of the Holy Roman Empire.[74]

Overall, cities benefited greatly from this loose constitution of the Holy Roman Empire. The imperial free city of Freiburg, or *free town*, for example, was created from its beginning with immunities "in a deliberate attempt to attract wealth and labour by offering an attractive new settlement."[75] Cities were able to operate within a common imperial legal structure while also operating autonomously and making agreements with each other, defying the presumption that sovereignty is a binary black and white concept.[76]

One outgrowth of the sovereign city was the league of cities. Many cities in the fifteenth century developed leagues with each other to pursue shared interests and protect their rights.[77] The *Décapole* cities, the Saxon league, and the Swiss Confederacy were originally such leagues of cities, as were other Swiss Imperial estates.[78] These city leagues formed connections with each other for reasons somewhat analogous to today's sister cities arrangements. However, their connections were far more in depth and focused on common protection of the cities' interests, rather than on one particular issue or general amity and cooperation.[79] Originally, Switzerland consisted of an alliance of free cities like Zürich, Bern, and Luzern, which, in order to protect themselves against the claims of surrounding nobles and the Emperor, evolved to become a powerful group within the Empire.[80]

Full sovereigns such as Switzerland evolved out of leagues of cities in the Holy Roman Empire yet continued to maintain Imperial law.[81]

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[73] *Id.* at 500-01.

[74] *Id.* at 228-30. While the Constitution of the Holy Roman Empire has influenced the countries it used to encompass, the Netherlands and particularly Switzerland maintain a constitution with wide autonomy for cities and local governments.

[75] *Id.* at 506.

[76] WILSON, *supra* note 4, at 576-77.

[77] SPRUYT, *supra* note 8, at 121.

[78] WILSON, *supra* note 4, at 585.

[79] SPRUYT, *supra* note 8, at 121.

[80] WILSON, *supra* note 4, at 586.

[81] WILSON, *supra* note 4, at 585; André Holenstein et al., *Introduction*, *in* THE REPUBLICAN ALTERNATIVE: THE NETHERLANDS AND SWITZERLAND COMPARED 18 (André Holenstein et al. eds., 2008). Switzerland is probably the best example of this phenomenon, as the entire sovereign country evolved out of a league of cities.

When the Treaty of Westphalia established the modern principle of state sovereignty in international law, Switzerland gained independence through the plain text of the treaty and was recognized as such by the other great powers despite continued connection to the Holy Roman Empire.[82] With numerous new and tiny independent sovereigns, leagues of shared interests continued, primarily built off of the history and legal precedent of the Holy Roman Empire.[83]

The Netherlands similarly emerged out of a league of shared interests and was not recognized as fully sovereign until after the 1648 Treaty of Westphalia, almost a century after the Union of Utrecht and hundreds of years after the Dutch provinces began to exercise quasi-sovereign functions under the auspices of the Empire.[84] The emergent Republics which the Dutch and Swiss founded out of the Holy Roman Empire in fact retained much of the constitutional legacy of the Empire, including the powers held by estates, cities, and cantons.[85] The Dutch Union of Utrecht maintained the diversity of customs and privileges which had evolved over time. The first article in the Union of Utrecht 1579 maintained that "provinces will form an alliance, confederation, and union among themselves . . . in order to remain joined together for all time in every form and manner, as if they constituted only one province," and that "each province and the individual cities, members and inhabitants thereof shall each retain undiminished its special and particular privileges, franchises, exemptions" without any sense of contradiction.[86]

In reality, mixed sovereignty was never abolished by Westphalia; instead, it receded as the *de facto* arrangement of the sovereign state emerged.[87] Indeed, when Jean-Jacques Rousseau asserted that he was a citizen of Geneva, this implied a relationship to a city that remains foundational to our modern notions of citizenship.[88]

B. Magdeburg and Lübeck Law and the Hanseatic League

While some leagues of cities formed to protect their sovereignty, like Switzerland, others developed to protect their trade interests.[89] The Hanseatic League is the greatest example of this development, and a good

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[82] *The Treaty of Westphalia* § LXIII, YALE LAW SCH. AVALON PROJECT (Oct. 24, 1648), https://perma.cc/4W48-NBRC.

[83] *Id.* at 572.

[84] WILSON, *supra* note 4, at 595.

[85] *See id.* at 585.

[86] Holenstein et al., *supra* note 81, at 16.

[87] *See* WILSON, *supra* note 4, at 585-89.

[88] JEAN-JACQUES ROUSSEAU, A DISCOURSE ON INEQUALITY 57-58 (Maurice Cranston trans., Penguin Classics 1985) (1755).

[89] WILSON, *supra* note 4, at 571.

model for how city diplomacy can function in tandem with the power of the sovereign.[90] Between the fourteenth and seventeenth centuries, Hanseatic cities were both part of their respective sovereign nations and also part of an international league of cities with joint agreements with each other. The influence of the League's leading city of Lübeck spread across the Baltic Sea.[91] Trade spanned between far-flung Hanseatic cities, from a core in Northern Germany around Hamburg and Lübeck, north to Bergen and Stockholm in Scandinavia, east to Danzig and Riga across the Baltic, and even to Novgorod in Russia.[92] In some cases, Hanseatic merchants set up German trading quarters within cities, such as the Kontors in London, Bergen, and Novgorod.[93] But in many cases the cities were incorporated as Hanseatic merchant cities, often governed by Lübeck Law in circles of regional cooperation with other Hanseatic cities while simultaneously maintaining varying relationships with other lords or the Holy Roman Emperor.[94]

As development spread further east in Northern Europe in the Late Middle Ages, these cities were able to shape the economic patterns of a whole region. Fueled by the influence of international cities and the common standards they adopted, the Hanseatic cities became a massive trading syndicate in which goods could be traded in accordance with the uniform legal standards across a whole region.[95] With each city founded by Hanseatic merchants, Lübeck rights—which defined a city's self-governance model—spread in different countries and harmonized the laws of the major trading cities.[96] Merchants could travel from Lübeck to Riga to Stockholm and back and expect the same standards of law. Pioneered by cities, this international legal uniformity was an early forerunner of the free movement seen nowadays in the European Union.[97] In many ways, this arrangement created a parallel form of political organization in the Late Middle Ages that functioned as an alternative to the sovereign state.[98]

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[90] Nijman, *supra* note 2, at 215; WILSON, *supra* note 4, at 571, 577-78.

[91] WILSON, *supra* note 4, at 571.

[92] *Id.*

[93] Mike Burkhardt, *Kontors and Outposts*, *in* A COMPANION TO THE HANSEATIC LEAGUE 141 (Donald J. Harreld ed., 2015); *Bryggen*, UNESCO, https://perma.cc/94UM-8G8X (last visited Dec. 17, 2019).

[94] SPRUYT, *supra* note 8, at 124, 128.

[95] *See* Nijman, *supra* note 2, at 215.

[96] *See* WILSON, *supra* note 4, at 507.

[97] *See id.* at 507, 682.

[98] *See* SPRUYT, *supra* note 8, at 126-28. As Spruyt observes, the Hanseatic League concluded treaties with binding effect on the cities that constituted its membership, engaged in war with Denmark, Sweden, England, and the Netherlands, extracted concessions from Denmark at the Peace of Stralsund, conducted blockades, and equipped warships to fight piracy.

Like in the Baltic region, much of the same process happened in Central Europe as the influence of the Empire moved east and as new towns were founded. Many Central European towns adopted Magdeburg Rights—similar to Lübeck Law—as their code of laws.[99] Cities in Central Europe became magnets for new talent and for people fleeing from the oppression of feudal barons in the countryside.[100] Such cities pioneered not only population growth but also the development of uniform legal standards, as well as civil rights, which transcended national boundaries. Serfdom ended at the city gates for many.[101]

The rise of cities in the Late Middle Ages, 1250-1500 C.E., therefore created conditions in which cities could exercise many of the functions that are seen today as exclusively sovereign. Cities played an economic role by drawing people away from the countryside and acted as a sanctuary against the oppression of feudalism. Cities were crucial to the European economy's shift from feudalism, as urban craftspeople and well-to-do peasants shifted their productivity away from a feudalistic mode of production towards the cities, which attracted unfree peasants and created centers for new production and international exchange. This change eventually shifted market power by compelling concessions from the landed class.[102] The cities also pioneered democratic concepts such as freedom and equality before the law and the right to make law through self-government,[103] as well as helping to create the conditions for later parliamentary development.[104]

C. The Holy Roman Empire's Legal System

The Holy Roman Empire developed an extensive and sophisticated legal system to facilitate connections between its quasi-sovereign states and to settle feuds between different lords who otherwise might go to war with each other. The *Reichskammergericht* (the Supreme Court),[105] the *Hofgericht* (the court presided over by the Emperor), and the *Reichshofrat* (the supreme Imperial Judicial tribunal)[106] worked to enforce a system of

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[99] JEAN W. SEDLAR, EAST CENTRAL EUROPE IN THE MIDDLE AGES, 1000-1500, at 328 (1994); WILSON, *supra* note 4, at 571.

[100] HENRY HELLER, THE BIRTH OF CAPITALISM 26-27 (2011).

[101] WILSON, *supra* note 4, at 506-07. Cities functioned to give sanctuary to people rejecting feudal exploitation after the Black Death. Tom James, *Black Death: The Lasting Impact*, BBC (Feb. 17, 2011), https://perma.cc/9J4T-ETHR.

[102] HELLER, *supra* note 100, at 26-27.

[103] *See* SPRUYT, *supra* note 8, at 128.

[104] Blickle, *supra* note 13, at 12.

[105] WILSON, *supra* note 4, at 630-31.

[106] *Id.* at 628-31.

quasi-international law that covered Germany and regulated relations between the different states of the Holy Roman Empire, even after the ratification of the Treaty of Westphalia.[107] Like a Supreme Court or miniature International Court of Justice, the *Reichskammergericht* in particular settled disputes between the many states of the Holy Roman Empire.[108] Analogous to the European Union's institutions today, such late judicial institutions of the Holy Roman Empire functioned to facilitate common norms among the hundreds of cities and principalities of the Empire, at a time when authority was still exercised locally.[109] This legal system facilitating multi-centric sovereignty persisted well into the post-1648 modern era of international relations.

D. Westphalia

The Holy Roman Empire's model of co-sovereignty was diminished, though not abolished, by the Treaty of Westphalia in 1648, then largely deteriorated toward a collapse of imperial authority over the eighteenth century.[110] The Treaty of Westphalia's immediate effect on the Holy Roman Empire was the establishment of what we would now consider to be a state monopoly on violence, precluding nobles and property owners from raising their own army.[111] The dispute over who held sovereignty in Germany led to the Thirty Years War (1618-1648). Seen as a battle between Protestant and Catholic states, the Thirty Years War was about more than religion and implicated hegemony and control of European territory, thus attracting foreign intervention by great powers such as France and Sweden.[112] The Treaty's signatories expressly declared that sovereignty rested solely with the temporal leader of the country.[113]

However, the Treaty of Westphalia did not eradicate the Holy Roman Empire's system of multi-centric sovereignty and constitutional governance, which continued to evolve over time.[114] Despite the common perception that the Holy Roman Empire's multicentric governance was broken by the treaty, such governance continued, even as the common understanding of who held sovereignty in the Empire shifted towards the

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[107] *Id.*

[108] *Id*.

[109] *Id.* at 682.

[110] WILSON, *supra* note 4, at 279-80.

[111] *See id.* at 279; MAX WEBER, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77-128 (Hans Heinrich Gerth & Charles Wright Mills eds., trans., 1946).

[112] WILSON, *supra* note 4, at 126-27.

[113] Daud Hassan, *The Rise of the Territorial State and the Treaty of Westphalia*, 9 Y.B. N.Z. JURIS. 62, 64 (2006).

[114] *See* WILSON, *supra* note 4, at 126-27.

independent states, whose localities' position in the Empire remained legally intact.[115]

For instance, Switzerland had its sovereign rights explicitly confirmed by the Treaty of Westphalia and was regarded as a successor state to the Holy Roman Empire, but failed to totally break from the constitutional structure of the Empire.[116] The Swiss Confederation was envisioned as a modern constitutional state only retroactively *after* Westphalia*,* as the cities and rural cantons internalized the notion of the sovereign state from theorists like Bodin.[117] When Johann Rudolf Wettstein, the mayor of the Swiss city of Basel, arrived in Westphalia seeking only to abolish the imperial appeal,[118] the Emperor instead created an exemption for Switzerland which derived from imperial law and which the Swiss did not clearly distinguish from sovereignty.[119] Westphalia confirmed that Switzerland had not paid homage to the Emperor for one hundred and fifty years and instead abided by its own laws, but because Switzerland failed to establish where sovereignty lay, the notion that both the cantons and the Confederation were free, sovereign, and independent was accepted.[120]

Switzerland's sovereignty was later reimagined with the introduction of the Bernese magistrate's functions, which paralleled Bodin's *République*.[121] It was only in the practice of international law and the customs of diplomacy that Switzerland's sovereignty was acknowledged internally in such modern terms as late as 1751 by the Swiss constitutional theorist Isaak Iselin.[122] The only Swiss university of that time, the University of Basel, continued the study of imperial law until late in the seventeenth century.[123] The Dutch and Swiss constitutions continued to maintain their polycentricity of powers even after Westphalia, and Swiss cities abided by constitutions stemming from structures of the Empire.[124] Several Swiss cantons even continued to bear the double headed imperial eagle in their coat of arms in 1684, decades after Westphalia, and according to Johann Caspar Steiner, this in no way contradicted Switzerland's independence as confirmed in Westphalia.[125] The inference we can draw

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[115] *Id.* at 174.

[116] Holenstein et al., *supra* note 81, at 18; Thomas Maissen, *Inventing the Sovereign Republic*, *in* THE REPUBLICAN ALTERNATIVE: THE NETHERLANDS AND SWITZERLAND COMPARED, *supra* note 81, at 128-29.

[117] Maissen, *supra* note 116, at 145.

[118] *Id.* at 134-35.

[119] *Id.*

[120] *Id.* at 135.

[121] *Id.* at 133-34.

[122] Maissen, *supra* note 116, at 136.

[123] Holenstein et al., *supra* note 81, at 18.

[124] *Id.* at 23.

[125] Maissen, *supra* note 116, at 129.

is that, based on historical reality and state practice, the hard boundary between "sovereign" and "not sovereign" is a modern neologism ahistorical to the early era of international law immediately after Westphalia—and that there is no contradiction between systems of mixed sovereignty and the sovereign state in the modern era of international law.

Mixed sovereignty in the Holy Roman Empire persisted after 1648. Subsequent treaties such as the Treaty of Utrecht continued to acknowledge the Holy Roman Empire as a sovereign state and recognize its unique constitutional arrangement despite the fact that it differed sharply from the centralized state systems of France and Britain.[126] Imperial states were considered both sovereign actors and party to the Holy Roman Empire's constitutional system, and practically speaking, sovereignty was always more fluid than states acknowledged.[127]

Sovereignty would remain ambiguous in the Holy Roman Empire while the Empire kept different negotiated rights of various principalities under a unifying ideological, political, and legal framework.[128] These practical arrangements of ambiguous sovereignty continued well after the Treaty of Westphalia, and there were so many different forms of sovereignty in the Empire that did not seem contradictory to most people at the time.[129]

Successor states also adopted this model from the Holy Roman Empire. For instance, the Netherlands emerged as fully sovereign out of the Treaty of Westphalia and retained large amounts of autonomy for both its provinces and cities, which conducted international trade across the world.[130] The city of Amsterdam extensively influenced terms of trade through its stake in the Dutch East India Company,[131] and representatives of Dutch cities banded together to promote their common trade interests,

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[126] WILSON, *supra* note 4, at 127-28, 471-72.

[127] *Id.* at 471-72.

[128] *Id.* at 279. States like Austria and Prussia were both imperial states and also kingdoms outside the empire's rule, with the Hohenzollern King of Prussia (known as the King in Prussia before 1772) and the Habsburg King of Hungary both considered kings of the territories they held outside the bounds of the Empire. *Id.* at 159, 210. Another state, Bohemia, which was continuously held in union with Habsburg Austria after the Battle of White Mountain, was both an independent kingdom and a member and prince elector of the Holy Roman Empire. *Id.* at 118. Similarly, after 1714, the British monarch held a second official title, "the Elector of Hanover." *Id.* at 169, 600.

[129] *Id.* at 159, 176.

[130] *Id.* at 594-99.

[131] Oscar Gelderblom & Joost Jonker, *Completing a Financial Revolution: The Finance of the Dutch East India Trade and the Rise of the Amsterdam Capital Market, 1595-1612*, 64 J. ECON. HIST. 641, 651, 654 (2004).

which even extended to affirming treaties.[132] The Netherlands maintained a system of estates in which cities remained immensely powerful and were considered sovereign by international observers.[133]

By granting de jure independence to the states that had already exercised de facto independence, the Treaty of Westphalia also transformed many free imperial cities into more fully sovereign city-states, a status that the most powerful of them kept until the reunification of Germany under Bismarck in the nineteenth century.[134] Some powerful cities like Hamburg became recognized under this system, which is still reflected in the political geography of modern Germany. Hamburg emerged as a powerful city-state after the Westphalian system with a great tradition of international trade deriving from the era of the Hanseatic League.[135] Today, Hamburg maintains its own Bundesland (a subnational state) with its historical title as the Freie und Hanseatische Stadt Hamburg (Free and Hanseatic City of Hamburg).[136]

Examples like the Free City of Danzig, a formerly Hanseatic City established after World War I,[137] and the Free City of Trieste, both port cities formerly part of the Holy Roman Empire, coincidentally or not, reflect a view of cities that closely resembles the historical precedent of free imperial cities, even as they were considered to have characteristics of the sovereign state. This is not merely a historical curiosity: city states with mixed sovereignty continue to persist even today, as in the case of Hong Kong.[138] Protests in Hong Kong that have erupted in 2019 show a dispute over the real nature of self-rule over the city, which formally passed from British to Chinese sovereignty in 1997 but which also formally remained a separate territory—one which maintains its own flag, border controls with mainland China, and a separate constitution which protestors are defending under the banner of universal suffrage. This is the essence of what

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[132] Maarten Prak, *Challenges for the Republic: Coordination and Loyalty in the Dutch Republic*, *in* THE REPUBLICAN ALTERNATIVE: THE NETHERLANDS AND SWITZERLAND COMPARED, *supra* note 81, at 53, 61.

[133] *Id.* at 54.

[134] *Hamburg*, ENCYCLOPÆDIA BRITANNICA, https://perma.cc/9AAM-FYF6 (last visited Jan. 23, 2020).

[135] *Id.*; WILSON, *supra* note 4, at 578, 657.

[136] *Hamburg*, *supra* note 134.

[137] Eugene van Cleef, *Danzig and Gdynia*, 23 GEOGRAPHICAL REV. 101, 101 (1933).

[138] China has similar arrangements of mixed sovereignty with Taiwan dating to the time of the Communist Revolution. Taiwan (Republic of China) and China (People's Republic of China) both claim to be the legitimate sovereign government of all of China and recognize officially that China is one country. Taiwan maintains formal embassies only in a few countries despite having one of the twenty largest GDPs in the world and being an independent government. DAMROSCH & MURPHY, *supra* note 2, at 325. Macao is a close constitutional parallel.

China has called "one country two systems," the contours of which are in dispute.[139] Other examples come from the Commonwealth of Nations, where sovereign countries such as Canada and New Zealand share the British monarch as the head of state. Commonwealth countries' diplomatic offices are called "high commissions" and some still share aspects of a judicial system with Britain.[140] Until 2004, New Zealand's final court of appeal was the Privy Council, the formal body of advisors to the sovereign of the United Kingdom,[141] and Jamaica continues to appeal to this body even today.[142] Brunei, although not a Commonwealth member, does so in some limited civil cases.[143] Nevertheless, all of these countries are considered full sovereigns by the international community.

The post-World War II era of international law added individual rights to the international legal framework. The Grotian tradition in international law thus continued after the two World Wars, reappearing as norms in modern international law. Another product of the history of Germany, the Nuremberg trials for Nazi war crimes established the principle of international human rights, the obligation on the individual, and key limits on the state's authority, all while international institutions and multinational governance structures formed.[144] This principle became central to the system of international law after the conclusion of World War II.[145] Customary international law is generally said to be the law of how nations behave.[146] The international role of cities has become increasingly prominent as the world has become more interconnected since the nineteenth century, which is often considered the apex of the absolute sovereign of the territorial nation state.[147] Cities have been acting as global players in the international arena since the conclusion of the Second World War.[148]

The Holy Roman Empire's sovereign development post-Westphalia is a useful paradigm to consider and analyze in light of the modern

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[139] *Id.*

[140] *Embassies*, COMMONWEALTH NETWORK, https://perma.cc/6E5L-2YGV (last visited Jan. 23, 2020).

[141] *History and Role*, COURTS OF NEW ZEALAND, https://perma.cc/QB3X-YYHU (last visited Jan. 23, 2020).

[142] *The Judiciary*, JAMAICA INFO. SERV., https://perma.cc/3P6H-R4N8 (last visited Jan. 23, 2020).

[143] The Brunei (Appeals) Order 1989, SI 1989/2396, arts. 2, 4 (Eng.), https://perma.cc/39Q2-YDF7.

[144] Henkin, *supra* note 24, 37-45.

[145] *See generally id.*

[146] DAMROSCH & MURPHY, *supra* note 2, ch. 2.

[147] *Id.* at 36 (quoting LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 8-11 (1995)).

[148] *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L. L. 821, 821-22 (1989).

world's predominant rigid airtight conceptions of sovereignty. The significance was clear post-World War II, as states once again accepted some limits on their capacity for violence and shared governance in the form of the United Nations, multi-lateral institutions, and the transnational European Union.[149] What we can draw from the Holy Roman Empire's constitution both before and after Westphalia is that sovereignty can be fluid and shared with cities without negating the modern state system—and in fact, this was a reality well into the modern era of international law and has been accepted as such. A strong national state is not the only form of sovereignty available to the modern global community: modern cities can tackle joint problems and harmonize their municipal laws to reflect international standards across borders for the greater good of their citizens. They have done it before.

III. CITIES AS SUBJECTS IN CUSTOMARY INTERNATIONAL LAW

Cities should be considered entities that are becoming emergent international actors and subjects of international law. The United Nations' adoption of the Sustainable Development Goals, which followed the Millennium Development Goals, emphasizes this fact. Specifically, Sustainable Development Goal 11 reflects cities' emerging role in international relations, as do Goals 16 and 17.[150] In particular, Goal 11 sets an international policy for good urban governance.[151] Increasingly, cities are "required to take international normative expectations into account when they plan and make decisions."[152] Cities ought to be considered international subjects in Sustainable Development Goal 11, which was generally accepted by the member states that were present, even as heated debates surrounded the broader adoption of the other Goals.[153]

In international practice, relations between cities and international institutions have progressed especially far. For instance, in 2010, the City of Rio de Janeiro received a loan directly from the World Bank.[154] Increasingly, the reality of the world challenges the traditional dualism of

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[149] Henkin, *supra* note 24.

[150] Helmut Philipp Aust & Anél du Plessis, *Introduction*, *in* THE GLOBALIZATION OF URBAN GOVERNANCE 4 (Helmut Philipp Aust & Anél du Plessis eds., 2019).

[151] *Id*.

[152] *Id.* at 5; *Sustainable Development Goal 11*, UNITED NATIONS SUSTAINABLE DEV. GOALS KNOWLEDGE PLATFORM, https://perma.cc/4EHZ-XS7C (last visited Dec. 17, 2019).

[153] Noora Arajärvi, *Including Cities in the 2030 Agenda*, *in* THE GLOBALIZATION OF URBAN GOVERNANCE, *supra* note 150, at 31.

[154] Michael Riegner, *International Institutions and the City*, *in* THE GLOBALIZATION OF URBAN GOVERNANCE, *supra* note 150, at 38.

state and non-state, and the law of custom reflects this pattern.[155] The universality of human rights law already binds cities with their residents in international law,[156] and, over time, secondary law developed by the United Nations and the World Bank has become "a voluminous body of general rules applicable to cooperation with cities,"[157] which includes quasi-judicial functions.[158] In international custom, cities are returning to a place they have previously held.

Arguably, agreements between international organizations and cities have already taken on some characteristics of treaties, functioning as custom outside the Vienna Convention.[159] This international custom is "common practice" in Brazil, where cities' para-diplomatic activities have been supported by the Brazilian Foreign Ministry.[160] Similarly, international norms of local law have been recognized constitutionally in South Africa.[161]

Individuals and organizations at the very least hold quasi-sovereign characteristics under the increasingly accepted and expanded purview of what it means to be an international actor.[162] Cities should be seen as quasi-sovereign as well. As described above, cities' international role justifies the view that "a rich history of foreign relations between urban political communities" has always existed, continues to exist, and thus should be recognized as such in customary international law.[163]

As cities grapple with international issues that cross borders and affect all humanity, such as climate change and immigration, joint city agreements should also be recognized as sources of customary international law. It is in the interest of achieving a minimal world order that as many participants as possible are included in the world's international system. Having multiple layers of acceptance of international norms also only serves to strengthen states' adherence to these norms. The increased weight and influence of cities in areas central to international law suggests that they are a critical piece of the puzzle in solving global issues. The top twenty-five metropolitan areas combined constitute over half of the

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155 *Id*. at 39.

156 *Id*. at 42; *see* DAMROSCH & MURPHY, supra note 2, at 437.

157 Riegner, *supra* note 154, at 42.

158 *Id.* at 43.

159 *Id.*

160 *Id.* at 54.

161 *Id.* at 56; *Abahlali BaseMjondolo Movement v. Premier of KwaZulu-Natal* 2009 (2) BCLR 99 (CC) at 67-68 paras. 127-29 (S. Afr.).

162 *See generally* Henkin, *supra* note 24; DAMROSCH & MURPHY, *supra* note 2, at 429.

163 Nijman, *supra* note 2, at 213.

United States' gross domestic product (GDP)[164] and the C40, a network of the world's megacities committed to address climate change, purports to represent twenty-five percent of global GDP, which is on par with the United States, the European Union, and China.[165] This shows that, with the extensive powers held by local governments, cities' action is becoming essential in addressing global issues, particularly in combating climate change in the face of nations' intransigence and gridlock.

In practice, international agreements are intrinsically multicentric. They are *de facto* anarchic: there is no international so-called super sovereign enforcing the norms of international law, and joint international agreements require only the signatories' voluntary compliance.[166] Cities' role in this system can be symbiotic with the already voluntary nature of international law. If one nation places a particular reservation on an international treaty, why not recognize cities' ability to fully commit to upholding international law to the extent of their competent powers? This would create multiple avenues for adherence to international norms other than just the tollbooth of the centralized state.[167] While not covered as sovereigns in the Vienna Convention on treaties, "other subjects of international law" are explicitly recognized as having legal treaty capacity under some other source, such as customary international law.[168] Thus, cities should receive the support of customary international law as competent subjects and their capacity to create agreements should be recognized by the international community.

The inclusion of cities into the international arena follows the precedents which have been set in the historic development of sovereignty and which have continued with the transformation of other non-state actors, such as international organizations and NGOs, into international legal subjects.[169] Indeed, international organizations have exercised international legal capacity in a variety of ways which have traditionally been

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[164] Kim Hart, *The Age of Winner-Take-All Cities*, AXIOS (July 10, 2019), https://perma.cc/S6SE-VHGF (discussing how, today, modern cities wield more power on the global stage than ever before.).

[165] *About C40*, *supra* note 28.

[166] MARTIN DIXON ET AL., CASES & MATERIALS ON INTERNATIONAL LAW 55 (6th ed. 2016).

[167] *See* BENJAMIN R. BARBER, IF MAYORS RULED THE WORLD 6-12 (2013). This is particularly true because states often represent narrow interests on a particular issue, rather than the will of the people to oppose an international norm.

[168] Vienna Convention on the Law of Treaties art 3., May 23, 1969, 1155 U.N.T.S. 331; DAMROSCH & MURPHY, *supra* note 2, at 126. This may include international organizations and other non-state actors that can be recognized as having legal force and that may operate based on rules comparable to those in the Vienna Convention.

[169] DAMROSCH & MURPHY, *supra* note 2, at 401.

considered reserved for sovereigns, including concluding treaties, sending and receiving ambassadors, and even occupying territory.[170]

The United Nations Economic and Social Council Article 71 provides that it may "make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence."[171] NGOs have participated in that framework, seeking to set standards on the use of landmines through an inter-state treaty regime.[172] This shows that non-state sovereigns can be recognized by the global community as sovereign or quasi-sovereign subjects of international law. The framework for cities in international law should follow this precedent. Para-diplomatic activities should be recognized as an international custom, and cities recognized as subjects of international law—and as limited sovereigns—subject to limitations placed on this role by relevant constitutional law. Opening up the arena of international law to cities would contribute to the philosophical goal of attaining a minimal world order for international cooperation and the global good.

A. Preemption and National Government Supremacy

The most obvious problem with cities forming international agreements with other foreign cities is the exclusivity which sovereign states claim for foreign policy. As this article contends, this is largely an avoidable problem because the agreements which cities make with each other fall outside of the scope of sovereign foreign policy, and cities thus have freedom to adhere to both international norms and sovereign policies.[173]

The existence of different layers of governance is intrinsic to many federal systems. In United States jurisprudence, for example, there are different levels of competence which the federal, state, and local governments claim for themselves. This could serve as a model for how cities could interact with different sources of law. Notably, there is an important distinction between domestic constitutional law and international law. Agreements made between cities may have an international character, as long as they are not barred by domestic constitutional law—although the precise boundaries between domestic constitutional law and international law may at times be blurred in mixed sovereignty systems like the European Union. There are various areas of policy with varying levels of con-

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[170] *Id.*

[171] U.N. Charter art. 71.

[172] DAMROSCH & MURPHY, *supra* note 2, at 431.

[173] In the domestic context, see Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141, 143, 146 (1963) for a discussion of how federal and state regulations may operate simultaneously without impairing the federal superintendence of the relevant field.

flict that naturally dictate how most sovereign states will react to autonomous agreements made by cities.[174] Sophisticated mixed sovereignty systems, such as the European Union, analogously may limit a sovereign state's power in certain areas like trade while simultaneously not abrogating the state's sovereignty. For example, following the *Van Gend en Loos* decision, the European legal concept of "direct effect" did not implicate any abrogation of the Netherlands' status as a sovereign state.[175] Mixed sovereignty implies no internal contradiction here.[176]

National governments reserve some traditional areas of competence to themselves. Preemption in the United States is one example of this. The United States' preemption doctrine has mostly dealt with states' actions but is applicable to cities as well, since they are considered incorporated under state law. The Supremacy Clause of the United States Constitution states that the Constitution is the "supreme law of the land," and that federal laws have precedence.[177] This is the basis of the preemption doctrine, which has been extensively litigated by American courts. However, federal preemption intends to only preempt state and local laws which intrude on powers reserved solely for the federal government, or where there is a direct conflict with federal law. The preemption doctrine does not apply to instances where local regulation derives power from a source not barred by the U.S. Constitution or the federal government.[178] Outside of an conflict between federal and state laws in an area in which the federal government has authority to legislate, the text of the Supremacy Clause does not explicitly prevent local authorities from being in charge of decision-making. If anything, it recognizes the multiplicity of laws which exist in a federal system and encourages adherence to federal, state, and local laws.[179]

There is the least potential for conflict in a city-made agreement that reflects state-endorsed policies and which relates to issues that the sovereign does not traditionally claim monopoly over.[180] In contrast, an agreement that conflicts with the sovereign state's national policies and deals

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[174] *See id.* at 141.

[175] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1; *see The Direct Effect of European Law*, EUR-LEX, https://perma.cc/H53E-AWND (last visited Jan. 23, 2020).

[176] This has been expressed in the literature of the European Union as multi-level governance. IAN BACHE ET AL., POLITICS IN THE EUROPEAN UNION 33 (3d ed. 2011).

[177] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.").

[178] *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 213 (1983); *id.* at 225 (Blackmun, J., concurring).

[179] *See generally* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

[180] *See Pac. Gas & Elec. Co.*, 461 U.S. at 213, 225.

with a category of decision-making over which the national government traditionally claims a monopoly, such as immigration law, may result in opposition.[181] Many of the issues most likely to result in city agreements across international borders concern economic and environmental protections, which the U.S. national government may have been silent on.[182] Today, cities and regional governments have taken action on these issues on an international level. For example, in light of President Trump's decision to pull the United States out of the Paris Agreement, California has recently signed a deal with China to cooperate on climate change.[183]

Germany, Canada, the United States, and India constitute prime examples of states whose national and local powers are constitutionally separated. While the United States often claims hard sovereignist positions in international law, it is probably the best example of a country whose national constitution can facilitate extensive international city agreements. Implicit in the United States Constitution is the continuation of limited state sovereignty deriving from the British colonial period.[184] The branches of the U.S. federal government operate from a set of enumerated powers delegated to them by the Constitution, and various forms of sovereignty have always remained with state and local governments.[185] U.S. cities have long exercised sovereign powers—even during the British colonial period. For example, Massachusetts preserved New England townships' powers.[186] Furthermore, the Tenth Amendment specifically reserves powers not enumerated in the Constitution as delegated to the federal government for the states and the people, and the Ninth Amendment explicitly states that the enumeration of certain rights in the Constitution should not be construed to exclude other rights not mentioned.[187] As a result, since the inception of the Constitution in 1789, cities have not

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[181] *See* Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941).

[182] *See About C40*, *supra* note 28. C40 Cities is a global network of ninety-four cities coordinating a municipal response to climate change.

[183] Matthew Brown, *California, China Sign Climate Deal After Trump's Paris Exit*, ASSOCIATED PRESS (June 6, 2017), https://perma.cc/YV7G-PCC3.

[184] For a discussion of the history of the development of state sovereignty in the United States, see Claude H. Van Tyne, *Sovereignty in the American Revolution: A Historical Study*, 12 AM. HIST. REV. 529 (1907). *See generally* AARON N. COLEMAN, THE AMERICAN REVOLUTION, STATE SOVEREIGNTY, AND THE AMERICAN CONSTITUTIONAL SETTLEMENT, 1765-1800, at 17-38, 127-46 (2016).

[185] U.S. CONST. amend. IX; *see* Printz v. United States, 521 U.S. 898, 918-21 (1997).

[186] *See* Kenneth A. Lockridge & Alan Kreider, *The Evolution of Massachusetts Town Government, 1640 to 1740*, 23 WM. & MARY Q. 549 (1966).

[187] U.S. CONST. amends. IX, X.

been impeded from acting in areas where they have always had sovereign power in the U.S. constitutional system.[188]

While the end of the American Civil War conclusively established the unity of the United States and the primacy of the federal government,[189] powerful state governments have remained part of the American constitutional framework.[190] "It is incontestible that the Constitution established a system of 'dual sovereignty,'"[191] and states in this system retained a "residuary and inviolable sovereignty."[192] The Framers established a constitutional authority in which multiple sovereigns would therefore "exercise concurrent authority over the people."[193] While the Constitution's idea of mixed sovereignty always conceived of state governments as the primary sub-national unit endowed with sovereign rights before the Constitution's adoption,[194] the United States' constitutional structure is just as amenable to reflect cities' independence as limited sovereigns. Cities' rights were not abrogated by the Constitution. They continue to exist, and they continue to be widely exercised.

Tenth Amendment jurisprudence has conclusively held that the federal government cannot commandeer state legislatures or state administrative resources.[195] The place of cities within this framework is unclear; however, they ought to receive the same protection that municipal corporations do under state law. The Founders clearly envisioned that mixed sovereignty extended to city governments. As stated by James Madison:

> Among communities united for particular purposes, [supremacy] is vested partly in the general and partly in the municipal legislatures . . . . [and] the local or municipal authorities form distinct and independent portions of the supremacy, no more subject,

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[188] U.S. CONST. amend. IX; *Printz*, 521 U.S. at 919-21; New York v. United States, 505 U.S. 144, 156 (1992); *see* THE FEDERALIST NO. 39 (James Madison); *Cities 101 – Delegation of Power*, NATL. LEAGUE OF CITIES, https://perma.cc/7FS9-9V9F (last visited Jan. 23, 2020). Many cities in the United States are subject to Dillon's Rule, which affirms a "narrow interpretation of a local government's authority, in which a substate government may engage in an activity only if it is specifically sanctioned by the state government." *Cities 101 – Delegation of Power*, *supra*. While cities in states that follow the Dillon's Rule are subject to *state* power, this power must be asserted and does not apply in the significant minority of "home rule" states, where the state delegates a significant amount of power to sub-units of government like cities. *Id.*; *see* Clay L. Writ, *Dillon's Rule*, VA. TOWN & CITY, Aug. 1989, https://perma.cc/3LYF-TXAY.

[189] Lisa Rein, *Civil War Gave Birth to Much of Modern Federal Government*, WASH. POST (Oct. 7, 2011), https://perma.cc/L6JW-US32.

[190] U.S. CONST. amend. X.

[191] *See Printz*, 521 U.S. at 918 (quoting Gregory v. Ashcroft, 501 U.S. 452, 457 (1991)).

[192] *Id*. at 919 (quoting THE FEDERALIST NO. 39, at 245 (James Madison)).

[193] *Id.* at 920.

[194] *Id.*

[195] *See id.* at 919-21; New York v. United States, 505 U.S. 144, 188 (1992).

> within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere.[196]

To reiterate, there is a distinction between constitutional and international law, both of which cities are subject to, and while it is necessary in practice for cities to have a constitutional right to form international agreements, they often do constitutionally form these agreements, which should be considered subject to international law.

While the U.S. Constitution prohibits sub-national governments from creating treaties with other countries,[197] nothing prevents them from making agreements with other non-sovereigns or agreements without the characteristics of treaties. For example, agreements between cities may avoid the exclusivity of the national state's international diplomacy with foreign sovereigns, since cities do not legally have the status of full sovereign states under international law. But if city agreements do not contravene another law, they can receive international and local recognition as part of customary international law and can even form regional norms and customs. The inference that can thus be drawn from the American federalist structure is that the relationship between sub-national and federal law is coextensive and adherence to both systems of law is welcomed. Only the federal government's interdict through constitutionally enumerated powers can limit the competence of other governments, which are otherwise free and sovereign.

Historical precedent for such city agreements also shows the boundaries of what cities can do without being preempted by national law. For example, the 1980s era campaigns calling for divestment from South Africa in protest of the country's apartheid system were an international movement that was often implemented by cities and, in some instances, even by levels of governance like universities and agencies.[198] This all happened in spite of the fact that divestment touched on sensitive areas of diplomatic relations with a foreign sovereign, a field traditionally claimed by the sovereign state. The divestment campaign had the potential to embarrass sovereign states, thwart official diplomatic relations, and contravene the stance taken by a foreign ministry, and though all these considerations weighed against cities' authority to conduct policy, the apartheid

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[196] THE FEDERALIST NO. 39 (James Madison).

[197] U.S. CONST. art. I, § 10.

[198] Brentin Mock, *When Cities Fought the Feds over Apartheid*, CITYLAB (May 24, 2017), https://perma.cc/VDK8-MNAV; *see, e.g.*, Richard Knight, *Sanctions, Disinvestment, and U.S. Corporations in South Africa*, *in* SANCTIONING APARTHEID 67-90 (Robert E. Edgar ed., 1990); David Rosenberg, *Trustees Vote for Divestiture from Backers of S. African Government*, COLUM. DAILY SPECTATOR (June 8, 1978), https://perma.cc/9SB4-ZMPT.

divestment campaign was widely successful.[199] This suggests an emergent principle of customary international law: cities' ability to enforce norms vis-à-vis the state.[200]

A set of general principles of international law can be derived from these patterns of local government behavior. The most important principle that we can derive is that independent action by city governments should be recognized as legitimate as under customary international law to the extent that city governments act within their constitutional power and their actions are not preempted by legislation of the state.

B. Cities' Unique Abilities

More than a region, a state, or any other subnational unit, cities are able to achieve the supposed goals of local political control: decisions that are closer to the ground and sensitive to local conditions. Cities represent a true community of interests in which people can come together and exercise civic virtue to further important community interests; they are defined by their communitarian interests, like economy and housing, as opposed to a nation state's commonality of religion or ethnicity. Regions, on the other hand, often function as miniature versions of national states.[201]

European regions like Scotland, Catalonia, and Flanders are defined more by separate nationality than any collective interest in local government. Cities, on the other hand, are uniquely able to piece together local political interests, while their cosmopolitan character separates them from the parochialism of regions.[202] Regions also often feature stark differences between industrialized areas and their rural hinterlands, which cities do not face. This makes cities the most efficient mechanisms for directing specific improvements critical to the betterment of human civilization, and is also largely the reason why functions like education, land use planning, transportation, energy, and waste management are managed mostly

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[199] *See* sources cited *supra* note 198.

[200] The international Boycott Divest Sanctions ("BDS") movement seeks to boycott economic products from the Occupied West Bank and has sought to use international economic pressure to push for change in the occupation of the West Bank. It has attracted massive criticism from both the Israeli government and politicians in the United States. Despite opposition from Israeli diplomats, the BDS movement has been very successful in achieving many of its goals and was endorsed by and proceeded in cities all over the world without preemption by national governments. Many U.S. states have pushed to ban BDS and, if anything, the constitutional question has been whether bans on BDS should be allowed. Dalal Hillou, *Criminalizing Nonviolent Dissent: New York's Unconstitutional Repression of the Boycott, Divestment, Sanctions (BDS) Movement*, 25 J. GENDER SOC. POL'Y & L. 527, 528-29 (2017).

[201] *See, e.g.*, *Catalonia Crisis in 300 Words*, BBC NEWS (Oct. 14, 2019), https://perma.cc/HED3-M8D6.

[202] Aust, *supra* note 2, at 269.

by cities.[203] These functions make cities particularly effective at managing the effects of a global tragedy of the commons, such as climate change, adaptation for which often requires extensive experimentation.[204] In fighting climate change, cities will be critical to devising and implementing rational policies against polluters.[205] At the same time, concerted activity by cities on the international level promises to deliver the sort of economy of scale capable of putting pressure on major industries, if the combined GDP of the world's cities is brought to bear.[206]

Most importantly, cities working in cooperation with each other can, more than any other unit of government, unite to deal with common global problems that challenge the parochial interests of a nation or a region, and which require people to act together around the world.[207] As cities' interests gradually converge and the problem of climate change is universally recognized by science and the international community, the threat to cities like New York, Amsterdam, Jakarta, Miami, Kolkata, Venice, Alexandria, and Mombasa is universal, and action by these cities becomes necessary to prevent harms affecting them all.

While national interests in a particular industry might preclude all nations from acting together,[208] by relying on a diversity of different levels of sovereignty, an agreement which encompasses a patchwork of the world's cities with the world's highest GDP may be able to drag even the greatest geo-political troglodytes kicking and screaming into the twenty-first century. Of course, cities are also often bastions of wealth and privilege, particularly in the current economy where powerful global cities are magnets for finance and technology.[209] In fact, cities exemplify much of the modern problems of economic and social inequality.[210] However, through the use of public spaces and communal living, cities are also some of the greatest incubators for solutions to inequality.[211]

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[203] *See id.* at 266.

[204] The tragedy of the commons is implicated by climate change in that no one actor has ownership over the common harm of carbon emissions, yet they can privatize the profits from CO2 pollution. Local rules can often best address these issues in a nuanced way. *See* OSTROM, *supra* note 31, at 70, 78, 81.

[205] Aust, *supra* note 2, at 263.

[206] Nijman, *supra* note 2, at 218.

[207] Aust, *supra* note 2, at 263.

[208] *See, e.g.*, Robinson Meyer, *The Indoor Man in the White House*, ATLANTIC (Jan. 13, 2019), https://perma.cc/4VVD-ATXH.

[209] For example, tech firms have clustered in cities, intensifying the pressures of gentrification. *E.g.*, Sam Raskin, *Amazon's HQ2 Deal With New York, Explained*, CURBED N.Y.C. (Feb. 14, 2019, 12:12 PM), https://perma.cc/Q9S8-TNLK.

[210] Nijman, *supra* note 2, at 217-18.

[211] *Id.* at 218-19.

IV. CITY RIGHTS TODAY

Federal constitutions like that of the United States prevent cities from forming truly independent foreign policies with other countries. Nevertheless, cities retain wide constitutional latitude to act and municipal independence remains. Cities have continued to form treaties of friendship across the world and have also shown a unique ability to learn from each other.[212] Mayors frequently visit other countries' major cities to glean insight into similar problems facing their own cities.[213] In a global world, cities often have more in common with other cities in faraway countries in terms of culture, politics, and economy than they do with their own hinterlands.[214] Still, these kinds of agreements have increasingly blurred the distinction between city and state policy. In one poignant recent example, the City of Prague and the City of Beijing's sister city agreement failed after the newly elected mayor of Prague objected to the agreement's mention of the One China policy, to which China responded strongly.[215] The President of the Czech Republic responded by noting that Prague's policies are not the same as those of the Czech Republic, and the Czech Foreign Ministry, which recognizes the One China policy, simply declined to get involved.[216]

To formulate a truly independent policy of cities that can maximize cities' ability to effect change through the use of constitutional powers is the challenge cities have to navigate. In the United States, federalism gives states the ability to craft their own policies in many different areas.[217] For instance, states and cities have very different policies concerning the legalization of marijuana,[218] and there has been discussion among legislators about creating interstate compacts on climate change and even election reform.[219] However, unlike states, which often function as smaller versions of the federal government, cities often maintain an inter-

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[212] Aust, *supra* note 2, at 258-59.

[213] *See, e.g.*, *The 2019 C40 World Mayors Summit in Copenhagen*, C40 CITIES, https://perma.cc/44XK-LUZB (last visited Dec. 17, 2019); Nijman, *supra* note 2, at 210.

[214] *See* Nijman, *supra* note 2, at 218.

[215] Lenka Ponikelska, *Beijing Takes Aim at Prague After 'One-China' Dispute Deepens*, BLOOMBERG (Oct. 9, 2019, 6:54 AM), https://perma.cc/UR5N-RFQM.

[216] *Id.*

[217] Printz v. United States, 521 U.S. 898, 918-19 (1997).

[218] *See, e.g.*, Joseph Misulonas, *15 Largest Cities That Have Decriminalized Marijuana*, CIVILIZED, https://perma.cc/VQQ6-9WVG (last visited Dec. 19, 2019). Local district attorneys have also adopted policies allowing people to avoid marijuana prosecution, like in Brooklyn, New York. Mary Frost, *Brooklyn DA: Prosecution of Low-Level Marijuana Cases Down 98 Percent*, BROOKLYN DAILY EAGLE (Feb. 20, 2019), https://perma.cc/8HFP-HZEY.

[219] *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, https://perma.cc/4SVH-T8T3 (last visited Dec. 3, 2019).

national character: they have their own residents, regardless of those residents' place of origin, and provide a means of furthering their residents' common goals independently of the national government. The growth of sanctuary cities in the United States is a good example of this phenomenon.[220] Other similar arrangements exist around the world.[221]

However, the true test of a city's ability to develop its own policy is the area of climate change. The vast majority of the world's GDP, which fuels consumption and therefore affects climate change, takes place in cities and metropolitan areas.[222] Cities can work together to develop better climate tactics than those introduced by their national governments, and they can do it with their own local knowledge. Furthermore, the problem of climate change presents a true global moral challenge the likes of which has not yet been seen. The value of the international legal and ethical framework, which has been widely accepted to protect the climate, is itself an imperative for the future of humanity.[223] To this, all levels of government should answer the call to change the world for the future of our planet.

A. Cities as Agents Against Climate Change

Cities have zoning and land use management capabilities that allow them to deal with the problems of climate change on a local level where national governments have failed to deal with this issue themselves.[224] Cities can do so in two ways. First, cities can make agreements with each other across international borders that should be considered quasi-sovereign acts and accepted and enforced as part of customary international law.[225] Second, cities can act to enforce agreements to comply with international norms that their national governments have not been willing to enforce or fully comply with.[226]

Mechanisms for intercity cooperation exist. Stemming from the original twinning arrangements borne out of World War II,[227] cities continue to cooperate within cultural, economic, and environmental realms to har-

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[220] *See* Amelia Thomson-DeVeaux, *Trump Is Losing the Legal Fight Against Sanctuary Cities, but It May Still Pay Off Politically*, FIVETHIRTYEIGHT (Feb. 20, 2019, 11:03 AM), https://perma.cc/GQ8G-GAR5.

[221] *See generally* Oomen & Baumgärtel, *supra* note 14.

[222] Nijman, *supra* note 2, at 216-18.

[223] *See* Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66 (July 8) (Shahabuddeen, J., dissenting).

[224] Aust, *supra* note 2, at 261-65.

[225] *See* Nijman, *supra* note 2, at 228-29, 232.

[226] Aust, *supra* note 2, at 265-70.

[227] *Id.* at 258.

monize their policies, generate new ideas, and promote cultural awareness.[228] The cities of Dresden and Coventry, for example, have a shared heritage of destruction during World War II and have cooperated as twin cities: the bombed Cathedral in Dresden was partially rebuilt with British aid.[229] New York has adopted London's solution to traffic congestion by legislating and enforcing congestion restrictions and developing bike infrastructure programs.[230]

Likewise, cities across the world can agree on and commit to international climate targets, such as those agreed to in the Paris Accords, in order to tackle emissions in the most densely populated cities, cities like Mumbai, New York, Mexico City, and Manila which face similar challenges. Similarly, California's former governor Jerry Brown committed to uphold the Paris Agreement—despite the Trump Administration's abandonment of the global compact—by working both with China's national government and with the regional government of the Province of Jiangsu.[231] Finally, the Global Parliament of Mayors creates a structure of international governance which mayors can use to achieve common goals. Leagues, not unlike the historical Hanseatic League, could conceivably develop to promote the economic, ecological, and social interests of cities and their citizens around the world as an evolution of this movement.

B. Sanctuary Cities

Cities have a critical role to play in the realm of immigrants' rights as well. Specifically, in the United States, but also in other countries such as the Netherlands, the sanctuary movement plays an increasingly important role.[232] Sanctuary cities in the United States are cities which have refused to allow city resources to be used for the purposes of federal immigration enforcement. This trend is not limited to the United States; in Europe, local authorities have refused to allow their resources to be used for nationally-directed immigration enforcement that seeks to deprive immigrants of their residence in countries where they have often lived their

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[228] *Id.* at 258-65.

[229] *Landmark Dresden Church Completes Rise from the Ashes*, DEUTSCHE WELLE (Oct. 29, 2005), https://perma.cc/PS2F-K5Y3.

[230] Bobby Cuza, *Congestion Pricing: What NYC Can Learn from London's Traffic Experiment*, NY1 (May 22, 2019, 6:51 PM), https://perma.cc/KS9U-N8VE.

[231] Matthew Brown, *California, China Sign Climate Deal After Trump's Paris Exit*, ASSOCIATED PRESS (June 6, 2017), https://perma.cc/JHZ5-MVSX.

[232] *See* Decision on the Merits, Conference of European Churches v. Netherlands, Eur. Comm. of Soc. Rights, No. 90/2013 (2014).

entire lives.[233] In congruence with international legal norms,[234] many cities give protection to refugees and asylum seekers.[235] This is a particularly relevant issue in Europe given the aftermath of the refugee crisis, which has left many asylum seekers in legal limbo,[236] and European cities have acted to protect refugees' rights contrary to the objectives of their respective national governments.[237]

Sanctuary cities in the United States largely take advantage of the country's federalist framework. It is well-understood legal precedent that the federal government cannot commandeer state and local legislatures.[238] While national immigration law is considered a matter for federal legislation,[239] the national government's relationship with the local enforcement of these federal laws remains in question, and sanctuary cities often refuse to use local law enforcement or city agencies to track and report people with outstanding deportation or removal orders to federal agencies that can execute those orders. The conflict between such local practices and federal immigration policy has led to the development—and litigation over—federal policies that seek to coerce sanctuary cities to comply with federal standards by withholding federal funding.[240]

In recent years, constitutional analysis in the United States has clearly trended toward affirming the doctrine barring federal commandeering. In *Murphy v. National Collegiate Athletic Association*, the Supreme Court struck down the Professional and Amateur Sports Protection Act on anti-commandeering grounds.[241] Notably, in *City of Los Angeles v. Barr*, the Ninth Circuit ruled that the Community Oriented Policing Services grant, which Los Angeles did not score highly enough to receive, did not constitute a violation of the Tenth Amendment.[242] In this case, a federal grant system allotted additional points to city applicants which showed that they were furthering federal immigration goals.[243] However, the case involved a federal grant where immigration enforcement was

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[233] *Id.*; Jascha Galaski, *Sanctuary Cities Challenge Restrictive Migration Policies*, LIBERTIES EU (Feb. 13, 2019), https://perma.cc/N8XF-X7AF.

[234] G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 14 (Dec. 10, 1948).

[235] Galaski, *supra* note 233.

[236] *Id.*

[237] *Conference of European Churches*, No. 90/2013.

[238] *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476-77 (2018); New York v. United States, 505 U.S. 144, 188 (1992).

[239] Hines v. Davidowitz, 312 U.S. 52, 62 (1941).

[240] *See* City of Philadelphia v. Attorney Gen. of the U.S., 916 F.3d 276 (3d Cir. 2019).

[241] *Murphy*, 138 S. Ct. at 1476. One district court has relied on *Murphy* in reaching a similar conclusion regarding executive orders targeting sanctuary cities. City of Philadelphia v. Sessions, 280 F. Supp. 3d 579 (E.D. Pa. 2017).

[242] City of Los Angeles v. Barr, 929 F.3d 1163, 1177 (9th Cir. 2019).

[243] *Id.* at 1170-71.

merely a factor in deciding which cities received the grant and how executive agencies allocated their own funds.[244] This is a far cry from the federal government enjoining a city from independent action.

Another issue which has arisen is whether cities' reliance on federal law can shield them from a Fourth Amendment constitutional violation, specifically where a local government wishes to detain a criminal defendant pursuant to a federal immigration order. The Second Circuit recently ruled that, where the city detained a defendant for four days relying on a federal immigration order, "the City could not blindly rely on the federal detainer in the circumstances."[245] Similarly, the Third Circuit has ruled that a city's suspicion that a criminal defendant has violated an immigration law is not enough to create probable cause to detain that defendant where probable cause is otherwise lacking.[246] These rulings suggest that, in the federalist framework of the United States, cities have an independent responsibility to uphold the Constitution, and that constitutional tort liability cannot be avoided because of a federal immigration order.

Overall, recent case law suggests that there is extensive room constitutionally that may allow U.S. cities to maneuver to defend immigrants' rights. In addition, cities could also be liable for violations of international human rights law, and cities should expand this federalist argument to assert their right to act in accordance with customary international law, particularly with regards to international standards on asylum. Through the use of local powers, cities can protect immigrants and adhere to a different framework than that demanded by national law.

CONCLUSION

Cities have acted as international subjects throughout history. The historical record is clear that cities have existed as sovereigns in a system of multi-centric sovereignty, particularly in Early Modern Germany and the Holy Roman Empire, up to and even after the Treaty of Westphalia. Far from abolishing mixed sovereignty, Westphalia kept it in place, and cities have not only experienced a renaissance in political power since World War II but have continued to perform functions of international subjects to the present day. Nowadays, cities are more important than ever before. Cities are able to tackle the most urgent problems humanity is facing today, such as climate change and migration. Cities' unique proximity to their citizens and communities allows cities to create better solutions that can serve an entire community, not the lucky few—and to operate at a level of governance that can uphold international norms. Thus,

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[244] *Id.*

[245] Hernandez v. United States, 939 F.3d 191, 208 (2d Cir. 2019).

[246] Galarza v. Szalczyk, 745 F.3d 634, 645 (3d Cir. 2014).

cities' role as sovereign players in the international arena is crucial for confronting the interconnected global crises humanity faces today, ranging from natural disasters to famine, migration, and climate change. Sovereign in history and in customary law, cities should be recognized as such by the global community and be finally welcomed to the arena of the international law.