

## ABSTRACT

### THE PARADOX OF OMNIPOTENCE: COURTS, CONSTITUTIONS, AND COMMITMENTS

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Sovereigns, like individuals, must sometimes make commitments that limit their freedom of action in order to accomplish their goals. Scholars have observed that constitutional arrangements can, by restricting a sovereign's power, enable the sovereign to make such commitments. The opposite, however, can often be true: constitutional arrangements can and do impede sovereign commitment by entrenching inalienable governmental powers and immunities. This Article explores the nature and origins of the commitment problems that sovereigns face, and the role of courts in solving such problems. It begins by setting forth an analytical distinction between effective and persuasive commitments. Effective commitments are made for the purpose of imposing actual restraint upon the commitment-maker; persuasive commitments, by contrast, are intended not to bind the commitment-maker, but rather to induce some third party to behave a particular way. Each type of commitment, in turn, poses a specific set of challenges for the sovereign or other actor that wishes to commit itself.

Of particular relevance to sovereigns are the matching problems of what might be called *undercommitment*, on the one hand, and *overcommitment*, on the other. The problem of undercommitment is an acute one for sovereigns: the more powerful the sovereign, the more difficult it may be for the sovereign to make commitments that other actors find credible. At the same time, however, any solution to the problem of undercommitment runs the risk of overcommitment: no sovereign wishes to incapacitate itself to an unforeseen or undesirable extent. Courts, it is argued, have the capacity to assist the sovereign in making commitments that are credible yet do not hobble the sovereign. In doing so, however, courts risk damage to the basis of their own power – namely, their own reputation for rendering fair and efficacious judgments. The Article concludes by suggesting that our Constitution can itself be understood as a form of sovereign commitment – one that is intended both to restrict the sovereign and to persuade the people of the sovereign's legitimacy – and that the doctrine of sovereign immunity compromises both of these goals.