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## A MARKET FOR SOVEREIGN CONTROL

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### ABSTRACT

*Can popular sovereignty and sovereign territory coexist? Can countries exchange sovereign territory consistently with the principle of self-determination? What if countries' rights to territorial integrity were predicated on corresponding duties to govern well? And can the international system provide mechanisms and incentives to improve the status quo?*

*These questions are not simply academic. Across the world, many regions are located in the wrong nations—wrong in the sense that the people of these regions believe they would be safer, happier, and wealthier if surrounded by different borders and governed by different leaders. Such people might be able to improve their lot by emigrating or voting out their current government, but those are imperfect solutions and are often unavailable to those who need them most. We*

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*ask how international law could help ameliorate the bad-government problem by facilitating welfare-enhancing border changes.*

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## INTRODUCTION

The location of borders shapes national identities, determines the ownership of valuable resources, and establishes who can claim various legal rights and benefits. Throughout history, people have fought and died to claim, protect, cross, or otherwise because of borders.<sup>1</sup>

But even as borders shape people's lives, people reshape them in return. Although the boundaries of sovereign territory are often delineated by natural features like mountains or rivers, they are ultimately products of human agency.<sup>2</sup> And in a broader sense, many of the ongoing debates in international law—those regarding refugees, remedial secession, the responsibility to protect, and fiduciary duties, to take a few prominent examples—are very much about the relationship between sovereignty, territory, and people. To the extent that sovereignty is territorial (as it tends to be under traditional conceptions), countries may be able to resist popular will; to the extent that sovereignty resides in the people, the significance of territory seems to dissolve.<sup>3</sup> But of course, neither option is fully satisfactory because sovereignty, territory, and people all seem to matter.

Our goal in this Article is to account for sovereign territory in a world where sovereignty ultimately resides with the people.<sup>4</sup> The challenge is designing a framework that respects, to the degree possible, both popular sovereignty and nations' territorial integrity. We

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1. Tayyab Mahmud, *Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier*, 36 BROOK. J. INT'L L. 1, 2 (2010); Steven R. Ratner, *Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber*, 100 AM. J. INT'L. L. 808, 809 (2006).

2. See, e.g., ALBERTO ALESINA & ENRICO SPOLAORE, *THE SIZE OF NATIONS* 1–2 (2003) (criticizing international economists for treating borders as exogenous); Frank Jacobs & Parag Khanna, *The New World*, N.Y. TIMES: BORDERLINES (Sept. 22, 2012), <http://www.nytimes.com/interactive/2012/09/23/opinion/sunday/the-new-world.html> [<https://perma.cc/E5BN-YE2N>] (“[H]istory chews up borders with the same purposeless determination that geology does, as seaside villas slide off eroding coastal cliffs.”).

3. See generally Thomas J. Biersteker, *State, Sovereignty and Territory*, in HANDBOOK OF INTERNATIONAL RELATIONS 157 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2002) (demonstrating that the meaning of statehood has changed over time as a function of social context).

4. We use “region” to refer to geographic territory *and* the people living on it, and—where greater specificity seems necessary—will use “people of a region” or “regional population” to refer to the people alone. For the most part, we are not concerned here with unoccupied territory, nor with displaced persons. As to the latter, we propose a conceptually similar partial solution to the refugee crisis in Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 COLUM. HUM. RTS. L. REV. 53 (2016) [hereinafter, Blocher & Gulati, *Competing for Refugees*].

attempt to do so by describing a “market” for sovereignty in which citizens of a region—as a collective—have tradable ownership rights,<sup>5</sup> and countries—with citizens’ approval—trade sovereign control over territory.<sup>6</sup> In situations involving oppression, transfers could occur without the parent nation’s approval, sometimes even without compensation. Such a market would provide a mechanism for welfare-enhancing border changes while accommodating both the self-determination rights of citizens and the sovereign rights of nations to control their territory. It would permit a mechanism for peaceful secession. And by encouraging cross-border competition among governments, it could improve democratic responsiveness and increase governments’ incentives to treat their citizens well.<sup>7</sup>

We refer to this framework as a market because it involves competition and transfers of a valued resource, but it is designed to maximize good governance rather than financial profit.<sup>8</sup> In most countries, would-be governments already compete with each other for sovereign control—that is a basic characteristic of democracy. But this competition occurs within the limits of each country’s institutions, politics, and economics. And there are situations in which a particular region either has no effective voice in this process or is not able to thrive regardless of which domestic political party prevails. Under the current system, the people of that region might try to emigrate to other nations that are willing to have them and where they believe they can

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5. We are not the first to suggest the utility of analogies to private law. See HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 91 (1927) (“The part of international law upon which private law has engrafted itself most deeply is that relating to acquisition of sovereignty over land . . .”). See generally *id.* (presenting private-law analogies in the realm of territorial sovereignty). For a similar argument focused on intragovernmental bargaining, see generally Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014).

6. For the argument in the context of border sales between U.S. states, see generally Joseph Blocher, *Selling State Borders*, 162 U. PA. L. REV. 241 (2014). See also *If States Traded Territory*, *ECONOMIST: THE WORLD IF* (May 16, 2016, 6:46 PM), <http://worldif.economist.com/article/12138/country-market> [https://perma.cc/DH5A-Y6EB].

7. Though there are fundamental differences, the idea of a market for sovereign control shares features with the market for corporate control. See generally Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target’s Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981) (arguing that corporate managers should passively accept outside tender offers to increase shareholder welfare); Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965) (proposing that mergers among competitors would be more efficient than allowing a competitor to eventually go bankrupt).

8. We explore the market analogy further in Joseph Blocher & Mitu Gulati, *Markets and Sovereignty* (June 11, 2016) (unpublished manuscript), <http://ssrn.com/abstract=2794501> [https://perma.cc/QVV8-ZPJD] [hereinafter, Blocher & Gulati, *Markets and Sovereignty*].

thrive. But emigrating is difficult—particularly for the poor, weak, or oppressed—and breaks up families and communities. What if, instead of a subset of the most productive and capable individuals emigrating to a new nation,<sup>9</sup> the new nation could come to them? A market for sovereign control would allow dissatisfied regions to “vote” for governments beyond their current borders.

There is reason to think that, at least in some cases, other nations will be interested in accepting these new territories. The drive to expand sovereign control has always been powerful,<sup>10</sup> and sovereignty is already “for sale” in various forms. Governments often sell servitudes to one another<sup>11</sup> and lease territory to foreign investors<sup>12</sup> in ways that directly or indirectly limit their own sovereign control.<sup>13</sup> Nations seek control over territory for ports, military bases, farmland,<sup>14</sup>

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9. See, e.g., Stacey Vanek Smith, *Tiny Island Nation Kicks Off Trend of Selling Citizenship*, NAT'L PUBLIC RADIO (Mar. 10, 2016, 3:56 PM), <http://www.npr.org/2016/03/10/469972509/tiny-island-nation-kicks-off-trend-of-selling-citizenship> [<https://perma.cc/YEQ9-NRPT>]; Peter Wise, *Sea, Sun and Easy Visas Lure China Buyers*, FIN. TIMES (Oct. 8, 2014, 6:19 PM), <http://www.ft.com/cms/s/2/d7c1b472-44a6-11e4-ab0c-00144feabdc0.html#axzz4IvGfqRXI> [<https://perma.cc/3N2G-BJ5Q>] (“The market for investor residence permits consists essentially of wealthy people living in countries they feel to be politically, economically or religiously unstable,” says Charles Roberts, whose Fine & Country real estate firm has sold about 100 properties to Chinese.”).

10. Andrew F. Burghardt, *The Bases of Territorial Claims*, 63 GEOGRAPHICAL REV. 225, 225 (1973) (“Virtually all states and empires have treated territory as being of itself good.”); see also *id.* (“[T]he wish to acquire more [territory] is admittedly a very natural and common thing; and when men succeed in this they are always praised rather than condemned.” (quoting NICCOLO MACHIAVELLI, *THE PRINCE* 42 (George Bull trans., Penguin Books ed. 1961) (1513))); Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT'L L. 830, 830 (2006) (“The history of international law since the Peace of Westphalia is in significant measure an account of the territorial temptation.”).

11. PETER STRAUSS, *THE VIABILITY OF TERRITORIAL LEASES IN RESOLVING INTERNATIONAL SOVEREIGNTY DISPUTES* 91–97 (2010).

12. See, e.g., Duncan Bartlett, *Ethiopia Weighs Benefits of Foreign ‘Land Grabs’*, BBC NEWS (June 10, 2011), <http://www.bbc.com/news/business-13725431> [<https://perma.cc/QR4-4XY7>]; Alex Spillius, *China ‘to Rent Five Per Cent of Ukraine’*, TELEGRAPH (Sept. 24, 2013, 7:18 PM), <http://www.telegraph.co.uk/news/worldnews/asia/china/10332007/China-to-rent-five-per-cent-of-Ukraine.html> [<https://perma.cc/Z6CZ-JCGB>].

13. Jochen von Bernstorff, *The Global “Land-Grab”, Sovereignty and Human Rights*, 2 ESIL REFLECTIONS 1, 3 (Oct. 18, 2013), <http://www.esil-sedi.eu/node/426> [<https://perma.cc/D994-957B>] (noting that when governments enter into large-scale land deals with foreign investors, “territorial sovereignty is affected for instance if large parts of the territory is [sic] leased to foreign governments for a period of 99 years, which is a standard clause in these land deals”). See generally PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2007) (arguing that the use of private contractors to perform essential government functions can undermine the effectiveness and morale of public government officials).

14. See John Vidal, *How Food and Water Are Driving a 21st-Century African Land Grab*, GUARDIAN (Mar. 7, 2010, 12:06 AM), <https://www.theguardian.com/environment/2010/mar/07/>

canals,<sup>15</sup> tax revenue, trade gains,<sup>16</sup> and other reasons.<sup>17</sup> On the sellers' side, countries might generally be reluctant to part with territory, but they could be willing to do so when they are in serious economic need<sup>18</sup> or could achieve security or political goals by doing so.<sup>19</sup> Nations already enter into agreements by which they yield authority over government functions such as the administration of law<sup>20</sup> and military defense.<sup>21</sup>

In this regard, the framework we have in mind would be largely consistent with existing international law, but that consistency illuminates at least two problems with the current legal structure. First,

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food-water-africa-land-grab [<https://perma.cc/7597-BF2F>] (“Ethiopia is only one of 20 or more African countries where land is being bought or leased for intensive agriculture on an immense scale in what may be the greatest change of ownership since the colonial era.”).

15. Jude Webber, *Nicaragua Breaks Ground with \$50bn Canal*, FIN. TIMES (Dec. 23, 2014, 4:53 AM), <http://on.ft.com/1wYBUHe> [<https://perma.cc/35CC-HTFD>] (describing the Chinese-funded project).

16. Nancy Birdsall, *The True True Size of Africa*, CTR. FOR GLOB. DEV. BLOG (Nov. 11, 2010), <http://www.cgdev.org/blog/true-true-size-africa> [<https://perma.cc/E6GW-RHTK>] (noting that Africa’s “economic size” is roughly equivalent to that of Chicago plus Atlanta, which is “why Africa’s leaders wish they could overcome the politics of sovereignty and eliminate the cost of all those borders—something the Europeans have been working on for half a century”).

17. See Andrea Janus, *Turks and Caicos Premier “Not Closing the Door” on Canadians’ Caribbean Dreams*, CTV NEWS (May 26, 2014, 12:39 PM), <http://www.ctvnews.ca/politics/turks-and-caicos-premier-not-closing-the-door-on-canadians-caribbean-dreams-1.1838466> [<https://perma.cc/P26M-93ZQ>] (quoting Peter Goldring, a member of the Canadian parliament, on the century-old idea of acquiring Turks and Caicos: “The United States has a Hawaii. Why can’t Canada have a Hawaii?”); *The Market for State Territory: Pass the Hemlock*, ECONOMIST (Nov. 19, 2011) (“Arturas Zuokas, the mayor of Vilnius, has made a teasing offer to Greece; he suggested his country acquire an island as ‘an exclusive place for rest in the Mediterranean’ and ‘a great global advert for Lithuania,’ featuring a spa, museums and a theatre.”).

18. See, e.g., Elena Moya, *Greece Starts Putting Island Land Up for Sale to Save Economy*, GUARDIAN (June 24, 2010, 9:33 PM), <http://www.guardian.co.uk/world/2010/jun/24/greece-islands-sale-save-economy> [<https://perma.cc/T9VV-5841>].

19. See generally Timothy William Waters, *The Blessing of Departure: Acceptable and Unacceptable State Support for Demographic Transformation: The Lieberman Plan to Exchange Populated Territories in Cisjordan*, 2 LAW & ETHICS HUM. RTS. 1 (2008) (describing and defending the legality of the Lieberman Plan, through which Israel would exchange some territory with the Palestinian Authority).

20. The Privy Council in London hears appeals from more than a dozen independent nations. On a more limited scale, the Netherlands ceded land to Scotland from 1999 until 2002 for the sole purpose of conducting a trial of the Lockerbie bombers. *Uncertain Future for Camp Zeist*, BBC NEWS (Mar. 14, 2002, 10:31 AM), <http://news.bbc.co.uk/2/hi/1870685.stm> [<https://perma.cc/98R9-R9UD>].

21. A handful of nations—including Costa Rica, Samoa, and Andorra—have no military and have “contracted” for protection through treaties. Others, including Palau and the Marshall Islands, are associated with another nation (the United States for those two) and receive protection for that reason.

traditional conceptions of international law permit nations to cede territory whether or not the territory's residents give their consent. The market we describe would impose an additional restriction—the approval of the ceded region—that would reflect the evolving norm of self-determination.

Second, the oft-conflicting principles of territorial sovereignty and self-determination—the latter of which has gained support in recent decades, though its legal status remains unclear—seem to force a choice between two absolutes: a default rule giving total sovereignty to parent nations and a narrow exception that transfers sovereignty to the people of a region in cases of extreme oppression, such as systematic human rights violations or genocide.<sup>22</sup> It is unclear what fills the area in between—where the people of a region are systematically disadvantaged but not severely oppressed.

Drawing from existing concepts in international law, we propose a rule to fill this gap: where a parent nation has failed to provide representation or equal treatment to a region,<sup>23</sup> the nation's entitlement to sovereign control becomes subject to a liability rule rather than a property rule. The parent nation, therefore, loses the power to forbid a cession but remains entitled to compensation set by the market (subject to review by a third party such as the ICJ).<sup>24</sup>

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22. The United Nations has declared, for example, that “all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.” G.A. Res. 2625 (XXV), at 123 (Oct. 24, 1970).

A few paragraphs later, however, the same declaration clarifies:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

*Id.* at 124. These statements are hard to reconcile.

23. This standard comes from the Vienna Convention, which suggests that territorial sovereignty is predicated on representativeness and equal treatment. *See infra* note 94 and accompanying text.

24. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (identifying property rules and liability rules as basic forms of legal entitlement). Although they are not exactly voluntary from the perspective of the parent nations, we consider these liability-rule transactions as part of the broader market for sovereign control. In Calabresi and Melamed's framework, values under a liability framework are assigned by a third party, rather than by a market—our framework combines elements of each. *See* GUIDO CALABRESI, *THE FUTURE OF LAW & ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION* 129 (2016) (noting that “liability-rule charges often look like, and are properly described as, prices”).

Our framework therefore fills a gap in the legal system between the historical conception of regions as the property of the parent nation and the modern principle of self-determination in cases of human rights violations. That gap can be filled by a rule that, by allowing easier regional exit, incentivizes parent nations to treat their marginal regions better (for fear that the region will attempt to exit) and parent nations and regions to split up earlier when the relationship is not working (by providing for higher returns to both sides from an earlier exit).

As with any conceptual framework, we do not expect this proposal to translate directly into practice, nor is it our goal to redraw the world map. Yet the potential practical implications are significant. Many contemporary borders were drawn at the whim of colonial administrators.<sup>25</sup> Others are products of military conquest or royal decree, such as the King of X bequeathing a dowry for his daughter's marriage to the King of Y.<sup>26</sup> Though time has transformed some of these idiosyncrasies into stable national identities, other undesirable boundaries have worsened. Whatever the cause, the result is that some populated regions are in the "wrong" countries, and some sovereigns have contemplated changing borders through market transactions in the way this Article describes. Consider the following:

- Threatened by a rising ocean, the island nation of Kiribati recently purchased territory in Fiji.<sup>27</sup> The Maldives face a similar problem and are considering a similar solution.<sup>28</sup> What rules of international law govern these purchases?

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25. See, e.g., Tarek Osman, *Why Border Lines Drawn with a Ruler in WW1 Still Rock the Middle East*, BBC NEWS (Dec. 14, 2013), <http://www.bbc.com/news/world-middle-east-25299553> [<https://perma.cc/78G9-65WL>] (describing the much-loathed Sykes–Picot border line and its relationship to the current conflict in Iraq and Syria).

26. See Anthony Farrington, *Trading Places: The East India Company and Asia*, 52 HIST. TODAY 5, 40 (2002) (noting that Portugal gave Bombay to the British empire as part of the dowry of Catherine of Braganza, daughter of King John IV of Portugal, who married King Charles II of Britain); see also ALASTAIR BONNETT, *UNRULY PLACES* 183 (2014) (recounting the story of two-hundred enclaves near the India–Bangladesh border that were “won or lost in a chess game between the Maharajah of Cooch Behar and the Nawab of Rangpur in the early eighteenth century”).

27. Laurence Caramel, *Besieged by the Rising Tides of Climate Change, Kiribati Buys Land in Fiji*, GUARDIAN (July 1, 2014, 1:00 AM), <https://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu> [<https://perma.cc/4Q59-VJ32>]. The purchase does not seem to have conferred full sovereignty, and, unsurprisingly, this exchange faces many practical and political obstacles. See James Ellsmoor & Zachary Rosen, *Kiribati's Land Purchase in Fiji: Does It Make Sense?*, DEVPOLICYBLOG (Jan. 11, 2016), <http://devpolicy.org/kitibatis-land-purchase-in-fiji-does-it-make-sense-20160111> [<https://perma.cc/Y528-P2VL>].

28. Ellsmoor & Rosen, *supra* note 27.



- In the lead-up to the Falklands War, several of Margaret Thatcher's senior advisors suggested that the United Kingdom avoid the conflict with Argentina by "buying out" the few thousand residents living in the Falkland Islands and associated islands, offering them \$100,000 per family to settle in Britain, Australia, or New Zealand.<sup>29</sup> But the plan was shelved and a thousand lives were lost in the ensuing war. Now, the United Kingdom spends around \$100 million annually to maintain a military presence on the islands,<sup>30</sup> Argentina continues to demand their return, and the islanders themselves have voted overwhelmingly to maintain their U.K. citizenship—which, in turn, is the primary reason for the British military presence.<sup>31</sup> What if Argentina offered the islanders \$1 million each to approve a change?<sup>32</sup>
- In 1997, the United Kingdom ceded sovereign control of Hong Kong to China. Suppose that, having now had nearly twenty years of experience under Chinese rule, a supermajority of Hong Kong's residents would like to return to British control.<sup>33</sup> Can the people of Hong Kong pay China to shift sovereignty back to the United Kingdom?<sup>34</sup>

Our framework suggests possible solutions, drawn partially from market design, to these difficult practical questions. The first Part of

29. Ronaldo Munck, *Malvinas: Politics, Territory and Internationalism*, 3 GLOBAL DISCOURSE 151, 153 (2013).

30. INT'L AFFAIRS & DEFENCE SECTION, THE DEFENCE OF THE FALKLAND ISLANDS, 2012, HC SN06201, at 6 (UK) (giving annual projections from 2006 through 2011).

31. *Argentina President Cristina Kirchner Renews Falkland Islands Claim at UN Meeting*, TELEGRAPH (Aug. 7, 2013, 4:44 AM), <http://www.telegraph.co.uk/news/worldnews/southamerica/falklandislands/10227319/Argentina-President-Cristina-Kirchner-renews-Falkland-Islands-claim-at-UN-meeting.html> [<https://perma.cc/H2LQ-LPAT>].

32. See *infra* notes 150–51 and accompanying text.

33. Phila Siu & Tony Cheung, *Poll Finds Fewer Hongkongers Identifying as Chinese, Thanks to Occupy*, S. CHINA MORNING POST (Nov. 11, 2014, 4:49 AM), <http://www.scmp.com/news/hong-kong/article/1636818/poll-finds-fewer-hongkongers-identifying-chinese-thanks-occupy> [<https://perma.cc/W4UT-XKS3>] (reporting a Chinese university survey showing that "Hongkongers' sense of Chinese identity has hit a record low"); *Poll Says Hong Kongers Would Prefer British Rule*, RADIO FREE ASIA (Mar. 14, 2013), <http://www.rfa.org/english/news/china/hong-kong-03142013141313.html> [<https://perma.cc/S54Q-HERG>] (reporting informal online poll suggesting that more than 90 percent of Hong Kongers would vote to rejoin the United Kingdom).

34. *China Blocks British MPs' Visit to Hong Kong*, BBC NEWS (Nov. 30, 2014), <http://www.bbc.com/news/uk-politics-30267026> [<https://perma.cc/KCT3-H36N>] (quoting Lord Patten, a former British governor of Hong Kong: "When China asserts that what is happening in Hong Kong is nothing to do with us, we should make it absolutely clear . . . that it is not the case").

the Article identifies the existing international rules, including their contradictions and gaps, and suggests alterations that would better reflect ascendant principles like that of self-determination. The second Part proposes a conceptual framework to facilitate welfare-enhancing changes in sovereign control. The third Part attempts to answer the most forceful criticisms we anticipate, and the fourth discusses caveats and complications.

## I. THE LEGALITY OF TRANSFERRING SOVEREIGN CONTROL

International law is obsessed with borders. In many ways, the international legal order depends on them.<sup>35</sup> Borders delineate nations<sup>36</sup> and are the building blocks of international law and politics. It is unsurprising, then, that international law has developed doctrines and institutions to address issues like cession of sovereign territory and border disputes. Although our proposed framework tries to respect existing rules—which is not always easy, given the internal tensions and conflicts of international law—it would require some changes to the current system.<sup>37</sup>

Current international law identifies at least two starkly distinct scenarios in which sovereign authority and quality of governance are related. If a region faces severe oppression or genocide, it can leave for free. If not, the parent nation can cede and acquire territory as it wishes with no need for regional approval. These paradigm cases track the underlying legal concepts of self-determination and remedial secession on the one hand and territorial sovereignty on the other. The legitimacy of remedial secession remains quite controversial in international law, and it may be too soon to call it a “rule.” But we accept it for purposes of the current analysis.<sup>38</sup>

In addition to embracing the contested principle of remedial secession, this framework incorporates three legal changes that better reflect modern trends in international law. First, nations seeking to abandon or transfer a region must first obtain the approval of that

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35. See Jan Paulsson, *Boundary Disputes Into the Twenty-First Century: Why, How . . . and Who?*, 95 AM. SOC'Y INT'L L. PROC. 122, 128 (2001).

36. PAUL GILBERT, *THE PHILOSOPHY OF NATIONALISM* 91 (1998).

37. For discussion of the requirement that nations permit regional votes, see *infra* notes 80–81 and accompanying text. For discussion of the requirement that citizens in realigned regions receive citizenship in the new country, see *infra* note 85 and accompanying. For a description of “liability rule” protection for countries that deny representation or equal rights, see *infra* notes 89–94.

38. See *infra* Part II.B.

region's citizens. This additional restriction would help account for the self-determination interests of the relevant region and could (perhaps paradoxically) encourage more transfers by legitimizing them.

Second is the introduction of the liability-rule regime.<sup>39</sup> Even under the principle of remedial secession, the only way a region can currently exit against the wishes of the parent nation is if there is extremely severe oppression. In our proposed system, by contrast, a nation that substantially fails to satisfy its fiduciary-type obligations to a region would have to let that region depart, but would be entitled to compensation. This middle ground would fill the gap between the two extremes.

Third, we envision sovereigns evaluating foreign regions to see whether they could ally with those regions for mutual benefit. Under the current international law regime, even the contemplation of such a possibility could be seen as a violation of territorial sovereignty. But for a market to work, it is important for outside nations to consider whether other nations are underperforming in the management of their own regions.

#### A. *The Traditional Rule: Territorial Sovereignty and National Control*

There are two primary sources of international law: treaties and custom. Because there is no general treaty regarding sales of sovereign territory,<sup>40</sup> the relevant international rules for this analysis are derived from customary international law (CIL). Under the textbook definition, CIL is present if two conditions are satisfied: (1) widespread practice among nations and (2) performance of that practice by states out of a sense of legal obligation (*opinio juris*).<sup>41</sup> Given the near impossibility of identifying the subjective intentions of states, the

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39. See *infra* Part II.C.

40. Background treaty obligations regarding debt, political alliances, and so on could be implicated by a sale of sovereign control, but international law has already created tools that might be useful for that task. See 1 LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW 224 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("When by cession or otherwise, a part of a state's territory is transferred to another, a succession to certain rights and obligations associated with the transferred territory occurs."). See *generally* Vienna Convention on the Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3 (setting rules for the succession of states, but not providing for sales).

41. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987) (defining CIL as the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation").

doctrine translates as a practical matter into an examination of actual state practices and inferences from those practices, along with a consideration of whether other states have objected to those practices or accepted them as legal.<sup>42</sup>

To satisfy the first part of the test—an evaluation of state practice—we must identify transfers of sovereign territory that were not said to violate international law. Such examples are widespread. In part, the historical record shows that there have been many sales of territorial control between sovereigns at peace with one another. Examples in U.S. history include the purchases of Louisiana from France in 1803,<sup>43</sup> Florida from Spain in 1819,<sup>44</sup> Alaska from Russia in 1867,<sup>45</sup> and the Virgin Islands from Denmark in 1916.<sup>46</sup> Similar examples abound across the globe.<sup>47</sup> Bombay (now Mumbai), for example, was part of the 1661 dowry given by the Portuguese to King Charles II of Britain.<sup>48</sup>

In addition to peaceful transfers, nations often buy and sell territory at the end of an armed conflict. After its war with Mexico, the United States purchased 525,000 square miles for \$15 million and an agreement to assume claims against Mexico by private citizens living in that territory.<sup>49</sup> After the Spanish-American War, it purchased the

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42. See generally MAURICE MENDELSON, *THE FORMATION OF CUSTOMARY INTERNATIONAL LAW* (1998) (describing this approach).

43. The United States paid France \$15 million for nine-hundred-thousand square miles of territory. See JON KUKLA, *A WILDERNESS SO IMMENSE: THE LOUISIANA PURCHASE AND THE DESTINY OF AMERICA* 335 (2003).

44. See Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, Spain-U.S., Feb. 22, 1819, 8 Stat. 252.

45. The United States paid Russia \$7.2 million for 586,412 square miles of territory. See Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, art. VI, Russ.-U.S., Mar. 30, 1867, 15 Stat. 539.

46. The United States purchased the Danish West Indies from Denmark, in the process ceding U.S. claims to portions of Greenland. See Treaty on Cession of the Danish West Indies, Den.-U.S., Aug. 4, 1916, 39 Stat. 1706.

47. Germany, for example, purchased the Caroline Islands and Northern Mariana Islands from Spain in 1899 for 25 million pesetas. See German-Spanish Treaty of 1899, Ger.-Spain, Feb. 12, 1899, Gaceta de Madrid, 1 de Julio de 1899 (Spain), <http://www.boe.es/datos/pdfs/BOE/1899/182/A00001-00001.pdf> [<https://perma.cc/K34T-8LBR>]; see also ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 128 (1947) (noting that “[t]reaties of the medieval type, by which a prince in one way or another, might dispose of his territory, are still found” in the 1700s).

48. See *supra* note 26.

49. Treaty of Peace, Friendship, Limits, and Settlement Between the United States of America and the United Mexican States Concluded at Guadalupe Hidalgo, arts. XII-XIII, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

Philippines at a price equivalent to \$2.00 per resident.<sup>50</sup> The Chinese grants of concessions in Shanghai to the British and the French in 1860 and the sale of Hong Kong and Kowloon to the British in the 1840s after the Opium Wars are further examples of such war settlements.<sup>51</sup>

The nineteenth and early twentieth centuries were full of what one might call contingent sales. Sovereign debtors would pledge streams of tax revenues—tobacco, guano, alcohol, salt, and the like—to foreign creditors.<sup>52</sup> If the debts went unpaid and a settlement proved elusive, the foreign creditors would try to get their governments to send troops to take over the customs houses of the defaulting governments. These pledges of revenues were in effect contingent sales of sovereign control, and although many Latin American nations argued that the manner of their enforcement—gunboat diplomacy—was illegal, they did not challenge the underlying sale of sovereign control.

Even though outright sales of sovereign territory are no longer common, countries continue to buy and sell some degree of sovereign control from one another.<sup>53</sup> Leases of land to foreign governments for the construction and governance of military bases and embassies involve limited cessions of sovereign authority in exchange for remuneration.<sup>54</sup>

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50. Lowell B. Bautista, *The Historical Context and Legal Basis of the Philippine Treaty Limits*, 10 *ASIAN-PAC. L. & POL'Y J.* 1, 17 (2008) (citing *THE FILIPINO NATION: A CONCISE HISTORY OF THE PHILIPPINES* 17 (Helen R. Tubangui et al. eds., 1982)).

51. See, e.g., Burghardt, *supra* note 10. Andrew Burghardt notes:

In 1815, when Austria was forced to surrender the Netherlands, she obtained Venice and Milan as recompense; Sweden obtained Norway to compensate for her lack of Pomerania and Finland; the Netherlands received Belgium for surrendering Ceylon, South Africa, and Guyana to the British. In 1919 France requested control of the Saar Basin as a reparation for the destroyed coal mines in the north of France.

*Id.* at 238.

52. See NORBERT GAILLARD, *WHEN SOVEREIGNS GO BANKRUPT: A STUDY OF SOVEREIGN RISK* § 2.1.2 (2014); Kris Mitchener & Marc D. Weidenmier, *Supersanctions and Sovereign Debt Repayment*, 29 *J. INT'L MONEY & FIN.* 19, 24 (2010).

53. See *supra* notes 11–21 and accompanying text; see also *Pass the Hemlock*, *supra* note 17, explaining:

In an era of self-determination sales of territory have come to seem anachronistic. But leases, involving a *de facto* transfer of control, are common. In 2010 Russia extended a deal granting Finland a canal for 50 years, and gave Ukraine concessions worth €30 billion to park its fleet at Sevastopol for 25 more years.

*Id.*

54. This exchange is not because embassies are the sovereign territory of the represented state, but because international agreements typically give the premises of diplomatic missions some immunity from local civil and criminal law. See Vienna Convention on Consular Relations arts. 40–57, April 24, 1963, 21 U.S.T. 3227, 500 U.N.T.S. 95; Vienna Convention on Diplomatic Relations arts. 31–39, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

In sum, there is abundant historical precedent for the sale of sovereign control. Explicit sales, contingent sales, and leases of territory have been occurring between sovereigns for hundreds of years.

The second requirement—*opinio juris*—is likely satisfied as well. Treatise writers have long acknowledged the traditional rule that countries have a nearly unbridled power to engage in cession, which is “the transfer of sovereignty over state territory by the owner-state to another state.”<sup>55</sup> As Robert Jennings and Arthur Watts note, such cessions require no approval of the affected regions:

The hardship involved for the inhabitants of the territory who remain and lose their old citizenship and are handed over to a new sovereign whether they like it or not, created a movement in favour of the claim that no cession should be valid until the inhabitants had by plebiscite given their consent to the cession . . . . But it cannot be said that international law makes it a condition of every cession that it should be ratified by a plebiscite.<sup>56</sup>

Holding aside the demands of good governance, then, the matter is entirely up to the countries involved.

Contemporary scholars agree. Steven Ratner notes that “states generally are free to agree on the disposition of disputed noncolonial (or non-trust or -mandated) territory and its ultimate borders as they see fit.”<sup>57</sup> And Seokwoo Lee writes: “International law does not seem to prescribe any specific limits on the right of a state to cede its territory. . . . ‘All that matters is that the cession takes place with the full ‘consent of the Governments concerned.’”<sup>58</sup>

55. OPPENHEIM, *supra* note 40, at 679; see R.Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 16 (1963) (defining cession as “the renunciation made by one state in favour of another of the rights and title which the former may have to the territory in question”). The process by which sovereign control over a region changes is also known as succession. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 587 (3d ed. 1979) (“[S]tate succession arises when there is a definitive replacement of one state by another in respect of sovereignty over a given territory in conformance with international law.”); see Amos S. Hershey, *The Succession of States*, 5 AM. J. INT’L L. 285, 285 (1911) (referring to a situation in which “a state acquires a portion of the territory of another through cession or conquest” as a “[p]artial succession”).

56. OPPENHEIM, *supra* note 40, at 684.

57. Ratner, *supra* note 1, at 811. Colonial territory is subject to the rule of *uti possidetis*, though even that rule can be contracted around. *Id.*; see Joshua Castellino, *Territorial Integrity and the “Right” to Self-Determination: An Examination of the Conceptual Tools*, 33 BROOK. J. INT’L L. 503, 549 & n.262 (2008).

58. Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 CONN. J. INT’L L. 1, 10 (2000); see 1 GEORG

*B. Modern Principles: Self-Determination and Popular Control*

The traditional rule thus permits governments to treat populated regions as their property, giving the people of the impacted region no say in cessions. We argue that this rule has lost its legitimacy, partially because it has fallen into disuse and partially because it is incompatible with modern principles like self-determination.

Emer de Vattel suggested as much centuries ago. Vattel accepted that cessions of sovereignty must be permitted in some cases even without public approval,<sup>59</sup> but he was generally more skeptical of the practice than some of his contemporaries (including Hugo Grotius).<sup>60</sup> Vattel specifically rejected the idea that a nation could benefit itself by buying and selling citizens: a nation “has not . . . a right to traffic with their rank and liberty, on account of any advantages it may expect to derive from such a negotiation.”<sup>61</sup> The key factor for Vattel was that approval for such sales must be given by the true owners of the nation—the people: “[A]s the nation alone has a right to subject itself to a foreign power, the right of really alienating the state can never belong to the sovereign unless it be expressly given him by the entire body of the people.”<sup>62</sup>

In this respect, Vattel anticipated self-determination, which is the right of peoples and regions to choose their own national affiliations—for example, through secession or realignment. The degree to which self-determination and concomitant rights like secession are mandatory rules of international law remains unclear,<sup>63</sup> and we do not

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SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 303 (3d ed. 1957).

59. EMMERICH DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS*, Ch. XXI, § 263 (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson & Co. 1867) (1758); see Stéphane Beaulac, *Vattel's Doctrine on Territory Transfers in International Law and the Cession of Louisiana to the United States of America*, 63 *LA. L. REV.* 1327, 1345 (2003) (arguing that the “only exception” to Vattel’s requirement of public consent “is in situations of pressing necessity or danger to public safety . . . which validate the cession of territory as between the parties to such treaties” and “[a]s for the individuals living there, they are not bound by even such a necessary transfer unless they consent to it”).

60. VATTEL, *supra* note 59, at Ch. V, § 69 (“I know that many authors, and particularly Grotius, give long enumerations of the alienations of sovereignties. But the examples often prove only the abuse of power, not the right. And besides, the people consented to the alienation, either willingly or by force.”).

61. *Id.* at Ch. XXI, § 263.

62. *Id.* at Ch. V, § 69.

63. See Allen Buchanan, *Theories of Secession*, 26 *PHIL. & PUB. AFF.* 31, 33 (1997); Hurst Hannum, *Rethinking Self-Determination*, 34 *VA. J. INT’L L.* 1, 42 (1993). The focus here is on

suppose that they are. But—whether out of obligation or not—many nations have long sought local approval of territorial secession,<sup>64</sup> and many secessionist movements (including Scotland, Crimea, and Catalonia in 2014) have held votes to assert that approval.

Whether or not it has achieved the status of an enforceable legal right, it is fair to say that self-determination has grown from an abstract aspiration to a principle recognized in foundational legal documents.<sup>65</sup> Further, although this is a highly contested matter, many see the right of self-determination as having evolved to include a right of remedial secession in cases of severe oppression.<sup>66</sup> The willingness to depart from traditional territorial sovereignty is also reflected in the idea that the world community has a “responsibility to protect” those people

international law, so it is not necessary to address the degree to which domestic law might forbid secession. To some degree, as with our liability-rule scenario, we anticipate that the former will trump the latter.

64. See OPPENHEIM, *supra* note 40, at 434–35, 455–57 (noting that even when territory is obtained through prescription, it is typically ratified by plebiscite); Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26 LAW & HIST. REV. 621, 628 (2008) (crediting eighteenth-century French practice for the norm that cessions of territory between nations are not valid unless popularly approved); Waters, *supra* note 19, at 20–21 (noting that although “there is no actual obligation,” there is “precedent for the practice of consulting an affected population”).

65. See International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 122 (Oct. 16) (Dillard, J., concurring) (“It is for the people to determine the destiny of the territory . . . .”); G.A. Res. 1541 (XV), U.N. Doc. A/Res/1541 (XV), at 29 (Dec. 15, 1960) (explaining that self-determination could lead to secession and the formation of a new state, association of a territory with an existing state, or integration of a territory into an already existing state); W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* 147 (1977) (“Today, there is no doubt that self-determination, as defined in U.N. and general international practice, is a principle of international law which yields a right to self-government that can be claimed legitimately by bona fide dependent peoples.”).

66. For a description of the evolution of the self-determination concept, see generally Patrick Macklem, *Self-Determination in Three Movements*, in *THE THEORY OF SELF-DETERMINATION* 94 (Fernando R. Tesón ed., 2016). See ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* 335 (2004); LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* 220–23 (1978); Thomas Franck, *Postmodern Tribalism and the Right to Secession*, in *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* 3, 3–27 (Catherine Brölmann, René Lefeber & Marjoleine Zieck eds., 1993). *But see* Donald L. Horowitz, *A Right to Secede?*, in *NOMOS XLV: SECESSION AND SELF-DETERMINATION* 50, 50–51 (Stephen Macedo & Allan Buchanan eds., 2003) (questioning the normative desirability of remedial secession); Jure Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, 6 ST ANTONY’S INT’L REV. 37, 37–40 (2010) (questioning support for remedial secession).



whose human rights are threatened.<sup>67</sup> The underlying idea is that states that fail to protect their own people from mass atrocities lose their right to territorial integrity. When these atrocities occur, the global community, with appropriate authorization from the United Nations, can intervene.<sup>68</sup> Indeed, the growing strength of the self-determination right helps explain the lack of sovereign sales after World War II.

### C. *Filling the Gap*

These two extreme positions—one giving absolute control to the parent nation and the other giving absolute control to the dissatisfied region—leave a gap. It has been said that “the defining issue in international law for the twenty-first century is finding compromises between the principles of self-determination and the sanctity of borders.”<sup>69</sup> How can a self-determination norm coexist with nations’ absolute power to maintain or cede regions? What about regions that are substantially underserved by their parent nations but not quite oppressed?

First, like Vattel, we would require regional approval for cessions. This would mean imposing more restrictions on parent nations than the traditional approach appears to do, but it would better satisfy the two-part definition of CIL. As to the requirement of widespread practice, we are not aware of any country selling a populated region in at least a half-century.<sup>70</sup> And as to the *opinio juris* requirement, the

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67. See, e.g., 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 139–42 U.N. Doc. A/RES/60/1, at ### (Oct. 24, 2005); U.N. Secretary-General, *Implementing the Responsibility To Protect*, at 4–10, U.N. Doc. A/63/677 (Jan. 12, 2009); BUCHHEIT, *supra* note 66; E. Tendayi Achiume, *Syria, Cost-Sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687, 712–17 (2015); Ratner, *supra* note 1, at 811.

68. See Report of the Secretary-General, *supra* note 67; see also Gareth Evans, *From Humanitarian Intervention to Responsibility to Protect*, 24 WIS. INT’L L.J. 703, 709 (2006) (“The starting point is that any state has a primary responsibility to protect the individuals within it. . . . [W]here the state fails in that responsibility, through either incapacity or ill will, a secondary responsibility to protect falls on the international community, acting primarily through the UN.” (footnote omitted)).

69. Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT’L L. & POL’Y 373, 373 (2003); see ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 190 (1995); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT’L L. 177, 201–02 (1991).

70. See *If States Traded Territory*, *supra* note 6 (identifying the Treaty of the Danish West Indies from 1916 as “the last time a country has directly sold control over territory to another”). There is little understanding of how and when CIL doctrines die through nonuse. That said, whatever the rule for CIL expiry is, the doctrine allowing sovereign sales of populated territory would likely satisfy it. See generally Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939 (2005) (explaining how international laws “perish”); Roger Alford, *The Death*

increasing acceptance of self-determination as a right and not simply an aspiration suggests that Vattel was right.

Our second and third departures from international law—the protection of territorial sovereignty with a liability rule in cases of ill-governed regions and the allowance of outside nations to search for underperforming regions in other nations—do not square with historical international practice and, therefore, traditional CIL. The empirical evidence on how courts find CIL, however, shows that the textbook definition is, for the most part, followed only in the breach.<sup>71</sup> Instead—necessarily being more speculative—courts appear to employ a kind of common law process using historical evidence to identify customary rules that will enhance global welfare. We think our framework would be consistent with a welfare-enhancing judicial perspective.<sup>72</sup>

Because the threshold for remedial secession is so high,<sup>73</sup> in practice it seems that a region must suffer serious human rights violations to leave.<sup>74</sup> Our goal is to prevent these severely oppressive scenarios from arising in the first place, by providing a mechanism that respects territorial sovereignty while giving nations more incentive to permit welfare-enhancing changes in sovereignty. A market for sovereign control has the potential to do just that, because mistreated

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*of a Customary Rule of International Law*, OPINIO JURIS (Aug. 28, 2009), <http://opiniojuris.org/2009/08/28/the-death-of-a-customary-rule-of-international-law> [<https://perma.cc/4C4L-SVK7>] (exploring how a practice that “has achieved the status of customary international law cease[s] to become international law”).

71. See generally Stephen J. Choi & Mitu Gulati, *Customary International Law: How Do Courts Do It?*, in CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 117, 146–47 (Curtis A. Bradley ed., 2016) (finding that international courts often ignore the textbook legal rule in light of a pressing global need for new law); Ryan Scoville, *Finding Custom*, 101 IOWA L. REV. 1893, 1899, 1935–40 (2016) (examining U.S. domestic court determinations of CIL).

72. See *Flomo v. Firestone Nat’l Rubber Co.*, 643 F.3d 1013, 1016 (7th Cir. 2011) (“Customary international law thus resembles common law in its original sense as law arising from custom rather than law that is formally promulgated.”); Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication*, in CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD, *supra* note 71, at 34, 50–54 (describing such an approach); BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 98–99 (2010) (similar).

73. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 218, ¶ 126 (Can.) (“A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.” (emphasis omitted)); William W. Burke-White, *Crimea and the International Legal Order*, (Penn Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 14-24, 2014), <http://ssrn.com/abstract=2474084> [<https://perma.cc/L3UG-9XCB>].

74. See Burghardt, *supra* note 10, at 232.

regions wanting to leave a country could in effect buy their way out of a bad situation. If the people of region X would rather live in Country B than Country A, they could bid—rather than fight—for their freedom. If Country B supports the move, perhaps because of historical or ethnic kinship with the residents of X, then it can facilitate the move by adding consideration to the bid.

This approach represents a better negotiation of the conflicting principles of territorial integrity and self-determination. In our system, misbehaving-but-not-oppressive countries will be entitled to compensation for a loss of sovereign territory. On the flip side, the people living in that territory will have self-determination but must pay for it. Our proposal delivers neither full territorial integrity nor an unencumbered right of self-determination. But it does accommodate both of those conflicting principles.

The transactions we have in mind will not be feasible in every secession dispute. Given the politically and emotionally fraught scenarios that lead to such disputes, there will often be gaps between asking and offer prices. Countries may be unwilling to give up territory they consider to be part of their identity; people may be unwilling to pay for something that they think is their right.

In such situations, outside funding might be available. After all, violent secessions are costly to the international community in terms of money spent and lives lost.<sup>75</sup> Rather than pay for military intervention or nation rebuilding, international organizations might prefer to facilitate border-changing treaties by simply buying out a nation's claim. Similarly, a neighboring nation—perhaps the one that the region wishes to join—might top up the territory's bid with funds of its own.

## II. THE FRAMEWORK

### A. *Starting Points*

We base our proposal on a few principles distilled from the foregoing discussion of borders and international law.

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75. Development aid in 2013 was approximately \$138.4 billion. OECD, AID TO DEVELOPING COUNTRIES REBOUNDS IN 2013 TO REACH AN ALL-TIME HIGH 1 (2014), <http://www.oecd.org/newsroom/aid-to-developing-countries-rebounds-in-2013-to-reach-an-all-time-high.htm> [<https://perma.cc/K44G-UK6F>]. Roughly a quarter-million troops were involved in peacekeeping operations. See Jane Dundon, *Global Trends in Peacekeeping Operations*, in STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, SIPRI YEARBOOK 2013, at 61, 63 (2013) (reporting approximately 233,000 troops deployed in 2012).

### 1. *The Problem of Borders.*

- There are nations and regions whose people would be better off with different national affiliations.
- Nations tend to resist border changes because they do not want to allow their regions to become independent or to affiliate with another nation.
- This resistance, and the lack of incentives or mechanisms to overcome it, is the main obstacle to welfare-enhancing border changes.
- When changes do occur—usually because of violent secession or outside intervention—the rules are unclear with regard to what compensation the former parent nation should receive for matters such as national debt, past investments, and lost natural resources.

### 2. *Legal Background.*

- Traditional international law permits nations to cede regions without the approval of the region's residents.<sup>76</sup>
- If people living within a region are severely oppressed, however, they might have a right to remedial secession—to exit with no penalty.<sup>77</sup>
- These two options correspond with two contradictory principles of international law: territorial integrity for the sovereign and self-determination for the “peoples.”<sup>78</sup>

### B. *The “Market” Mechanism*

Our goal is to design a mechanism that allows for welfare-enhancing transfers of regions in a fashion that generally satisfies the primary constraints of international law (the principles of self-determination and territorial integrity) while giving parent countries more incentive to either govern their regions well or permit them to exit. We explore that system in market terms, and we contemplate and

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76. See *supra* Part I.A.

77. See *supra* Part I.B.

78. International Covenant on Civil and Political Rights art. 1, para. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (“All peoples have the right of self-determination.”); International Covenant on Economic, Social, and Cultural Rights art. 1, para. 1, Dec. 16, 1966, 993 U.N.T.S. 3 (same).

describe possible financial transactions, but these are a means rather than an end. The goal is to improve governance, subject to the starting points noted above and—as much as possible—the international law described below. Changes to the international legal system are required, but they are in the nature of filling gaps in the system rather than rebuilding it.<sup>79</sup>

1. *Who Must Agree.* The relevant parties are the impacted region, the acquiring nation or nations, and the parent nation. In this system, the region and acquiring nation would have to assent to any change. The parent nation's power to veto a change would depend on its governance of the region.

*a. The People of the Impacted Region.* Consistent with the principle of self-determination, the population of a region would have the right to vote on whether to solicit, accept, or refuse governance bids from other nations.<sup>80</sup> The parent nation would have to refrain from blocking or otherwise interfering with the vote,<sup>81</sup> and the vote would take place under internationally determined standards with external monitors.<sup>82</sup>

*b. The Acquiring Nation.* Nations wanting to exert sovereign control over a particular region could propose compensation to the people of the region for their approval and to the parent nation for its consent. The existing parent nation could also make a bid (to get the region to stay), as could the disaffected region (if it wanted independence).<sup>83</sup> Such compensation could take a range of forms, from

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79. Nations can, in theory, get together and formulate a treaty to govern border changes. Our goal is to see what can be done within the existing system.

80. For uninhabited territories, this step would be irrelevant—the negotiation would simply proceed between the nations involved.

81. Many countries forbid such votes, and even discussion of them. See, e.g., *China Uighur Scholar Ilham Tohti on Separatism Charges*, BBC NEWS (Feb. 26, 2014), <http://www.bbc.com/news/world-asia-china-26333583> [<https://perma.cc/TXE3-S4KF>]; Raphael Minder, *Catalonia to Defy Court with Independence Straw Poll*, N.Y. TIMES (Nov. 4, 2014), <http://www.nytimes.com/2014/11/05/world/europe/defying-court-ruling-catalonia-to-press-ahead-with-independence-straw-poll.html> [<https://perma.cc/92MR-TF53>].

82. The use of international monitors for elections has been extensive and increasing over the past half-century and both NGOs and the United Nations have developed procedures and criteria for how monitoring should be done. For a discussion of these mechanisms, including their problems, see generally JUDITH G. KELLEY, *MONITORING DEMOCRACY: WHEN INTERNATIONAL ELECTION OBSERVATION WORKS, AND WHY IT OFTEN FAILS* (2012).

83. Our proposal would not guarantee international recognition of the new state. See Christian Hillgruber, *The Admission of New States to the International Community*, 9 EUR. J.

lump-sum financial transfers to land swaps to military and political obligations.<sup>84</sup> The only required element of the offer would be the option of citizenship for the people of the acquired territory.<sup>85</sup>

*c. The Parent Nation.* The power of parent nations to block realignment of their regions presents a thorny problem. Under the current system, there are two possibilities. At one extreme, parent nations have full and complete rights to transfer regions—population included—to other sovereigns or simply to give up sovereignty and abandon the population altogether.<sup>86</sup> At the other extreme, parent nations that severely oppress their regions can theoretically lose their right to control or be compensated for the loss of the region (the principle of remedial secession). Whether a nation can block the secession or realignment of a region, therefore, depends on how well the nation treats that region, which the current system treats as a binary question that depends on the existence of significant oppression. Our proposal incorporates these two existing options and offers a third.

*2. Three Approaches to Price Setting.* Our mechanism allocates the price-setting power to three different parties, depending on how well a region is governed: to the parent nation and region in cases of good governance, to the region itself in cases of outright oppression or genocide, or to the global community (with a right of review through a court like the ICJ<sup>87</sup>) in cases of governance that denies representation

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INT'L L. 491, 499 (1998) (“The reliability of the new entity as a partner in international relations is the decisive criterion of statehood in the sense of international law.”). But the kind of sale described here would, most likely, result in recognition by the parent state, which would facilitate broader recognition. *See id.* at 504–05.

84. STRAUSS, *supra* note 11, at 104–07 (describing different forms of compensation for leases between countries).

85. This requirement would help prevent the risk of colonial-style oppression. Versions of the principle have appeared in international law and practice. *See, e.g.*, Convention on the Reduction of Statelessness art. 10, Aug. 3, 1961, 989 U.N.T.S. 175 (“Every treaty . . . providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless . . . . In the absence of such provisions a Contracting State . . . shall confer its nationality on [otherwise stateless] persons . . . .”); Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694, 721–22 (2011) (discussing a similar problem in the context of state succession).

86. *See supra* Part II.B.

87. The ICJ is a possibility, not a perfect solution. *See* David Sloss, *Using International Court of Justice Advisory Opinions to Adjudicate Secessionist Claims*, 42 SANTA CLARA L. REV. 357, 389 (2002) (recognizing limitations and arguing that “the I.C.J. advisory opinion mechanism is an under-utilized tool that may be helpful in promoting political settlement of some secessionist disputes”).

or equal rights. These three approaches correspond with notions of the parent nation's territorial sovereignty as dispositive, irrelevant, or important. Keeping with current international law, the choice between these options—the degree to which territorial sovereignty must be respected—depends on how well the parent nation treats the region.

*a. Category 1: Set by Parent (Property Rule in Parent).* If the parent nation provides representation and equal treatment to the people of a region, the only valid transaction is one in which the parent nation, region, and purchasing nation all agree on a price. The parent nation's interest is generally protected by a property rule, and it can veto any proposed transfer. Whereas the traditional approach would permit nations to unilaterally approve a transfer, the rule must take into account the modern right of self-determination, meaning that the region must also approve any transfer—something that many have advocated and which many nations already do in practice.<sup>88</sup>

*b. Category 2: Set by Region (Property Rule in Region).* In cases of extreme oppression, a parent nation forfeits its ability to say no to a region's departure. This is remedial secession; it transfers sovereign control to the region itself. Absent ex post negotiation, the parent nation receives no compensation for its prior investments in local natural resources, the region's share of the national debt, and so on.

*c. Category 3: Set by the World Community (Liability Rule in Parent—the Purchased Secession or Realignment).* The gulf between the preceding options is wide. What interests us are those cases that fall between these two extremes, in the range of what one might call medium oppression—where a government has denied representation or equal treatment to the peoples of a region, but has not crossed the line into extreme oppression. The Supreme Court of Canada acknowledged this category in its opinion on the possible secession of Quebec:

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88. If flipped around, this principle rules out the possibility of forced secession or expulsion. The expulsion question, as the debates over Grexit illustrate, is complicated. We explore this question in Joseph Blocher & Mitu Gulati, *Forced Secessions*, 80 LAW & CONTEMP. PROBS. (forthcoming 2017) [hereinafter Blocher & Gulati, *Forced Secessions*] and Joseph Blocher, Mitu Gulati & Laurence R. Helfer, *Can Greece be Expelled from the Eurozone? Toward a Default Rule on Expulsion from International Organizations*, in FILLING THE GAPS IN GOVERNANCE: THE CASE OF EUROPE 127 (Franklin Allen et al. eds., 2016).

[T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.<sup>89</sup>

The court found that Quebec did not fall into the third category, but it is easy to imagine situations that do.<sup>90</sup>

In these in-between cases the parent nation's sovereign control should be protected by a liability rule rather than a property rule.<sup>91</sup> This would permit regions to exit—at a market price, subject to review by a third party—when they have been denied representation or equal treatment, even if they have not been subject to extreme oppression.

Though the application of a liability rule in this context would be novel, the concept is not. Law often recognizes entitlements as legitimate while denying the holder of the entitlement the power to set the price.<sup>92</sup> Such rules are typically preferred when transaction costs and holdout problems present obstacles to bargaining, or when, for

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89. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 218, ¶ 138 (Can.) (emphasis added); see *id.* at ¶¶ 128–35. Similar language is also found in the concurring opinion of Judges Wildhaber and Ryssdal in a 1996 case from the European Court of Human Rights:

In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy.

*Loizidou v. Turkey*, 23 Eur. Ct. H.R. 513, 535 (1996) (Wildhaber, J., concurring, joined by Ryssdal, J.); cf. Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession, and the Great Powers' Rule*, 19 MINN. J. INT'L L. 137, 137–39 (2010) (discussing criteria used by the international community to validate a group's self-determination efforts).

90. The ongoing Ukraine–Crimea–Russia conflict seems a plausible candidate. Joseph Blocher & Mitu Gulati, *Ukraine and Russia—You Break It, You Bought It*, ERIC POSNER BLOG (Feb. 4, 2015), <http://ericposner.com/guest-post-ukraine-and-russia-you-break-it-you-bought-it> [<https://perma.cc/FSS5-QVEN>].

91. The other possibility would be to vest the entitlement in the region and protect it with a liability rule. This possibility means that a poorly governed region could be forced to stay but would be entitled to compensation determined by a third party. We have vested the liability rule in the parent rather than the region partly because territorial sovereignty is the current default rule, and because our requirement of regional approval for any cession protects the right of self-determination.

92. See generally Calabresi & Melamed, *supra* note 24 (discussing liability rules).



other reasons, the holder of an entitlement should not be able to say no but should receive some compensation.<sup>93</sup> Many of these same reasons—including transaction costs and bargaining breakdowns—support use of a liability rule to protect parent nations' sovereign control in cases of regional oppression.

As a practical matter, the challenge is to define what kind of oppression is sufficient to trigger the liability rule. One possibility is to peg the trigger to a threshold already found in international law. The Vienna Declaration suggests that the guarantee of territorial sovereignty extends only to “states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.”<sup>94</sup> Breach of those principles might be shown by flouting of CIL rules, U.N. resolutions, and the like. This liability rule would cover the states that fail this threshold—for example, by denying equal protection or representativeness<sup>95</sup>—by giving their regions a right to leave at a price set by an auction. If the parent nation rejected this market-determined price, it could seek review with some international body such as the ICJ.

For example, if it were true that Ukraine's corrupt government had discriminated against Ukrainians of Russian descent and that the people of Crimea genuinely wished to become part of Russia,<sup>96</sup> then it

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93. The prototypical example is of homeowners facing pollution from a socially valuable industry. Sometimes law will require damages to compensate them for their harm, but not give them an injunction to block the activity. *See, e.g.,* *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 872 (N.Y. 1970).

94. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 2, U.N. Doc. A/CONF. 157/23 (June 25, 1993); *see also* G.A. Res. 50/6, preface (Oct. 24, 1995) (recognizing the “right of peoples . . . to realize their inalienable right of self-determination,” which “shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples”).

95. We adopt this standard because we want to hew as closely as possible to existing international law, but there are of course many other ways to define “bad” governments: those whose people are poor or dissatisfied, for example. Nations respecting our two requirements—equal protection and representativeness—will be subject to domestic political pressure with regard to these shortcomings, and so will hopefully address them to the degree possible. Outright oppressive regimes fall into the second category, and thereby lose the power to forbid exit.

96. *See* Anton Moiseienko, *What Do Russian Lawyers Say About Crimea?*, OPINIO JURIS (Sept. 24, 2014, 9:51 AM), <http://opiniojuris.org/2014/09/24/guest-post-russian-lawyers-say-crimea> [<https://perma.cc/QJD3-VZST>]; Valerie Pacer, *Vladimir Putin's Justification for Russian Action in Crimea Undermines His Previous Arguments Over Syria, Libya and Iraq*, LONDON SCH. ECON.

seems more legitimate to say that Russia could acquire it at a price. In practice, this would probably mean offsetting some of Ukraine's existing debt to Russia.<sup>97</sup> (If this sounds too friendly to Russia, consider the fact that, as things now stand, Ukraine has lost Crimea and received nothing in return.)

This would mean vesting an international body—probably the ICJ—with the power to determine when the liability rule has been triggered, and also the power to review challenges to the compensation that is provided to the parent nation in the case of a regional exit. This raises difficult questions of institutional design and authority that this Article does not attempt to answer.

3. *Best Practices.* The foregoing is an outline of elements that should be required for any transaction in the market for sovereign control. But as with any market, there are other rules and principles that might be desirable even if not required:

- Require giving the people of a transacted territory the option of retaining their current citizenship;<sup>98</sup>
- Require supermajority approval of the transferred region and a simple-majority vote of the parent nation, reflecting the comparative weight of the interests at stake;
- Set standards or prerequisites for when regional votes must be permitted. Given the costs and the low likelihood that the vote will be in the affirmative, the option to hold a regional exit vote should be held at larger intervals of time than typical local elections—maybe every twenty-five years;<sup>99</sup>
- Require parent nations to publicize all offers of compensation;

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& POL. SCI.: EUROPP (Mar. 11, 2014), <http://blogs.lse.ac.uk/europpblog/2014/03/11/vladimir-putins-justification-for-russian-action-in-crimea-undermines-his-previous-arguments-over-syria-libya-and-iraq> [<https://perma.cc/3S4L-882T>].

97. See generally Blocher & Gulati, *supra* note 90 (arguing that Ukraine should claim that it is entitled to set off debt to Russia for having taken large portions of its country).

98. SHAUL ARIELI, DOUBI SCHWARTZ & HADAS TAGARI, INJUSTICE AND FOLLY: ON THE PROPOSALS TO CEDE ARAB LOCALITIES FROM ISRAEL TO PALESTINE 75 (2006) (describing this as the current custom).

99. Democratic principles demand that incumbent political parties must stand for election every so often: Why not hold the state itself to a roughly analogous standard?

- Encourage compensation in the form of dedicated revenue streams, providing some nexus between the form of compensation and the purchased territory;<sup>100</sup>
- Forbid sales except when all involved countries have sufficiently democratic governments and institutions.

Any or all of these practices might be desirable, but for now, the goal is simply to identify the minimum requirements for legitimacy.

*Figure 1. Elements of the Framework\**

	<b>Category 1</b>	<b>Category 2</b>	<b>Category 3</b>
<b>State of Governance</b>	Good (Strong Default Rule)	Oppressive or Genocidal	<i>Denies Representation or Equal Rights</i>
<b>Who “Owns” Sovereignty</b>	Parent Nation	Region	Parent Nation
<b>Who Must Approve</b>	Parent Nation <i>and Region</i>	Region	<i>Region</i>
<b>Who Sets Price</b>	Parent Nation <i>and Region</i>	Region	<i>1. Auction; 2. ICJ (if Price Disputed)</i>
<b>Corresponding Legal Principle</b>	Territorial Sovereignty	Self-Determination or Remedial Secession	<i>Combination of Territorial Sovereignty and Self-Determination</i>
<b>Possible Example</b>	United Kingdom and Scotland	Indonesia and East Timor	Ukraine and Crimea (Arguably)

\* Italicized portions represent changes to the current system.

### III. THE FOUR HORSEMEN

Though we have tried to show that our proposal is largely consistent with existing international law and practice, the framework

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100. For example, if a Hindu country were to purchase a Hindu region from a Muslim country to save its residents from religious strife, the purchaser might offer to build a mosque for the parent nation instead of simply writing a check. This approach might make the offer more politically palatable to the seller and make it easier to determine whether the buyer has performed its obligations.

is nontraditional to say the least, and we have benefitted from extensive discussions, feedback, and criticism. We call the following categories of objections the “four horsemen” to capture the tone of the most strident critics.

#### A. War

*Stable boundaries help prevent conflict. Competition for sovereign control has led to global catastrophe twice in the last century and to countless smaller conflicts and wars. The diagnosis is correct—some boundaries are “wrong”—but the proposed remedy kills the patient. If you want to do something for peace, put this Article into a desk drawer and never speak of it again.*

International law strongly favors stable borders<sup>101</sup> on the premise that they will discourage violent conflict.<sup>102</sup> This supposition is reflected in doctrines like *uti possidetis*, which freezes the borders of newly independent states based on boundaries drawn by colonial administrators<sup>103</sup> even when those borders seem to conflict with principles of self-determination.<sup>104</sup>

The premise is debatable.<sup>105</sup> Despite the stability norm, borders are frequently disputed both internally<sup>106</sup> and externally.<sup>107</sup> And borders can and do change peacefully—consider the “velvet divorce,”

101. See, e.g., JENNINGS, *supra* note 55, at 70 (“[T]he bias of the existing law is towards stability . . . . This is right, for the stability of territorial boundaries must always be the ultimate aim.”); Stuart Elden, *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, 26 SAIS REV. INT’L AFF. 11, 11 (2006) (identifying “territorial preservation of existing boundaries” as a central tenet of the international political system).

102. Paulsson, *supra* note 35, at 122. The doctrine of *uti possidetis* is often defended or explained on these grounds. See, e.g., Org. of African Unity [OAU], *Border Disputes Among African States*, at 1, OAU Doc. AHG/Res. 16(I) (July 21, 1964).

103. Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554, ¶ 20 (Dec. 22); Elden, *supra* note 101, at 12.

104. Cf. *Frontier Dispute*, 1986 I.C.J. at ¶ 26 (recognizing the conflict between *uti possidetis* and self-determination, and concluding that maintenance of the status quo was “the wisest course” so as to “prevent the stability of new states being endangered by fratricidal struggles”).

105. JOHN AGNEW, *GEOPOLITICS: RE-VISIONING WORLD POLITICS* 102 (Derek Gregory & Linda McDowell eds., 1998) (noting the costs of maintaining colonial boundaries).

106. Aman Mahray McHugh, Comment, *Resolving International Boundary Disputes in Africa: A Case for the International Court of Justice*, 49 HOW. L.J. 209, 218 & n.73 (2005).

107. Paulsson, *supra* note 35, at 123 (noting that 129 of such conflicts occurred between 1950 and 1990, covering “roughly one-third of the then existing land boundaries” (citing PAUL K. HUTH, *STANDING YOUR GROUND: TERRITORIAL DISPUTES AND INTERNATIONAL CONFLICT* (1996))); see also Burghardt, *supra* note 10, at 226 (discussing examples of external disputes).

which divided Czechoslovakia into the Czech Republic and Slovakia.<sup>108</sup> But assuming for the sake of argument that stability *does* lessen violence both at the domestic level (by reducing potentially explosive struggles) and the international level (by discouraging interference with other nations' affairs),<sup>109</sup> the question is whether this new framework could do better.

1. *Preventing Incipient Conflicts.* First, consider the likelihood of incipient armed conflict in the case of disaffected regions. Violence is likely to be a function of at least three factors: the degree of unrest in the region, the parent nation's toleration of dissent, and the willingness of other nations to intervene.<sup>110</sup>

*a. Degree of Regional Unrest.* Under the current system, as in ours, regions with low levels of unhappiness are unlikely to give rise to violence. In the current system, such regions are likely to accept their lot; in our system, they might explore the possibility of a change in sovereign control but are unlikely to push for it.

When a region is deeply unhappy, however, armed conflict is more likely. In the current system, the residents of such a region might try to fight their way out of the parent country, or to increase the cost of affiliation to a level that the nation is unwilling to bear. The residents might even seek military support from other nations. The result is a powder keg.

Under our proposal, the incentives are different. The availability of a market solution gives the region an exit option it did not have before—a means by which to leave a volatile situation. Violent conduct will be counterproductive because secessionist movements will want to demonstrate to other nations that they could thrive with a new affiliation, not that they are unstable.

*b. Toleration of Dissent.* In nations that tolerate dissent and are unwilling to constrain secessionist movements by force—for example,

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108. *But see* Noel Maurer, *Slovakia and Scotland*, POWER AND THE MONEY (Sept. 17, 2014, 2:36 PM), <http://noelmaurer.typepad.com/aab/2014/09/slovakia-and-scotland.html> [<https://perma.cc/KUV9-44NX>] (arguing that the divorce neither reflected popular opinion nor delivered benefits).

109. For an example of an argument along these lines, see Donald L. Horowitz, *The Cracked Foundations of the Right to Secede*, 14 J. DEMOCRACY 3, 9–11 (2003).

110. There is a vast literature on the causes of war, and we do not mean to suggest that this framework is the only way to think about the issue. *See generally* JACK S. LEVY & WILLIAM R. THOMPSON, CAUSES OF WAR (2010).

the United Kingdom with Scotland in 2014—there is little risk of regional disaffection causing war. Decisions will be made peacefully under both the current system and the proposed alternative.

But when nations do not tolerate dissent, the market for sovereign control is likely to outperform the present system. Under the current system, nations can and do use their police powers to ensure domestic law and order or protect their territorial integrity. So long as they do not go too far—and the threshold is high—they can use these powers to quash dissent. Our proposal would reduce the incentives for doing so and would give the parent nation an incentive to find a better match for its unhappy partner, particularly because fraught regional affiliations are costly.

*c. Outside Intervention.* Under the current system, a foreign government that would obtain a high benefit from secession might be willing to provide support to people of the disaffected region. Such investment can fuel the fire of domestic conflict. Under the current system, secessionist movements have a perverse incentive to escalate the conflict so as to justify outside intervention. Under our proposal, a foreign government that supports a disaffected region could pay the existing parent nation to allow the secession, rather than use its resources to escalate whatever nascent conflict might exist.<sup>111</sup>

For all three factors, then, our framework would likely prevent armed conflict better than the current system. To be sure, this proposal would bring back an element of competition for territory, which carries risks. However, managed through a market for sovereign territory, such competition could not only improve domestic political responsiveness by giving nations more incentive to treat their people well, but could lessen the risk of international conflict by increasing economic interdependence.

The winners of the competition in a market for sovereign control will not be, as in the past, the nations that have the most powerful militaries. The winners will be the nations that can best provide citizens of the various dissatisfied regions with an expectation of future flourishing and pay the parent nation compensation for the acquisition

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111. The marginal cost of a financial bid might be higher than that of military action, at least when the military itself is already equipped and ready to fight. Indeed, as a domestic political matter there may be *benefits* to military posturing or skirmishing. We cannot fix that problem, but we do not worsen it either.

of the new territory. Escalating conflict will make it harder, not easier, to prevail in this regard.

A market for sovereign control would reduce the incentives for potentially violent outside interference by would-be acquirers. The acquiring nation needs the approval of the populace of the territory. It therefore has an incentive to persuade the populace of the benefits that it can provide as compared to those that might be provided by other suitors, including the parent nation. An outside nation, if it does stir up local support for secession, will not necessarily reap the benefits of its misbehavior. It might succeed in breaking up the existing relationship only to lose out to another suitor.

We might be wrong: perhaps the introduction of a market for sovereign control will incentivize or provide a smokescreen for bad behavior. A parent country might further mistreat a dissatisfied region to force it to accept a sale.<sup>112</sup> A dissatisfied region might make things hard on its parent country for the same reason. Similarly, would-be acquiring nations might try to destabilize a nation or its regions to create the possibility of a sale. Neither current international law nor this proposal can prevent such destabilization. But the market would create desirable alternatives. Instead of spending resources on an invasion and dealing with sanctions and rebellions, nations would be incentivized to use their resources to make an attractive offer.

One might also argue that the most serious risk of violence comes not from outside nations that want a transaction, but from those hoping to stop one. In most cases we would expect that sales of sovereign territory will enhance the welfare of neighboring nations because improvements to a neighbor's economic circumstances tend to create positive externalities. But there will be costs, because neighboring nations may have to alter their defense plans and economic policies to deal with changes in their neighbor's national identity. A market for sovereign control would provide a mechanism by which to take these interests into account: third parties could participate economically—for example, by adding funds to a territory's bid for independence.<sup>113</sup>

Finally, the introduction of a liability rule could theoretically lead to violence—for example, if a parent nation refused to accept a purchased secession or realignment. We cannot rule this out—it is the

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112. If the nation went too far, however, it might trigger remedial secession and therefore lose the region entirely with no possibility of compensation.

113. Cf. Ratner, *supra* note 1, at 823 (“[T]he international law on territory points toward substantive solutions during negotiations, whether offered by the parties or by outsiders.”).

same problem that arises in the context of remedial secession and self-determination. But the net benefits would likely be positive. The region's exit might prevent a civil war after all. Although the parent nation would not have a right to say no, it would receive compensation, which should limit its interest in going to war.

2. *Resolving Existing Disputes.* A second set of cases consists of situations when two or more nations have laid claim to the same piece of sovereign territory and the dispute has already begun. Such disputes are common,<sup>114</sup> and while some seem harmlessly absurd,<sup>115</sup> others exacerbate underlying tensions<sup>116</sup> or escalate into violence.<sup>117</sup>

Despite some successes, existing international law and legal institutions have struggled to resolve conflicts over sovereign territory.<sup>118</sup> The result is that “[t]erritorial negotiations seem dominated by power, politics, bargaining and compromise;

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114. See *supra* note 107.

115. Machias Seal Island is roughly equidistant from New Brunswick and Maine, and is the subject of a sovereignty dispute between Canada and the United States. Stephen R. Kelley, *Good Neighbors, Bad Border*, N.Y. TIMES, Nov. 27, 2012, at A31. Canada's Department of Foreign Affairs maintains a lighthouse on the island “for sovereignty purposes,” and pays for two Canadians (the island's only inhabitants, besides seals and puffins of indeterminate nationality) to stand watch in month-long shifts. *Id.*

For decades now, “Denmark and Canada have clashed over their competing claims to a small, uninhabitable rock known as Hans Island.” Christopher Stevenson, *Hans Off!: The Struggle for Hans Island and the Potential Ramifications for International Border Dispute Resolution*, 30 B.C. INT'L. & COMP. L. REV. 263, 263 (2007). It has now become a tradition for Danish visitors to leave a bottle of aquavit on the island. Canadians retaliate with bottles of Canadian whisky. *Id.* at 267 & n.30. Ratner points to similar actions, for similar reasons, in the Spratly Islands. Ratner, *supra* note 1, at 820 (“The results are the displays of Chinese, Taiwanese, Filipino, Vietnamese, Bruneian, and Malaysian authority in the islands, to the point of planting flags and hapless sailors on uninhabitable rocks.”).

116. *How Uninhabited Islands Soured China-Japan Ties*, BBC NEWS: ASIA (Nov. 10, 2014), <http://www.bbc.com/news/world-asia-pacific-11341139> [<https://perma.cc/D87T-K4QM>]. On the role of law in the Senkaku/Diaoyu Islands dispute, see Chi Manjiao, *The Unhelpfulness of Treaty Law in Solving the Sino-Japan Sovereign Dispute over the Diaoyu Islands*, 6 E. ASIA L. REV. 163, 164 (2011).

117. Paul R. Hensel, *Charting a Course to Conflict: Territorial Issues and Interstate Conflict 1816–1992*, in A ROAD MAP TO WAR: TERRITORIAL DIMENSIONS OF INTERNATIONAL CONFLICT 115, 130–32 (Paul F. Diehl ed., 1999) (arguing that territorial disputes are more likely to lead to violent conflict than other kinds of international disputes).

118. See Todd L. Allee & Paul K. Huth, *Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover*, 100 AM. POL. SCI. REV. 219, 220–21, 229 (2006) (showing that of 348 territorial disputes from 1919 to 1995, thirty resulted in pursuit of judicial or arbitral solution); Ratner, *supra* note 1, at 821 (“The absence of compulsory jurisdiction outside Article 36(2) of the ICJ Statute and compromissory clauses in treaties means that only in rare cases does the law require two sides to face an adjudication of their border dispute.”).



determining the role for law in this process has seemed almost impossible.”<sup>119</sup> The ultimate resolution of the dispute in the South China Sea will be an important test—a tribunal in the Hague recently issued a rebuke to China, which in turn responded that the decision “[was] invalid and ha[d] no binding force” and that “China d[id] not accept or recognize it.”<sup>120</sup>

A market for sovereign control could facilitate settlement by permitting countries to buy out each other’s claims. Parties can, after all, negotiate even when entitlements are unclear or disputed, just as they do in other kinds of settlement.<sup>121</sup> These resolutions, once entrenched in treaties, would outrank other factors like *uti possidetis* and inherited title.<sup>122</sup>

Our framework would not be a perfect solution to international disputes. Countries will undoubtedly continue to pursue armed conflict, for reasons of national pride, overconfidence, leaders’ narrow interests, failure to predict costs, and so on.<sup>123</sup> But the market alternative provides one more possibility for avoiding war, and there is some reason to think that it could succeed. Simply bringing the parties to the table to talk about a transaction might get them to focus on one another’s interests and thereby help avoid bloodshed.<sup>124</sup> Purchase will often be cheaper than war, and the international community might prefer to help fund a purchase rather than a military intervention or a

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119. Ratner, *supra* note 1, at 808.

120. Jane Perlez, *Panel Rejects China’s Claims in Sea Dispute*, N.Y. TIMES, July 13, 2016, at A1.

121. See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4, 6–30 (1984) (presenting a model in which “the determinants of settlement and litigation are solely economic, including the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement”).

122. Territorial Dispute (Libya/Chad), Judgment, 1994 I.C.J. 6, ¶ 73 (Feb. 3) (declining to consider arguments based on *uti possidetis*, inherited title, or spheres of influence because the disputed borders were defined by treaty); Castellino, *supra* note 57, at 566 (“The law as it stands suggests that *uti possidetis juris* lines may be modified by consent.”); Brian Taylor Sumner, Note, *Territorial Disputes at the International Court of Justice*, 53 DUKE L.J. 1779, 1804 (2004).

123. See Paulsson, *supra* note 35, at 124. Jan Paulsson explains:

Not all boundary disputes can be reduced to an economic equation. States may contest territory that has no resource value but that has emotional significance or strategic military value. For example, there seem to have been few resources at stake in the dispute between Argentina and Chile in the *Laguna del Desierto* arbitration.

*Id.*

124. See ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 1981) (describing the benefits of interest-based negotiation in international disputes).

postconflict nation-building effort. Even in volatile or war-torn areas, sales can sometimes provide a peaceful solution. Notably, Egypt and Israel were able to resolve their dispute over the Taba hotel strip—held by Israel following the 1967 and 1973 wars—through arbitration<sup>125</sup> and negotiated purchase.<sup>126</sup>

### B. Colonialism

*Trading sovereignty will lead to colonialism—rich countries, as they did a century ago, will use manipulative and coercive techniques to take over the poorest nations, just as surely as if they had invaded with armies. History shows that countries will leverage economic power into political power. Your proposal will produce a new era of imperialism.*

The colonialism objection to our proposal comes in at least three forms. The first is that countries and regions, perhaps because of coercion, will assent to undesirable proposals. Second, to the degree that transfers of sovereign control import or rely on domestic rules—in defining what counts as consent, for example—introduction of a market could exacerbate existing problems by allowing nations to effectively sell out their regions. Third, within the liability framework, the diminishment of territorial sovereignty would give the ICJ, or another international body, power that might be used to disfavor certain nations.

One response to each of these objections would be to limit transfers only to regions and countries that meet certain prerequisites: high levels of education and civic involvement, for example, or strong democratic institutions. This restriction would eliminate the liability-rule transfers and lessen concerns about nations selling citizens without their informed consent while preserving an important role for the market in the cases like Scotland, Quebec, and Catalonia.

But it would be a pity to deny benefits to the regions that need them most. There are three reasons not to fear that this market would devolve into an imperialist project. First, any time a territory is transferred from one country to another, its residents must be given citizenship in the new country. Second, the residents must approve any

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125. Boundary Dispute Concerning the Taba Area (Egypt-Isr. Arb. Trib. 1988), 27 I.L.M. 1421 (1988).

126. Alan Cowell, *Israel Gives Disputed Resort to Egypt*, N.Y. TIMES (Mar. 16, 1989), <http://www.nytimes.com/1989/03/16/world/israel-gives-disputed-resort-to-egypt.html> [<https://perma.cc/4K72-TNS7>] (“Egypt paid \$37 million for the hotel and agreed to allow easy Israeli access to it in negotiations that resolved the last obstacles to the return.”).

such transfer; thus, they have the right to refuse. Third, bad choices about borders will not be set in stone; the mechanism makes it easier to reverse them.

The citizenship requirement puts pressure on the acquiring nation to share its resources with its new residents and respond to their concerns, consistent with domestic laws.<sup>127</sup> Under colonialism, the reverse was true: conquering nations extracted resources from their colonies and the colonies' people while denying them citizenship and therefore preventing political or other repercussions.

Because it raises the cost of an acquisition, the full-citizenship requirement should deter rich nations who might otherwise rush out to purchase sovereign control over poor regions.<sup>128</sup> One need only consider the lack of enthusiasm that rich nations have for immigration from impoverished nations. Indeed, critics of our proposal might suggest that its flaw would not be a lack of supply, but of demand.<sup>129</sup>

The second protection against colonialism is the right of transacted territories to say no. Unlike colonialism, the acquisition of territory will be made not by force, but by consent. Here, dissatisfied regions will choose which outside nations can best help them thrive. That reverses the traditional pattern of colonialism. If there are concerns about misinformed, coerced, or fraudulent voting, international monitors and institutions can step in.<sup>130</sup>

Historically, such fraud has been a problem. In many cases, territory was acquired “using unequal and even fraudulent treaties—subjugation, and, in some instances, quasi-prescription claims.”<sup>131</sup> But international law has come a long way. Coercive agreements are voidable. The Vienna Convention on the Law of Treaties identifies

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127. We do not assume that countries necessarily treat their citizens equally in all respects—most nations, including the United States, do not. See Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 345 (2007). But we assume that most countries treat citizens better than noncitizens.

128. See *Should the U.S. Merge with Mexico?*, FREAKONOMICS (Nov. 6, 2014, 9:55 AM), <http://freakonomics.com/2014/11/06/should-the-u-s-merge-with-mexico-full-transcript> [<https://perma.cc/9VH3-AK65>] (quoting Austan Goolsbee on the possibility of a U.S.–Mexico merger: “[G]iven the fiscal set up of the US, if you’re going to add 60 million people who make less than \$5,000 a year, under our current system, you’re going to have massive transfer payments and subsidies from what are now the United States to the new states . . . formerly of Mexico”).

129. See *infra* Part III.D.

130. The Organization for Security and Co-operation in Europe’s Office for Democratic Institutions and Human Rights (ODIHR) is just one prominent example of an institution that already does this kind of work.

131. Castellino, *supra* note 57, at 529.

coercion and threat or use of force “in violation of the principles of international law embodied in the Charter of the United Nations” as a basis for voiding a treaty.<sup>132</sup> The same principles would void a coercive treaty of cession.<sup>133</sup>

Critics might not be satisfied with these two protections against colonial domination. Perhaps we put too much faith in international law and institutions. The liability-rule regime in particular would empower the ICJ (or something like it) to make determinations about which countries have governed their regions well enough to retain them. Perhaps the ICJ will disfavor poor, weak, or non-Western governments, thereby becoming a roving colonialism commission—determining which regions can be purchased and for how much.

But this scenario is unlikely. Problems of definition and enforcement have always plagued international law, but the market for sovereign control would be no more susceptible to them than other foundational projects, including international human rights law. We have not precisely defined the threshold for the liability rule, but neither has international law defined the standard of oppression needed for remedial secession.<sup>134</sup> And not trying at all means letting underserved regions continue to suffer in the legacy of colonialism: a high price to pay to avoid a fear of future colonialism.

One might nonetheless object that our mechanism would introduce an element of colonialism by exacerbating inequality between rich and poor nations.<sup>135</sup> It is true that a market for sovereign control, like any market, would favor the rich in that they would be able to buy regional control whereas the poor would only be able to sell. But, as in those other markets, locking out the poor can harm their interests more than letting them in. The market would give them a chance at something better.

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132. Vienna Convention on the Law of Treaties art. 52, May 23, 1969, 1155 U.N.T.S. 333, 334.

133. Bautista, *supra* note 50, at 11 (“Clearly, a treaty of cession is void if it arises out of an act of annexation procured by the threat or use of force in violation of the U.N. Charter.”).

134. See Jonathan Masters, *Why the Crimean Referendum Is Illegitimate*, COUNCIL ON FOREIGN REL. (Mar. 16, 2014), <http://www.cfr.org/ukraine/why-crimean-referendum-illegitimate/p32594> [<https://perma.cc/FVV6-QNS3>].

135. Indeed, this inequality can happen even in the absence of any coercion or information failures. See Stuart Banner, *Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand*, 34 LAW & SOC’Y REV. 47, 49 (2000) (suggesting that problematic land markets cannot always be explained by the duplicity or failures of the contracting parties).

We do not doubt the strength of nations' desire to expand their sovereign control.<sup>136</sup> In fact, we count on it. A market for sovereign control could transform that demand into value for poorer nations. So long as the rightful "owners" of the valued good—here, the people of the territories that rich nations might seek to acquire—have the right to say no, then the strength of the desire for sovereign control means a higher price.<sup>137</sup> Recognizing, protecting, and facilitating trade in that right should help alleviate existing inequality.

### C. *Antidemocracy*

*There already exists a mechanism by which countries and their people can choose to alter borders: It's called democracy. Your framework would undermine political participation and introduce the kind of commodification that corrupts democratic values.*

Although our framework employs a market mechanism, we are not attempting to put markets ahead of governance, but rather to activate a market *for* governance. The proposal could even be described as a form of global democracy rather than as a "market" for sovereign control. Borders would remain important, but people would be able to look beyond them when choosing their laws and leaders. In doing so, they could place whatever value they want on "noneconomic" values and preferences such as stability, cultural similarities, shared language, and historical affinities.<sup>138</sup> Moreover, the "compensation" given to nations and regions need not be, and almost surely would not be, purely financial—it might include land swaps, military obligations, trade agreements, or cultural resources.

Such a mechanism could serve democratic values better than the current system. As it stands, international law appears to give nations the power to abdicate sovereign territory without either obtaining approval from the territory's residents or giving them a choice regarding citizenship. For example, the United Kingdom gave up control of Hong Kong and Kowloon in 1997 despite the fact that neither the United Kingdom nor China sought the permission of the

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136. See *supra* notes 11–21 and accompanying text.

137. Who "pays" that price is of less import—it might come directly from the acquiring nation or from the parent nation as a way of obtaining the necessary consent.

138. Michael Ignatieff, *Scots Have Revived the Majesty of Democracy*, FIN. TIMES (Sept. 19, 2014, 11:23 AM), <http://www.ft.com/cms/s/2/e2cdcc62-3f5a-11e4-984b-00144feabdc0.html#axzz4IkeMaP1Q> [<https://perma.cc/D86F-WN2Z>].

inhabitants of those regions.<sup>139</sup> Nor were the citizens of the region offered U.K. citizenship. The same was true of Portugal and Macau in 1999, Australia and Papua New Guinea in 1975, and many other situations since World War II. In none of these cases did the colonial power either obtain popular approval from the inhabitants before abdicating control or allow them to retain citizenship.<sup>140</sup>

In other words, borders can and do change hands in the current system in ways that are far less democratic than what we propose. In our framework, where rights lie both with the people inhabiting the region and the parent nation, approval from the inhabitants is a precondition to any transfer of sovereign control. Concretely, the United Kingdom would not have been allowed to give away Hong Kong and Kowloon without prior approval from the citizenry.

Adding a monetary consideration to this process would not make it any less democratic. Consider an analogy to immigration. Recent figures suggest that a quarter-billion people—roughly 3 percent of the world’s population—are migrants.<sup>141</sup> They, the countries they left, and the countries that accepted them have all acted largely on the basis of economic considerations—a market of sorts.<sup>142</sup> Immigrants from poor countries are attracted by valuable goods such as better educational opportunities, more jobs, less corruption, lower taxes, cleaner roads, better health insurance, and so on. Likewise, countries decide which would-be immigrants to accept based on their current wealth and future earning potential. Countries ranging from the United States to Saint Kitts and Nevis facilitate immigration for those who are willing to invest a certain dollar amount or create a certain number of jobs.<sup>143</sup>

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139. More recently, Gibraltar has unsuccessfully demanded a vote as part of the discussions between England and Spain about its status. See *Gibraltar Demands Veto on Future Status*, BBC NEWS (Oct. 31, 2001, 2:11 PM), <http://news.bbc.co.uk/1/hi/world/europe/1630056.stm> [https://perma.cc/WW5V-UHU6] (quoting Josep Pique, Spanish Foreign Minister, as stating: “The people of Gibraltar cannot have the right of veto over matters being discussed by two sovereign states”).

140. Waters, *supra* note 19, at 23–25 (describing border changes from World War I through the Cold War, and noting that “in none of the cases has assignment been subject to approval by the affected populations”).

141. POPULATION DIVISION, UNITED NATIONS DEP’T OF ECON. & SOC. AFFAIRS, POPULATION FACTS 1 (2013), [http://esa.un.org/unmigration/documents/The\\_number\\_of\\_international\\_migrants.pdf](http://esa.un.org/unmigration/documents/The_number_of_international_migrants.pdf) [https://perma.cc/4ZG6-NCNV].

142. See Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent*, 120 YALE L.J. 2088, 2090 (2011).

143. See, e.g., Immigration and Nationality Act § 203(b)(5), 8 U.S.C. § 1153(b)(5) (2012) (facilitating the approval of green cards for immigrants who invest \$1 million or at least \$500,000 in targeted employment areas). In some instances, groups of would-be immigrants have worked

Multiple E.U. nations—including Portugal, Spain, Greece, and Malta—offer visas and passports to foreigners who are willing to spend specified amounts of euros purchasing property.<sup>144</sup>

In short, a “market” for nationality—and therefore sovereign control—already exists. Selling sovereign control over a particular territory would mean permitting group or regional immigration, which would be more democratic than the existing market for immigrants. By forcing marginalized communities to exercise their exit rights at an individual level, the current structure reduces their ability to engage in collective bargaining with their unsatisfactory governments. Individuals who find themselves unable to fully thrive under a particular national system but do not have the political clout to produce local change—for example, Tamils in Sri Lanka, Muslims in Kashmir, or Rohingya in Myanmar—have an incentive to expend resources to move, exercising an exit option rather than trying to change or improve their existing government. Their departure reduces domestic political pressure and saps the resources of the community they leave behind.

Such market-driven competition is likely to enhance democratic responsiveness. The desirability of interjurisdictional competition for citizens has been described as a general matter by Charles Tiebout,<sup>145</sup> and within specific areas of law by many others.<sup>146</sup> These accounts have been criticized on the basis that jurisdictional competitions are plagued by transaction costs because residence is sticky, which means that the practical and legal barriers to immigration are high. Our proposal

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collectively for section 203(b)(5) purposes. *See, e.g.*, David Barer, *Chinese Investment Could Kick-start Pflugerville Office Construction*, COMMUNITY IMPACT (Nov. 13, 2014), <https://communityimpact.com/austin/news/2014/11/13/chinese-investment-could-kick-start-pflugerville-office-construction-2> [<https://perma.cc/S3Q6-78H6>] (describing “Project Great Wall,” a joint project in Pflugerville, Texas backed by three dozen Chinese investors seeking green cards); Smith, *supra* note 9.

144. Zoe Dare Hall, *The Countries Offering Passports to Lure Property Investors*, FIN. TIMES (Mar. 7, 2014, 6:23 PM), <http://www.ft.com/cms/s/2/3d36db18-9fc3-11e3-b6c7-00144feab7de.html> [<https://perma.cc/92FN-UM2H>]. Though passports are typically sold at the individual level, Kuwait has recently attempted to purchase Comoros citizenship for its Bidoon population. Peter Spiro, *Kuwait Bulk-Orders Comoros Citizenship for Stateless Bidoon*, OPINIO JURIS (Nov. 13, 2014, 11:59 AM), <http://opiniojuris.org/2014/11/13/kuwait-bulk-orders-comoros-citizenship-stateless-bidoons> [<https://perma.cc/TT2M-4W67>]. Without the Bidoons’ support, this would not satisfy our framework.

145. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

146. *See, e.g.*, Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1442–58 (1992); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1213–27 (1992).

would overcome these criticisms by bringing the new governing power to the people, rather than forcing them to go to it.

Elements of this idea are already evident in international practice. The idea behind free-trade zones—or any choice-of-law system—is to use elements of another country’s legal regime. Nations commonly set up special economic zones with distinct rules. The charter-city movement has sought to establish cities that would be located in poor countries but governed by the legal and political systems of rich ones.<sup>147</sup> A market for sovereign control would add to this process, permitting an alteration of national borders to reflect the change in governing authority.

By facilitating exit, the market could arguably corrode democracy by decreasing the relative value of loyalty and voice,<sup>148</sup> lessening people’s incentive to fix broken systems. But voices for change tend to be more effective when backed by a credible threat of departure. Nations that want to keep a dissatisfied region will have more incentive to be democratically accountable to it. As for commodification itself, our proposal comes too late to cause additional harm—as noted above,<sup>149</sup> governments already sell public land and yield sovereign functions. The market would simply combine those transactions.

Two democratic objections remain. First, nations subject to the liability rule would have no choice but to accept purchased secessions and realignments from dissatisfied regions, which means that not all transactions would be fully voluntary. This is true as far as it goes, but the liability-rule regime only applies to countries that deny representation or equal rights to their regions, so the net effect on democratic values would probably be positive. Because nations will almost certainly want to avoid the liability-rule framework altogether, they will have an incentive to provide representation and equal rights.

Second, what counts as a legitimate “approval” at the regional or national level must be determined by reference to domestic standards. This raises a risk that undemocratic nations will purportedly approve

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147. See generally PAUL ROMER, *TECHNOLOGIES, RULES, AND PROGRESS: THE CASE FOR CHARTER CITIES* (2010) (arguing that chartering new cities for the purpose of changing and developing new rules to structure interactions among people will help raise living standards); Adam Davidson, *Honduras Takes a Mulligan*, N.Y. TIMES, May 13, 2012, at MM19 (describing Romer’s efforts to create a charter city in Honduras).

148. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 31–32 (1970).

149. See *supra* notes 11–21 and accompanying text.



sales that are not in the interests of their citizens.<sup>150</sup> Hopefully, the existence of a background market for sovereign control will increase the incentives for totalitarian regimes to govern well, even if only for reasons of economic self-interest.

#### *D. Impossibility*

*Even holding aside the astounding transaction costs, there is no demand in this supposed “market.” The immigration policy of every industrialized nation is highly restrictive, which is evidence that they have no interest in permitting—let alone paying for—the kinds of changes you envision. Moreover, no nation would ever want to sell, because no amount of compensation will politically justify the loss of territory.*

A market for sovereign control will not lead to widespread changes in national borders. On the buyers’ side, the world’s richest nations will not rush to drain their treasuries by incorporating the peoples of poor and oppressed regions. Cost aside, such nations have less need to acquire territory than in the past because they can increasingly rely on treaties and technology to achieve market access, protect foreign investments, and project military power. On the sellers’ side, the attachment to land might well be resistant to pricing. Moreover, domestic political pressure will probably prefer acquisition or retention of territory—an obvious and tangible thing—to a change in the inscrutable national balance sheet.

We accept this criticism. Hopefully, a market for sovereignty can—even if rarely employed, and even if used just once—offer a workable solution to actual problems, or at least illustrate a way forward. Our goal here is to add an option, not to ensure that nations frequently employ it.

The question is what factors would make the mechanism most desirable and likely to be employed. These factors could include low or nonexistent population in the region (simplifying the process of political agreement); economic need or crisis in the parent nation (increasing the incentive to sell); identifiable physical resources (making it easier to “value” the region); simple boundaries, as in the case of islands (making a clean break more straightforward); the existence of cross-border affinities between the region and another country (ensuring a desirable bid); “linkages” between regions and

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150. For example, a particular region might collude with its own government to approve a sale that the rest of the country strenuously opposes.

forms of compensation (enabling dedicated revenue streams that would encourage transparency and political salience); lack of a history of violent conflict (improving the odds of peaceful negotiation); and high-functioning domestic institutions (facilitating information and reducing transaction costs of agreement).

When these factors are aligned or particularly strong, the market for a new parent nation should be more desirable, such as in the following scenarios:

1. *The Lingering Colony.* Many former colonial powers maintain outlying territories, often at great expense, and sometimes against the claims or desires of other nations with a natural territorial affinity.<sup>151</sup> The Falkland Islands are an example: the United Kingdom spends more than \$100 million annually on a region that has only three thousand residents. Argentina wants the islands badly enough to continue demanding their “return,” thirty years after losing a costly war. The strength of the demand is undeniable, and the example is not unique. The British, Dutch, and French all continue to hold sovereign territory that another nation might value more—think Gibraltar, which is much desired by Spain, and whose citizens would overwhelmingly like to stay in the European Union.<sup>152</sup>

2. *The Bad Equilibrium.* Some regions are beset with constant and costly tension, conflict, and suspicion vis-à-vis their parent nations. The parent nation expends large amounts of resources on law enforcement. The region suffers socially, economically, and politically. The result is a bad equilibrium in which each side suspects the other, misinterprets even well-intentioned actions, and retaliates against perceived slights. If the conflict were somehow removed, the region could thrive. A new national identity for the region, in this context, could potentially shift the relationship to a better equilibrium yielding large economic gains for all of those involved. If peace could be returned to Kashmir, for example, it might take advantage of its natural beauty and become a tourist haven. There would be gains to trade if a deal could be crafted.

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151. Another common and perhaps less recognized scenario arises when nations wish to unburden themselves of expensive former colonies who refuse “independence.” We explore that issue, and the more general question of expelling regions from nations, in Blocher & Gulati, *Forced Secessions*, *supra* note 88.

152. See *Brexit: Spain Calls for Joint Control of Gibraltar*, BBC NEWS (June 24, 2016), <http://www.bbc.com/news/world-europe-36618796> [<https://perma.cc/4LY5-5FR6>].

3. *Ethnic and Cultural Connections.* Some rich countries have ethnic and cultural commonalities with the people in an underperforming region in a different nation. These affinities give taxpayers incentive to help their brethren behind other borders whether by extending citizenship<sup>153</sup> or through some other mechanism. Consider West Germany and East Germany. After the fall of the Berlin Wall, the richer west expended taxpayer funds to build up the impoverished east and gave its inhabitants full citizenship rights. This happened in part because of the ethnic and cultural ties that the inhabitants of the west felt with those in the east.

4. *A Small Oppressed Region.* Some rich nations—especially those that already spend billions on foreign aid—might be willing to absorb small regions that are being severely oppressed. With taxpayers in these nations currently contributing money and manpower to peacekeeping operations,<sup>154</sup> altering an undesirable border might be a better investment. And perhaps the willingness of the population of the rich nation to take on the burden of helping some poor and underperforming region will be greater if the people of the rich nation see that there will not be a massive and immediate influx to their mainland of migrants who have different religions, sensibilities, educations, and so on. If the entire region is politically incorporated into the new nation, there is less need for the people to move.

5. *Self-Purchase.* Our focus has been on underperforming regions—those that would need an external buyer or at least external funding to escape their current situation. But there are rich regions that might want to alter their national affiliation, or set out on their own. Such regions might see the remainder of the country as a drain on them, and there may be basic philosophical or religious differences. Assuming no oppression or bad governance, such regions would have to gain the approval of the entire nation, but perhaps their resources would permit them to buy their way out of a bad relationship.

6. *Conflicting Territorial Claims.* An enormous proportion of the world's borders are subject to dispute. Some disputes may be past the

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153. See, e.g., Nick Thorpe, *Hungary Creating New Mass of EU Citizens*, BBC NEWS (Nov. 7, 2013), <http://www.bbc.com/news/world-europe-24848361> [<https://perma.cc/G5LB-GEX5>] (noting a new Hungarian law offering citizenship to anyone who has “a direct ancestor who was a Hungarian citizen, and a basic knowledge of the language”).

154. See *supra* note 75.

point of peaceful resolution. Others are minor—conflicting claims to uninhabited islands, for example—but continue to fester because the countries involved find it impossible to negotiate. A market for sovereign control would permit one to offer to buy out the other's claim, just as neighboring individuals often do when their property boundaries are found to conflict.

#### IV. CAVEATS AND COMPLICATIONS

Any attempted solution to problems as intractable as those involving territorial sovereignty, border changes, and self-determination will be hard to implement. The prior Part tried to address big-picture objections, but some caveats and complications remain.

##### A. *Who Gets to Vote?*

A change of nationality impacts not just current generations but future ones. This means that the standard rules regarding who gets to vote on the decision might need to be modified. Given the impact on future generations, for example, might one want the voting age for this decision to be altered? What if a parent nation packs a dissatisfied region with loyalists—might there be length-of-residence requirements?

One option here is to rely on domestic law to define voter eligibility. But this could give the parent nation a way to interfere with the vote and might exacerbate underlying problems. What if, for example, a region wants to secede precisely because its nation denies women the right to vote? These problems are not unique to our proposal—the question of democratic legitimacy precedes this idea and will persist after it. Our view is that votes should take place under international standards, but we have not elaborated what those are.

##### B. *What Counts as a Region?*

We do not know what counts as a region, but we are in good company in that regard. The current right of self-determination as articulated in international conventions generally accrues to

“peoples,”<sup>155</sup> and no one quite knows what those are either.<sup>156</sup> Existing boundaries can provide some guidance. The boundaries of Scotland, Kashmir, and Catalonia are reasonably clear, at least on the map. There are also historically defined regions that remain widely recognized, even though they have since been broken up to serve other interests. Kurdistan is a ready example. But there has to be a way to allow for new regions—those where affiliations are not just a function of domestic law and history, but also of other factors such as ethnicity, race, religion, and politics. One of those factors could be “the peoples who are being systematically disfavored by a nation.”<sup>157</sup> In a sense, by choosing to disfavor a particular region, a country would thereby establish both the conditions and the scope of the exit right.

### C. *What About Stateless Peoples?*

Dispersed and landless populations get no direct benefit from our proposal. Even “remedial” secession is not much of a remedy for people who have been forced to secede. But the logic of the proposal can still be extended to help them. In a separate paper, we argue that such refugees effectively constitute the fourth category in our analysis—rather than simply having a property-rule entitlement in their own sovereign control (as in the remedial-secession context), they are in fact owed a *debt* by the oppressing country.<sup>158</sup> That debt should be tradable so that oppressed populations can treat it as an asset that can be traded to whichever nation is willing to grant them entry. Other nations might for example purchase the refugees’ debt and use it to offset existing sovereign debts held by the oppressing nation.

Illustrations are unfortunately easy to find. As of this writing, thousands of Rohingya are fleeing Myanmar. If the Rohingya had land and a clearly identifiable region where they were clustered, they would fit the remedial-secession category. But most of them have close to nothing, and whatever little the lucky ones have is being extracted from

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155. See G.A. Res. 1514, Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

156. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 218, ¶ 123 (Can.) (“[T]he precise meaning of the term ‘people’ remains somewhat uncertain.”); MARCELO G. KOHEN, *Introduction to SECESSION: INTERNATIONAL LAW PERSPECTIVES* 1, 6–9 (2006).

157. See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 614, ¶ 229 (separate opinion by Cançado Trindade, J.).

158. See generally Blocher & Gulati, *Competing for Refugees*, *supra* note 4 (discussing the support in international law for the notion that countries of origin owe such a debt).

them by the military as an exit fee.<sup>159</sup> Neighboring nations have refused them entry. If, however, those nations could benefit from the value of the refugees' claim against Myanmar, they might be more welcoming.

*D. What About the Rights of Minority Groups Within the Region?*

Separatist regions will often contain a minority whose situation might be made worse off by a transfer.<sup>160</sup> A majority vote in the region itself will not protect them. One might think that the parent country will protect them, but this is not always the case. Imagine a region with three ethnic groups. Group A has the majority overall in the parent country, Group B is a substantial and disfavored second, but Group C is the majority in the region, with the rest of the population in that region being Group B. Group A might be happy to transfer Group C's region, thereby selling out the members of Group B living in the region.

One solution would be to make the vote requirement for regional exit very high (either in terms of turnout or percentage supporting), such that the majority in any region has to make a deal with the minority there to obtain its votes. Another possibility is to require that the citizens in the affected region be given the option to retain their prior citizenship. Either answer will increase the likelihood of holdout problems and thus make regional exit less likely. But a world where regional exit occurs only in extreme situations may be optimal. And it would also be possible for the dissatisfied section of the transacted region to realign further, even if that means another subdivision.<sup>161</sup>

## CONCLUSION

Many regions—especially those whose populations are a national minority—feel oppressed and ill-served by their current countries. Some try to secede, but such attempts are resisted even in the most progressive countries. Other regions yearn not to strike out on their own but to join different countries. This desire is often viewed with

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159. Todd Pitman & Esther Htusan, *Myanmar Profits Off Rohingya Exodus*, CNS NEWS (Nov. 6, 2014, 8:05 PM), <http://www.cnsnews.com/news/article/ap-exclusive-myanmar-profits-rohingya-exodus> [<https://perma.cc/SX66-S9AD>].

160. Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 452 (1991) (noting the “minority-within-a-minority” problem).

161. Thomas M. Franck & Paul Hoffman, *The Right of Self-Determination in Very Small Places*, 8 N.Y.U. J. INT'L L. & POL. 331, 383 (1975) (“[I]nfinitesimal smallness has never been seen as a reason to deny self-determination to a population.”).

even more disfavor. As a result, undesirable borders typically stay in place until forcibly moved by secession or the intervention of some powerful external actor. As the situations in Kashmir, Jaffna, Iraq, and Ukraine illustrate, the byproducts are often violence, instability, and poverty.

We have tried to show how a “market” mechanism might ameliorate such problems by facilitating transfers of sovereign territory between nations while taking seriously the notions of popular sovereignty and self-determination. We have also tried to answer the strongest legal, practical, and theoretical arguments against our proposal. Many readers will remain unconvinced. Even those who accept the theoretical coherence and desirability of the proposed changes might still insist that they will never come to fruition in the way described.

Our hope is that a market for sovereignty can—even if rarely employed, and even if used just once—offer a workable solution to actual problems. At the least, like other conceptual frameworks,<sup>162</sup> a market should be able to point toward practical solutions by helping to identify the legal, political, ethical, or other obstacles that prevent welfare-enhancing border changes. International law remains haunted by the problem of borders and sovereign control. Our framework suggests one way to improve them.

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162. The Coase Theorem, to take the most obvious example, is a central tool of legal analysis despite the fact that—as Coase himself emphasized—the world has transaction costs.