

DISINTEGRATING CUSTOMARY INTERNATIONAL LAW: REACTIONS TO *WITHDRAWING FROM INTERNATIONAL CUSTOM*

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INTRODUCTION

Withdrawing from International Custom,¹ a recent article by Curtis Bradley and Mitu Gulati, has sparked interest and debate. Bradley and Gulati's article develops with significant nuance and detail a proposal that, naturally, can be best understood by a careful reading of their work. In essence, it proposes a modification in customary international law ("CIL") doctrine—a change that would permit states to unilaterally exit from existing CIL.

This Essay will act as a brief reflection on that article. In creating their argument for the right of states to unilaterally exit CIL, the limitations on such a right and the duties of parties seeking to exit, *Withdrawing* turns to three areas of social life in which the rules for entry and exit are ordered and at least partially doctrinally set: contracts, political representation and constitutions. This Essay will provide a brief response to the analogy *Withdrawing* makes to each of these three areas. Ultimately, it argues that Gulati and Bradley have not adequately considered aspects of these three means of social ordering. If they had, they would find that i) unilateral exit from contract is a breach of the exiting party's obligations, ii) political representation argues in favor of the existing system and iii) that there is a strong presumption in constitutions—just as there is in treaties, legislation

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1. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202 (2010) [hereinafter *Withdrawing*].

and contract—in favor of symmetry between how parties become bound by law and how they become unbound by that same law.

In Part I, this Essay will explore the analogies *Withdrawing* makes between CIL and contract and will argue, first that the analogy *Withdrawing* makes between CIL and contract is lacking and, second, that even to the extent that contract demonstrates how other doctrinal areas order exits from legal relationships, contract illustrates the point that unilateral exit is a recognized abdication of the exiting party's obligations and that unilateral exit gives rise to legal liability. In Part II, it explores the analogies *Withdrawing* makes between governments and agents in order to i) unpack some of the political theory constructs on which *Withdrawing* relies, and ii) explore the limitations *Withdrawing* sets on the proposal for unilateral exit. Part III of this Essay makes an affirmative argument for symmetry between CIL formation doctrine and CIL disintegration doctrine. The current proposal anticipates that CIL formation would remain unchanged, but exit for any given state would be far more expeditious than is contemplated by current CIL exit formulations. This Part will argue that this proposal violates a strong presumption in favor of symmetrical entrenchment.²

I. SOCIAL CONTRACT, NOT CONTRACT

In developing the proposal for unilateral exit from CIL, *Withdrawing* often relies on analogies to contract doctrine, never stating explicitly how this analogy is functional, nor how it fails. It is important to recognize that an analogy between CIL and contract is far from perfect, especially in the context of a proposal for unilateral exit from CIL. CIL is more akin to a social contract than it is to a private contract between parties. It is sensible to analogize treaties to contracts in some contexts and to constitutions in other contexts. Treaties, especially commercial, bilateral treaties, bear notable similarity to contracts. However, for reasons that should be obvious to most readers, CIL bears significant differences from treaties, both at the formation stage and, at least in most cases, in the means for departure.³ These differences matter, even when CIL and treaty cover similar subject areas. Bradley and Gulati attempt to point to the substantive overlap between CIL and treaty in order to claim that the two are therefore the

2. The theory of symmetrical entrenchment is presented in John McGinnis and Michael Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 386 (2003).

3. In contrast to CIL formation, treaty obligations are formed after they are negotiated—and explicitly stated in written form. See Vienna Convention on the Law of Treaties art. 2(a), May 23, 1969, 1155 U.N.T.S. 331.

same, or at least that they can be thought of as the same for purposes of exit mechanisms. But it simply does not follow that if contract is sometimes like treaty (a relatively unobjectionable claim) and treaty is sometimes like CIL (another relatively unobjectionable claim), that contract is therefore like CIL.

To the extent that CIL binds parties to one another and we feel a need to think about that relationship in contractual terms, Rousseau is quite helpful. By participating in CIL formation, each state places itself and its otherwise free exercise of sovereign will under the direction of the collective will. Once CIL has formed on a particular norm, it binds each state that has not objected to its creation. It binds states to comply with the norm, and it also binds each state to its counterparts, who have legitimate grounds to expect compliance with the norm. Each state becomes an indivisible part of the body of states that are bound to the particular norm and, through it, to one another.⁴ In place of each state, “this act of association produces a moral and collective body composed of as many members as there are voices in the assembly, which receives from this same act its unity, its common *self*, its life and will.”⁵ CIL is formed willfully, through the collective acts and beliefs of states. Those collective acts and beliefs result in each state agreeing to constrain its future behavior to reflect the common will. CIL is thus much like a first order social contract. This is quite different from a transactional contract and it is also very different from treaty. We should thus expect that the terms of exit would be quite different as well.

Contract is a troublesome analogy for other reasons as well. For example, to the extent *Withdrawing* analogizes to contract, it does so by making reference to contract-formation, rather than to contract exit.⁶ It does this without making any argument for why contract formation is relevant to CIL exit. Students of contract know that how a contract is formed is

4. This phrasing generously borrows from JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 24 (Donald A. Cress, ed. trans., 1983) (1762).

5. *Id.*

6. See, e.g., *Withdrawing*, *supra* note 1, at 248-49 (discussing the formation of sovereign debt contracts). It also refers to a phenomenon in contract known as penalty default, in which a term is “purposefully set at what the parties would not want.” *Id.* at 268 (quoting Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989)). Gulati and Bradley use the concept of penalty default to deflect arguments for using treaties to override CIL that has become outdated or undesirable without recognizing that, unlike in the penalty default context, CIL only arises because the parties – at least at one time – seem to have actually wanted and behaved in accordance with the underlying norm.

doctrinally distinct from the consequences of its dissolution.⁷ If we are to analogize to contract at all, it ought to be with respect to exit, not formation.

Still, there is more to say about contracts. Like CIL, contracts bring parties into relationship with one another. More importantly given the proposal at hand, which contemplates the dissolution of legal relationships, contract doctrine also contains useful tools for understanding what courts have viewed as the reasonable means to dissolve complex, arms-length relationships. Thus, discussion of some key aspects of contract exit doctrine may be useful in thinking about CIL disintegration. Especially if CIL is to be equated to contract, then a proposal that contemplates the terms of exit from CIL ought to be concerned with the rules for exit from contract—in particular, the rules of breach, non-performance and repudiation.

Even to the extent the CIL-to-contract analogy fails, these components of contract law may be useful because of what they say about our experience with respect to fair outcomes when reasonable, legally enforceable expectations are disappointed. Also, both CIL and contract anticipate that the commitments governing the parties may not always be desirable, and may thus require departure. Contract law has long grappled with these concepts in a relatively simplified, economic, typically bilateral context. For these reasons, it may help shine light on what is reasonable to expect from exiting parties in the area of contracts.

Unilateral departure from legal obligations agreed between the parties is called breach.⁸ Breach results in a number of legal consequences for the parties to the contract, from the right of the non-breaching party to be compensated by the breaching party (in the event of partial breach) to damages coupled with termination of the relationship between the parties (in the event of total breach). Parties may breach a contract by a number of methods, including performance that is inconsistent with the terms of the contract, non-performance and anticipatory repudiation.⁹

A partial breach coupled with the declared intention to exit the contractual relationship results in total breach.¹⁰ The proposal asserted in *Withdrawing* contemplates that states would give notice of their intention to exit from existing CIL and that such notice would be given before the

7. Contract formation is covered under doctrines governing, for example, offer, acceptance and consideration, while contract dissolution is covered under doctrines regarding, for example, breach, repudiation, avoidance, and remedies.

8. BLACK'S LAW DICTIONARY 213 (9th ed. 2009).

9. *See id.* at 1418.

10. *See id.* at 213.

given state's actions began to deviate from CIL.¹¹ This type of ex ante declaration of an intention to deviate from the state's promised behavior bears the most similarity to the doctrine of anticipatory repudiation, under which a party repudiates its contractual duties before the time for performance arrives.¹² Before exploring the analytical utility of anticipatory repudiation,¹³ it may be worthwhile to explore a simpler concept in governing contract-based relationships.

A common conceptual leap for all students of contract law is that breach is not necessarily normatively bad. Contract doctrine leaves open the possibility of an efficient breach, which contemplates the situation in which unilateral exit from the contractual relationship is beneficial to the breaching party, even after all parties with legitimate expectations under the contract are properly compensated. It is important to note, of course, that a breach is only called efficient (and thus normatively neutral or positive) in the event that efficiency can be achieved even after the breaching party has internalized damages incurred by its contracting counter-parties, with those damages reflecting the costs to the injured party, as that injured party experiences them.¹⁴ The key point is that "the result of nonperformance is economically efficient only if the value of the gain to the [breaching] party is greater than the value of the loss to the other party."¹⁵

The same might be said of departures from CIL. A state's intentional CIL violation can be seen as efficient when the value of the gain to the exiting state is greater than the value of the loss to non-violating states. One should expect that this is exactly how CIL would change over time. As states realize that their behavior has become inefficient and decide to absorb the costs of their violations, a particular norm would either change or disintegrate entirely. CIL, like contract, anticipates that relationships change through time, as parties' values, interests and goals change. Thus,

11. See *Withdrawing*, *supra* note 1, at 258-59. Presumably, a state's performative departures before giving due notice would indisputably be violations of CIL.

12. See ALLAN E. FARNSWORTH, FARNSWORTH ON CONTRACTS § 8.20 (3d ed. 2004).

13. See generally *Palmer v. Fox*, 274 Mich. 252 (Mich. 1936) (stating that a repudiation together with a breach by non-performance has the effect of giving a claim for total breach to the injured party); see also RESTATEMENT (SECOND) OF CONTRACTS § 243(1) (1981). When non-performance is accompanied or followed by repudiation, this is called a total breach. *Id.* §243(2).

14. These subjective preferences of the non-breaching party have to govern the assessment of damages in the efficient breach situation in order to account for the likely possibility that the breaching party and the non-breaching party will value the breach differently. This is the Kaldor or the Kaldor-Hicks criterion. See FARNSWORTH, *supra* note 12, §12.3 (citing Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549 (1939); J. R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696 (1939)).

15. *Id.*

CIL also implicitly contemplates efficient violations of the law. If it were otherwise, CIL would be unidirectional and could never change.

Breach of contract discussions are most squarely related to *Withdrawing* in the context of anticipatory repudiation, since, like in the proposal stated in *Withdrawing*, the would-be departing party declares its intention to depart from its binding obligations prior to actual departure. For this reason, it is worth considering the consequences of contractual anticipatory repudiation.

Anticipatory repudiation on the part of one contracting party “gives rise to a claim for damages for total breach.”¹⁶ This may be true even when the repudiation “is not accompanied or preceded by a breach by non-performance.”¹⁷ In other words, the anticipation of failed expectations may itself give rise to a claim for damages. Parties may engage in anticipatory repudiation for a number of reasons, including the type of changed conditions that would recommend efficient breach. Regardless of the reasons for the anticipatory repudiation, it may be treated as a breach giving rise to damage claims.¹⁸

There are significant and important differences between departures from contract and departures from CIL that merit consideration. Unlike in contract, CIL deviations are likely to impact many parties negatively by disappointing the expectations that form the basis of the CIL norm, decreasing the likelihood that a deviation can be efficient. This clearly makes CIL more “sticky” than contract and Part III will discuss why this is normatively desirable and consistent with the theory of symmetrical entrenchment.

Additionally, deviations in contract can result in the end of the relationship between the parties.¹⁹ This is clearly not true in CIL, where violations, even of the gravest magnitude, can only change the relationship between states, but can never truly end them. The result is that in addition to whatever compensation is made to non-violating parties, it is equally

16. RESTATEMENT (SECOND) OF CONTRACTS § 253(1) (1981); *see also* Fox v. Dehn, 42 Cal. App. 3d 165, 171 (Cal. Ct. App. 1974) (holding that repudiation following partial breach by non-performance is to be treated as a total breach and not as an anticipatory breach).

17. RESTATEMENT (SECOND) OF CONTRACTS § 253(1), Comment a (1981).

18. *See id.* § 250-51; *see also* Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974) (holding that changed circumstances in a sale of goods contract still give rise to damage claims for anticipatory repudiation. This was held even as the obligor had died, but his estate was incapable of fulfilling the contractual obligations).

19. *See* Plante v. Jacobs, 103 N.W. 2d 296, 298–99 (Wis. 1960) (holding that material deviations from specifications and plans agreed to in a contract result in damage claims as established by the diminished value rule); RESTATEMENT (SECOND) OF CONTRACTS §235(2), Comment b (1981).

important that the violating state, with rare exception, be maintained, resuscitated and re-integrated into the community of non-violating states.

Finally, in contract context, deviations may result in total breach and act to free all parties from their obligations. Rather, all parties, including the deviating state, remain bound by the norm. In the CIL context, however, deviations are violations of law and will continue to be violations of law until enough states deviate from the particular norm with sufficient regularity that the norm disintegrates. Again, Part III will argue the value in this state of affairs.

II. REPRESENTATION IS MORE THAN AGENCY

In the section of *Withdrawing* dedicated to the affirmative case for restricting states' ability to unilaterally exit CIL, Gulati and Bradley have included a section on "Agency Problems."²⁰ This Part will first discuss why employing the terminology of agency is troublesome and will go on to explain why the space which Gulati and Bradley allocate to "Agency Problems" is impractically narrow.

As an initial matter, the use of the agency moniker reveals either the limited attention Gulati and Bradley have devoted to the function of states on the international plane and the source of state legitimacy to make international law, or it reveals their fatalistic cynicism about the possibility of democratic representation—let alone participation—on the international plane. The section on Agency Problems²¹ is quite short, but its brevity does not keep it from displaying internal contradictions with respect to whether Gulati and Bradley view states as the delegates of their citizens on the international plane, and thus required to represent their citizens' interests,²² or whether states are more like trustees,²³ free to do what they believe to be the best course, making "even bad decisions across a wide array of issue areas,"²⁴ independent from what their citizens might actually desire.

This internal inconsistency is confusing, not so much because it is necessary, possible, or even desirable that the authors pick one mode of representation to stand behind, but because they appear to believe that states are delegates at one moment and identify states as entities apart and autonomous from their citizens in the next moment. This vacillation happens without an articulation of these alternate theories of how states'

20. See *Withdrawing*, *supra* note 1, at 266.

21. *Id.*

22. The use of the term Agency would imply this view of representation.

23. See BLACK'S LAW DICTIONARY 1656 (9th ed. 2009).

24. *Withdrawing*, *supra* note 1, at 267.

role in CIL formation (and disintegration) can be mutually accommodating, nor how each theory might affect their proposal. For this reason, it is important to at least briefly discuss the role of states in international law-making,²⁵ especially because it reflects one of the classical questions of political theory—whether a representative of a particular constituency is bound to represent this constituency, or is free to act as she/he/it believes is best for the nation.²⁶

Governments act as legislators for and representatives of their people when they make international law. This is more easily perceived in the treaty context, but it is also true in the CIL context. The proposal advanced in *Withdrawing* embraces this view of states as legislators, able to exit CIL and change the law applicable to a particular state by way of simple proclamation.²⁷

Those who have thought about the role of legislators have long recognized the principal-agent relationship is not a useful description of the legislator-citizen relationship.²⁸ There are a number of reasons the principal-agent analogy is not apt and, at best, only describes some features of political representation. For example, in the principal-agent relationship, the agent acts as the principal's direct representative, acting on the principal's directives and can be recalled on the principal's demand. At least in the case of democratic states, this may appear an apt characterization of the state-citizen relationship. However, agents are typically legally answerable to their principals, especially in the event that the agent fails to execute the principal's instructions. This characteristic is untenable, even in democratic states, for at least two reasons. First, in every state system, there will be many citizens and citizens' groups, each with very different desires and demands of their representatives. The representative simply cannot execute the orders of each principal—or even the demands of amassed principals—in good faith, due to the fact of political diversity. Rather, the representative will regularly attend to some of its citizens and contradict the desires and demands of others. Hanna Pitkin, a leading political theorist on this issue notes with great clarity:

In the first place, the political representative has a constituency and constituents, not a principal . . . In the second place, he is a professional politician in a framework of political institutions He

25. A full discussion of this topic is most certainly outside of the scope of this Essay, but surely a topic worth further consideration.

26. HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 215 (1967).

27. *See Withdrawing*, *supra* note 1, at 207.

28. The authoritative work on this subject is PITKIN, *supra* note 26.

must be sensitive to his political party . . . and to various public and private groups and interests . . . In the third place, he will also have views and opinions, at least on some issues And issues do not come before him in isolation; issues are interrelated Thus in legislative behavior a great complexity and plurality of determinants are at work²⁹

Second, the idea that representatives would bear legal (rather than merely political) accountability to their citizens for their international legislative acts is unlikely, due to the traditional protections of sovereign authority provided state actors.³⁰ These differences result in Pitkin's conclusion that "[n]one of the analogies of acting for others on the individual level seems satisfactory for explaining the relationship between a political representative and his constituents. He is neither agent nor trustee nor deputy nor commissioner" ³¹ Rather, representation happens holistically—through the complexity of a functioning political system, which includes multiple actors acting in multiple capacities over time.³² The key is that representation happens only "if the people (or a constituency) are present in governmental action . . ." ³³ and when representatives are at least "potentially responsive" to their citizens.³⁴

It is unclear whether Gulati and Bradley believe states ought to be at least potentially responsive to their citizens.³⁵ What is clear is that they believe that in at least some substantive areas, governments are free to revel in claims of sovereign authority, exiting from CIL irrespective of their citizens' directives.³⁶ Still, they concede that there are areas of substantive international law in which governments' interests may predictably diverge from those of their citizens.³⁷ They cite to human rights as the example of this³⁸ but offer no solid basis for why human rights fit that category, while international environmental law or the law on weapons of mass destruction or any number of basic commercial law agreements might not similarly fit this description. One does not require particular

29. *Id.* at 219–20.

30. *See, e.g.,* *Withdrawing*, *supra* note 1, at 267 n.263 (citing LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 12, n.* (1995)).

31. PITKIN, *supra* note 26, at 221.

32. *Id.*

33. *Id.* at 222.

34. *Id.*

35. *Withdrawing*, *supra* note 1, at 267 n.263

36. *Id.* at 266–67

37. *Id.* at 267.

38. *Id.* *See also* Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119 (2007).

creativity to imagine that states' interests may diverge from their citizens' interests in some facets within each of these categories. Given this, we can start to see that their attempt to limit a state's right to unilateral exit in the area of human rights, but not in other areas sounds rational but is impractical. Rather, it is a limitation that blows open the proposal, exposing its unpredictable borders.

They state that the limitation they identify on the right to unilateral exit is "by its own terms limited to international law that is focused on certain fundamental rights of individuals (such as *jus cogens* norms),"³⁹ but it is unclear why this would be the case. Why limit unilateral exit for matters of slavery and piracy (which are generally agreed to be *jus cogens* norms) but not for child labor, which is laden with strong moral considerations?⁴⁰ It is not because moral considerations fall outside of Gulati and Bradley's contemplation. In fact, they make a clear concession to strong moral considerations. But this further exacerbates the fuzziness of the boundaries on their proposal and demonstrates the lack of clarity and predictability that would result from its realization.

In trying to define the borders of this limitation they write that governments should not be able to unilaterally exit when "we can be confident, *ex ante*, that the interests of governments and populations will diverge, and where the moral considerations are so strong that they override the usual deference to national governments."⁴¹ Under these criteria, we would not allow states to exit from international prohibitions with respect to slavery or child labor (in which moral considerations are high) but we may allow them to exit, for example, from prohibitions on piracy (where moral considerations are less strong), despite prohibitions on piracy being generally accepted as *jus cogens* norms.

Presumably Gulati and Bradley's desire to limit the right to unilateral exit is premised on personal discomfort with the relationship of

39. *Withdrawing*, *supra* note 1, at 267.

40. Further, we must recognize that it is not always clear, *ex ante*, what is and is not a *jus cogens* norm. Take for example, the norm against imposing a death sentence on minors. The case of *Michael Domingues v. United States* provides an example of an international body's opinion that a particular norm is of a *jus cogens* nature. See *Michael Domingues v. U.S.*, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02 (2002), available at <http://www.cidh.oas.org/annualrep/2002eng/USA.12285.htm>. Michael Domingues had been convicted and sentenced to death in Nevada for two murders committed when he was 16 years old. *Id.* ¶1. When Domingues petitioned the Inter-American Commission of Human Rights, the United States argued that there was no *jus cogens* norm that establishing eighteen as the minimum age for the death penalty. The Commission disagreed, concluding that there is a "*jus cogens* norm not to impose capital punishment on individuals who committed their crimes when they had not yet reached 18 years of age." *Id.* ¶85.

41. See *Withdrawing*, *supra* note 1, at 267.

governments to their people in their role as representatives of their populations when making international law. This discomfort is legitimate, given the complexity of representation, which extends far beyond agency, and is quite clearly not an agency relationship in matters of human rights. Gulati and Bradley want to concede a limitation when the state is acting for itself, rather than on behalf of its people, but only in some areas of the law. How we are to know where this limitation to their proposal would apply is unclear. The only thing that is clear *ex ante* is that *Withdrawing's* proposal would introduce confusion and a lack of predictability that is undesirable and contrary to the consistency and predictability of process we expect from legitimate systems of law.

Further, what if the citizenry of a given state can theoretically be shown to have deliberated and mandated that their state should exit from norms against piracy or slavery or child labor? Perhaps Gulati and Bradley would then argue that we should allow unilateral exit? But their proposal stops short of this, rather controversial, suggestion. Perhaps this is logical even though, on initial pass, one might be tempted to endorse unilateral exit when there is a demonstrable national mandate for it. This proposal may appear somewhat appealing when standing within the borders of and contemplating a “good” democratic state existing in isolation. In this instance unilateral exit strikes us as responsive to the interests of that particular state’s people. However, this is clearly problematic for the international legal order.

The principle of sovereign equality mandates that all states are equal on the international plane. If democratic governments can unilaterally exit from CIL, what about dictatorial governments? Would their right to exit unilaterally be more restricted than democratic governments? We are surely more troubled by the ability of dictatorial governments to decide, in relatively short periods of time and with very few checks on their actions to unilaterally exit from CIL. Imagine, for example, a once democratic state that suffers a coup and very soon thereafter violates multiple CIL norms. Under current CIL exit-doctrine, that state would be *in flagrante delicto*. Under the proposal made in *Withdrawing*, that state would be acting legitimately, provided that it fulfilled the minimal requirement of giving notice of unilateral exit prior to engaging in CIL violations.

III. SYMMETRIC ENTRENCHMENT

This Part will make the argument that the process by which law is unmade should bear significant similarity to how law is made. Essentially, it argues for symmetrical entrenchment of CIL.

The argument that states should be able to withdraw unilaterally from custom on prior notice is premised, among other things, on the sense that if states can bind themselves to CIL, one by one, by comporting themselves in accordance with a forming norm, then they should be able to unbind themselves, one by one, in similar fashion. But this is both a misrepresentation of how CIL binds states and insensible to basic expectations about how law is and should be unmade.⁴²

This argument will proceed as follows. First, this section will first describe how it is that states become bound by CIL, in order to be clear about why *Withdrawing's* proposal presents asymmetrical entrenchment concerns. It will then go on to discuss the concept of symmetrical entrenchment and illustrate its presence in other areas of law-making.

CIL is formed when a sufficient number of states behave in a particular way with sufficient consistency for a sufficient amount of time out of a sense of legal obligation.⁴³ When this occurs, every non-objecting state will be bound by the law, even those that merely acquiesce. States generally have time to see custom forming around them, and have the opportunity to object so as to either i) preserve a strong argument that CIL has not formed around a particular norm or ii) be exempt from the application of a particular norm under the persistent objector doctrine.⁴⁴

There are many arguments over how many states are required to create custom.⁴⁵ Nowhere, however, do these arguments advance that it takes just one state. There are similarly arguments over what counts as state practice.⁴⁶ Nowhere do these debates suggest that a single state can unilaterally become legally bound to a forming custom as a matter of CIL by way of making a single declaration. What is key is that no one argues that just one state can unilaterally make CIL. A single state can, of course, decide and declare today that a non-binding norm will henceforth bind them and that they believe that norm to have become CIL. But this, without more, will not make the norm CIL until a sufficient number of other states

42. A real strength of *Withdrawing* is the attention it might draw to the interesting issue of unmaking law, which has been understudied. For a fairly recent article about the unmaking of U.S. common law, see, for example, Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1 (2004); JAY M. FEINMAN, UN-MAKING LAW (2005).

43. See Maneley O. Hudson, *Working Paper on Article 24 of the Statute of the International Law Commission*, 2 Y.B. INT'L L. COMM'N. 24, 26 (1950).

44. See, e.g., IAN BROWNIE, PRINCIPLES OF INTERNATIONAL LAW 11 n.49 (7th ed. 2008) (citing Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L LAW 1 (1974-1975)).

45. See *North Sea Continental Shelf (F.R.G. v. Den. / F.R.G. v. Neth)*, 1969 I.C.J. 3, ¶ 72 (Feb 20).

46. See ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 131-42 (1987) (summarizing the debate regarding what behavior counts as state practice).

have done the same with sufficient consistency for a sufficient period of time. Simply put, a single state cannot unilaterally bind itself to a norm as a matter of CIL.⁴⁷

Under the existing CIL doctrine, a single state also cannot unilaterally un-bind itself. Rather, it must wait for the same process that initially bound it to take place again. A sufficient number of states must challenge CIL with sufficient consistency for a sufficient period of time such that the norm disintegrates. Until that time, a violation of the norm is a violation of the law. This consistency between the process and effort required to make and disintegrate CIL has been referred to, in other areas, as symmetric entrenchment.⁴⁸

The idea that a law should be similarly burdensome to make and to unmake has aesthetic appeal and seems intuitively correct, though very little has been written to theorize this idea. The strongest articulation of this theory comes from John McGinnis and Michael Rappaport, who have developed it in order to argue against asymmetric entrenchment of United States domestic legislation.⁴⁹ Many of the arguments they make in developing a theory of symmetric entrenchment for domestic legislation apply equally to the question at hand.

McGinnis and Rappaport demonstrate that constitutional entrenchments are ordinarily symmetrical because their enactment and repeal both occur under the rules of Article V of the Constitution.

Like all Constitutional amendments, the Eighteenth Amendment was entrenched, in that it could only be repealed by satisfying the two strict super-majority rules necessary to amend the Constitution. Yet, the entrenchment was symmetric, since . . . [it] was enacted through the exact same procedures that were necessary to repeal it.⁵⁰

The United States Constitution is not the only example of a constitutional presumption in favor of symmetric entrenchment.⁵¹

47. The one hypothetical exception to this statement would be in the case of a state that had persistently objected to the formation of a norm that has become CIL. Under persistent objector doctrine, that state would, without a declaration to the contrary, be unbound by the norm. Perhaps, that state could unilaterally become bound by way of a single declaration to that effect. It should be noted, however, that this is not the same as a state deciding to unilaterally exit because signing up to established custom is a unilateral decision to join the community of states whereas exiting established custom is a unilateral decision to go rogue.

48. See McGinnis & Rappaport, *supra* note 2.

49. *Id.*

50. *Id.* at 417.

51. An interesting research question beyond the scope of this paper would be an empirical enquiry into the unmaking of constitutional provisions or whole constitutions. Intuition and brief survey suggests that the symmetric entrenchment theory holds in most countries.

Particularly interesting to this discussion, are perhaps those countries operating under systems of asymmetric federalism. Such systems, in some respects, accommodate the possibility that a particular territory within a federation may want to exit or be exempt from particular constitutional rules—a roughly analogous condition to one particular state hoping for exit from CIL. Spain, Italy, Germany, Austria and the former Yugoslavia employ aspects of asymmetric federalism, allowing municipalities or components of the federation a certain degree of legislative and/or constitutional autonomy from the federation.⁵² In all of these examples, the possibility of exit or exemption from particular federal constitutional provisions was either negotiated at the time the constitution was formed, obviating the question of entrenchment from the outset (Yugoslavia is an example here)⁵³ or required the consent of the whole federation and looked like symmetrical (or at least similar) entrenchment.⁵⁴ None of the examples of asymmetric federalism support asymmetric entrenchment in the form of unilateral exit from existing norms.

McGinnis and Rappaport also present extended evidence and argument about symmetric entrenchment in the legislative process, arguing that legislation is improved when the process of making and unmaking legislation is symmetrical,⁵⁵ leading them to the position that “the central normative consideration governing entrenchment . . . is the presumption of symmetry.”⁵⁶

If this Essay failed to convince readers that contract is not a fit analogue for CIL and readers still adhere to the logic that CIL is like treaty and treaty is like contract, therefore CIL must be like contract, then it may now be worth considering that contract law also embeds the theory of symmetrical entrenchment. One party acting alone cannot create contractual obligations. Thus, if one party unilaterally exits the contract, the exit is a violation of the contract—a breach—and it will give rise to obligations to remedy the breach. Only in the case of mutual rescission can parties to a bilateral contract surrender their rights and duties under the

52. See SERGIO ORTINO, MITJA ŽAGAR & VOJTECH MASTNY, THE CHANGING FACES OF FEDERALISM: INSTITUTIONAL RECONFIGURATION IN EUROPE FROM EAST TO WEST 123-27; 140-41; 179 n.62 (citing Arthur Benz, *From Unitary to Asymmetric Federalism in Germany: Taking Stock after 50 Years*, 29 PUBLIUS: THE JOURNAL OF FEDERALISM, no. 4, 1999 at 56, 193-95, 200 n.42 (2005)).

53. *Id.* at 123-27.

54. *Id.* at 193-95.

55. McGinnis & Rappaport, *supra* note 2, at 419-26.

56. *Id.* at 418.

contract without breaching the contract.⁵⁷ Mutuality is required in making the contract and mutuality is required for exiting without violating the contract.

Treaties also reflect a strong tendency toward symmetric entrenchment. Gulati and Bradley make much of the fact that treaties often allow states to unilaterally exit their treaty commitments and argue that if states can do that in the treaty context, they should be able to do so in the CIL context.⁵⁸ This is an interesting argument but it is unpersuasive. It attempts to make treaties and CIL the same by pointing to the fact that treaties and CIL often cover substantively similar areas of law. They then argue that this similarity dictates that exit rules for treaties and CIL should be the same. The argument fails, however, because it does not take account of the strong presumption in favor of symmetrical entrenchment. In other words, it fails to recognize that treaties and CIL are different because their formation process is different. The means by which they become entrenched is different. States unilaterally declare their intention to become bound by a treaty and, so, with few exceptions, they can declare their intention to become unbound. This means most treaties are consistent with symmetrical entrenchment theory. Current CIL-formation and exit doctrine is similarly consistent with symmetrical entrenchment theory. As previously discussed, states cannot typically unilaterally bind themselves to CIL, nor can they unilaterally unbind themselves. Gulati and Bradley's proposal, however, would be inconsistent with symmetrical entrenchment theory. Rather than focus on the substantive overlap of treaty law and CIL, *Withdrawing* would have done well to observe the deeper procedural symmetric entrenchment similarity between these and many other kinds of law.

CONCLUSION

Gulati and Bradley have provided us with a creative and unusual proposal. They have stated that their article is written “primarily for scholars and students of international law.”⁵⁹ With luck, it will enliven discussion and debate regarding legitimate disintegration of CIL and law more generally. But what is good for academic discussion and theory is not

57. JOSEPH M. PERILLO & JOHN D. CALAMARI, CALAMARI AND PERILLO ON CONTRACTS, 819 n.1-2 (6th ed. 2003) (citing *Smith & Smith Bldg. Corp. v. DeLuca*, 654 A.2d 368 (Conn. App. Ct. 1995) and *Kirk v. Brentwood Manor Homes*, 159 A.2d 48 (Pa. Super. Ct. 1960)).

58. See generally Bradley & Gulati, *supra* note 1 (noting that it is not obvious why it should be easier to exit treaties than CIL, especially given the significant overlap that exists today between the regulatory coverage of treaties and CIL, as well as the frequent use of treaties as evidence of CIL).

59. *Id.* at 275.

always supported in existing law and theory, nor is it necessarily normatively desirable.⁶⁰ The critiques of *Withdrawing* discussed here and in other contributions to this symposium clearly demonstrate this truth.

60. Thanks to Anthea Roberts's comments regarding this distinction.