

## **BLOCHER, GULATI, AND COASE: MAKING OR BUYING SOVEREIGNTY?**

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Blocher and Gulati's wonderful and challenging thought experiment brings to mind one of the most influential articles in legal scholarship, Ronald Coase's *The Problem of Social Cost*.<sup>1</sup> Coase famously observed that, in the absence of transaction costs, the law's assignment of entitlements should have no effect on behavior. Whoever most values the entitlement would purchase it (if the law assigned it to another), or retain it (if the law already assigned the entitlement to that person). Thus things like property and tort rights should have no impact on the level of human activity, whether safeguarding against harm or adding value through exploitation. The assignment of that right should affect only wealth distribution, not behavior.<sup>2</sup>

So, Blocher and Gulati seem to say, a state's right to territory similarly should be seen as an entitlement that might be exchanged for sufficient consideration. Why would not Coasean bargaining over territory lead to a Pareto-optimal world? After transaction-cost-free bargaining, would not alignments of territory and sovereignty resolve in a way that maximizes social welfare, which is to say human happiness?

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1. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

2. There is, of course, a significant literature on how wealth effects may affect behavior. See Robert D. Cooter, *The Coase Theorem*, in *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 457, 457–60 (John Eatwell, Murray Milgate & Peter Newman eds., 1987). For present purposes, however, we can put that to the side.

It takes great imagination and some intellectual courage to ask these questions, given the hidebound and conservative nature of most international-law scholarship. The issues are compelling, and the human costs of ignoring them are great. Rethinking the relationship between sovereignty and territory does not deny the foundations of international law, but rather pushes us to think about the social consequences, and therefore the social value, of this enterprise.

With Coase in mind, I want to explore how we might go about responding to Blocher and Gulati's challenge. George Stigler notoriously obscured *The Problem of Social Cost's* real thrust by assuming away the article's central point, namely the proviso about no transaction costs.<sup>3</sup> Hence the Coase Theorem, something that Coase himself saw as mostly beside the point. As Coase patiently tried to explain over the next fifty years, it was exactly transaction costs, embedded in institutional relationships, in which he was interested.<sup>4</sup>

Coase focused early in his scholarship on the make-or-buy decision, namely the choice of an economic actor to organize internal production of an input rather than buy it from the market.<sup>5</sup> The fact that firms do make rather than buy indicates that some kinds of internal structures—institutional design, if you will—are superior to free markets. This indicates that under some conditions managed cooperation (such as hierarchical administration) entails lesser costs and greater benefits than market transactions. This seemingly obvious but deeply subtle insight served as the springboard for a large and celebrated literature on institutions as substitutes for classic market transactions.<sup>6</sup>

So, Coase might respond to Blocher and Gulati, “you have a very interesting point, but what explains the transaction costs?” Rather than assuming them away, what institutional arrangements (firms, in the most general sense possible) might we plausibly design to minimize them? Ultimately, Coase would say, we desire a world where the

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3. GEORGE J. STIGLER, *THE THEORY OF PRICE* 110–14 (3d ed. 1966).

4. R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 174 (1988).

5. R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 395 (1937) (“[A] firm will tend to expand until the costs of organising an extra transaction within the firm become equal to the costs of carrying out the same transaction by means of an exchange on the open market or the costs of organising in another firm.”).

6. To focus only on the Nobel laureates, see ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985); Herbert A. Simon, *Human Nature in Politics: The Dialogue of Psychology with Political Science*, 79 *AM. POL. SCI. REV.* 293 (1985).

benefits of enhanced bargaining over territorial entitlements exceed the cost of creating the institutional arrangements that make adjustments in entitlements possible. So what institutions are we talking about and in what ways would creating and maintaining them be costly? When should sovereigns buy territory in market transactions, and when should institutional arrangements that substitute for markets make boundaries?

### I. MARKETS FOR SOVEREIGNTY AND AGENCY COSTS

For those with a traditional economics bent, one begins by thinking of institutional arrangements as a response to agency problems under conditions of asymmetric information.<sup>7</sup> Agency problems arise when an agent has different incentives from its principal, for example a desire to embezzle funds or shirk duties. Information asymmetry exists whenever one party (here the principal) cannot at a reasonable cost obtain adequate knowledge of the agent's activities. With respect to territory, an agency problem that immediately comes to mind is the pesky relationship between people and their government. To the extent people live on territory, any disposition of that territory involves dealing with those people. The government that does the disposing will take the interests of those people into account to the extent that institutional arrangements link the people (the principal) to the government (their agent).

But agency relationships are imperfect. The government might prefer to ignore their wishes. The people may have little or no ability directly to hold the government accountable (in the modern era, typically through voting). They may instead have only the capacity to impose indirect consequences (ranging from civil disobedience to armed resistance), an especially costly, and often wasteful, course of conduct. Even with accountability, information-asymmetry problems will ensure less-than-complete compliance of the agent with the principal's interest, absent a preexisting perfect alignment of the interests of both found nowhere in the world as we know it.

This observation indicates that we should look first for sovereign transfers of territory in situations where the government faces few if any constraints regarding the preferences of the inhabitants. Old-fashioned imperialism, where the human subjects of the imperial

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7. The classic discussion is Michael Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). References to bonding and monitoring in particular are derived from this article.

power were regarded as lacking any say in the disposition of their lives, seems an especially good candidate. To use the examples offered by Blocher and Gulati, it is no surprise that the United States was able to buy Louisiana from France, Florida from Spain, Alyeska from Russia, and the Virgin Islands from Denmark.<sup>8</sup> The decision of the British to adhere to the terms of its lease of Hong Kong, resulting in a transfer of the territory to Chinese sovereignty without a plebiscite of the affected people, is a more modern instance.<sup>9</sup> In every case, the preferences of the indigenous population may or may not have been aligned with the transacting sovereign, but we can be confident that their views did not matter. Their former sovereign had no interest in the preferences of colonized people, and the United States and China, as acquirers, gave no voice to the population.

More generally, one can observe that before democratic republics came onto the scene, transactions in territory were not that costly and relatively common. Sometimes cash-strapped sovereigns would settle territorial disputes for money, however their subjects felt about the matter. Thus Samuel Pepys refers to the “selling” of Dunkirk by Charles II to Louis XIV in 1662, a transaction that provoked some popular discontent but not enough to deter the King.<sup>10</sup> Otherwise, sovereigns might acquire or lose land through ritualized and limited warfare that left the occupants (or at least their economic capacity) largely unscathed. The career of Frederick the Great serves as an example.<sup>11</sup> Compared to outright sales conforming to the Alyeska model, Frederick’s “purchases” may seem wasteful. But one thing that economics teaches us is always to ask, “compared to what?” On a continuum between a pure market transaction and total warfare, these events lean toward the former. And one reason that violence and social disruption could be contained was that the subjects of the territorial transfers—the people on the ground—lacked many alternatives to acquiescence. They could exit—pull up stakes and emigrate to somewhere else in Europe or to America—but they lacked the capacity to impose significant costs on the rulers and had no direct voice in the

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8. Joseph Blocher & Mitu Gulati, *A Market for Sovereign Control*, 66 DUKE L.J. 797, 808 (2017).

9. *Id.* at 833–34.

10. 4 SAMUEL PEPYS, THE DIARY OF SAMUEL PEPYS 344 (Henry R. Wheatley ed., 1893) (“I am sorry to hear that the news of the selling of Dunkirk is taken so generally ill, as I find it is among the merchants[.]”).

11. See TIM BLANNING, *FREDERICK THE GREAT* xxviii (2016).

outcome.<sup>12</sup> Contrast the territorial adjustments achieved by Otto von Bismarck in the Franco-Prussian War. He changed sovereign boundaries, not through outright purchase but through constrained use of force not too different in scale from that of Frederick the Great. One of the “sellers,” however, was Republican France, whose nationals had a say in their governance.<sup>13</sup> The running sore that Alsace-Lorraine became, or more precisely popular resentment in democratic republics (France before 1918, and Germany from 1918 to 1940, after it had surrendered the territory back to France) toward that territorial disposition, generated extremely high transaction costs in the form of passions that twice paved the way for total war.

What this comparison suggests is the existence of a tradeoff between low transaction costs in the transfer of territory between states, on the one hand, and the institutional relationship between governments and subjects, on the other. Relationships that correspond with contemporary human-rights ideals—think of the supposed human right to democracy<sup>14</sup>—complicate the ability of a government to make territorial adjustments that might maximize the joint welfare of the states involved.

## II. DEMOCRACY AS A TRANSACTION COST AND THE INSTITUTIONAL ALTERNATIVES

Bloch and Gulati, to be sure, embrace this ideal of democratic group preferences. They want to raise the cost of territorial transfers by giving a say to the affected inhabitants. Under their regime, the United Kingdom no longer can come to an accommodation with Argentina to turn the Falklands into the Malvinas without the consent of the small local population. Home-country popular solidarity with the current inhabitants of the Falklands already limits what the United Kingdom can do, but in Blocher and Gulati’s world the United

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12. See ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* 4 (1970).

13. To be precise, the France that entered that war was Louis Napoleon’s Empire, but the one that had to live with its immediate consequences was the Republic.

14. For advocacy of such an international human right, see Stephen J. Schnably, *Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal*, 62 U. MIAMI L. REV. 417, 438 (2008). For skepticism, see John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1741–42 (2009).

Kingdom would have to clear another hurdle in the form of a local referendum.<sup>15</sup>

Blocher and Gulati see this impediment to otherwise optimal transactions as necessary in light of modern international law's orientation toward humanity rather than sovereigns.<sup>16</sup> What they overlook, however, are two institutional problems. First, it is far from clear that referenda are good mechanisms for uncovering democratic preferences. Demagoguery and fraud might subvert the meaning of the vote, which at best reflects a transient preference of the not-necessarily-representative subset of the population that bothers to vote. One might think of the British referendum on E.U. membership in these terms.

Second, even if referenda do a tolerably good job of uncovering group preferences, they present other problems. First, they do not fully reflect intensity of preferences, and thus subject passionate minorities to the dominion of the blasé majority. Unlike legislative institutions that permit logrolling and similar contracting, they treat all voters alike. Second, factors well studied by the field of public choice, a subset of political economy, indicate the possibility that assertions of local identity could block generally desirable transactions.

Let's stay with the Falklands example. One of the main insights of modern public-choice scholarship is that small and homogenous groups face relatively lower organizing costs. This feature allows such groups to exploit opportunities to extract rents to the detriment of the general welfare.<sup>17</sup> Falklands' polity seems to fit perfectly. Allowing them to veto any deal between the United Kingdom and Argentina would create a very expensive entitlement.

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15. Blocher & Gulati, *supra* note 8, at 817 (“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.”). As John Coyle notes, the British government faces an audience constraint. John F. Coyle, *Friendly and Hostile Deals in the Market for Sovereign Control: A Response to Professors Blocher and Gulati*, 66 DUKE L.J. ONLINE 37, 40–43 (2017).

16. Blocher & Gulati, *supra* note 8, at 831–32; see Anne Peters, *Humanity as the  $\alpha$  and  $\Omega$  of Sovereignty*, 20 EUR. J. INT'L L. 513 (2009).

17. VILFREDO PARETO, *MANUAL OF POLITICAL ECONOMY* 379 (Ann S. Schwier & Alfred N. Page eds., Ann S. Schwier trans., 1971) (1927) (“If a certain measure A is the cause of the loss of one franc to each of a thousand persons, and of a thousand franc gain to one individual . . . it is likely that, in the end, the person who is attempting to secure the thousand francs *via* A will be successful.”); see DENNIS C. MUELLER, *PUBLIC CHOICE* III 238–42 (2003); Anne O. Krueger, *Government, Trade, and Economic Integration*, 82 AM. ECON. REV. 109, 110–11 (1992).

### III. MARKET FAILURE IN DEMOCRATIC CHOICES OF SOVEREIGNTY

This example makes a broader point: one never can talk about markets without considering the possibility of market failure. The structure of the Falklands-United Kingdom-Argentina market has obvious flaws, which might point us in the direction of alternative approaches. Rather than assign to the indigenous population a tradable entitlement (here a blocking right), perhaps one should instead consider as a substitute some mixture of bonding and monitoring (to use the terminology of financial economics).

For example, one might guarantee the indigenous inhabitants certain core rights, including automatic citizenship in the transferring country (doubtlessly coupled with subsidies to ease the adjustment). The transferring state also might create—and the receiving state might accede to—a monitoring mechanism to ensure protection of those who choose to remain in the transferred territory. The Treaty of Westphalia employed this feature, inasmuch as the signatories created a right of the affected sovereigns to intervene on behalf of minority co-religionists in the territory of their adversaries.<sup>18</sup> A treaty between Argentina and the United Kingdom similarly might provide the British with an ongoing role to look after the remaining Falkland Islanders in the Malvinas.

One might imagine other structures, but these simple proposals should suffice for our purposes. They illustrate strategies for the creation of substitutes to the veto right that Blocher and Gulati would give to the affected population. The basic economic point is that, because of imperfect market structure, it makes little sense to endow the Falkland Islanders with an entitlement that they hypothetically could trade for these protections. As Coase teaches us, the transaction costs engendered by creation of the entitlement that Blocher and Gulati envision may be prohibitive.

### IV. INSTITUTIONAL PREDICATES TO A MARKET IN SOVEREIGNTY

Blocher and Gulati propose not only a humanity-based right to veto boundary changes, but also one to force them. They propose—to use the terminology of Guido Calabresi and Douglas Melamed—to convert the principle of territorial integrity from a property rule into a

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18. STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 73–75, 77–83 (1999).

liability rule.<sup>19</sup> Under specified circumstances and subject to not-yet-identified institutional arrangements, local populations would have the power to compel sovereigns to surrender territory in return for compensation. Blocher and Gulati regard widespread abuse and exclusion of discrete population groups as a basis for an opening bid in a territorial adjustment process. To use the terminology of finance, they would endow an aggrieved minority with a call right to buy local sovereignty, with the strike price subject to determination by some mechanism. In the language of Albert Hirschman's groundbreaking work, they would create stronger exit entitlements as a substitute for weak voice powers.<sup>20</sup>

The merit of the proposal turns on the design of the mechanism that will adjudicate such claims. The property rule-liability rule distinction emerged as a way of analyzing private law in societies with strong and effective legal institutions.<sup>21</sup> Domestic courts in most rich countries can, at a relatively low cost, impose sanctions to protect property entitlements and assess damages to enforce liability rights. Where are the counterparts in international law to respected and effective domestic courts? The short answer is these mechanisms do not currently exist. One would have to construct some kind of institution to supervise the transfer-and-compensation mechanism. Many questions immediately present themselves.

First, who will do the designing? Do affected states get a veto, as they would if this mechanism were to rest on treaty law? Or does an international body such as the United Nations Security Council get to make the call? May states instead design a mechanism unilaterally? Blocher and Gulati seem to support the involvement of one particular U.N. body, the International Court of Justice (ICJ). But at present that

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19. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

20. See Hirschman, *supra* note 12, at 129–31.

21. Calabresi & Melamed, *supra* note 19, at 1089–93. Even earlier, the idea of self-assessment of the value of property, motivated by providing a call right to the world as the assessed value, appeared as a mechanism for rationalizing property taxation. Arnold C. Harberger, *Issues of Tax Reform for Latin America*, in FISCAL POLICY FOR ECONOMIC GROWTH IN LATIN AMERICA 116–21 (Joint Tax Program of the Organization of American States ed., 1965). For development and extension of the concept, see Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771, 771 (1982); Eric A. Posner & E. Glen Weyl, *Property Is Another Name for Monopoly: Facilitating Efficient Bargaining with Partial Common Ownership of Spectrum, Corporations, and Land* (Coase-Sandor Inst. for L. & Econ. Working Paper No. 772, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2818494](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818494) [<https://perma.cc/RBH4-RRS8>].

institution exercises jurisdiction only by consent, given in advance by treaty or declaration, or post hoc, once a dispute has arisen.<sup>22</sup> Do the authors envision states with restive, perhaps oppressed minorities consenting in advance to the ICJ's disposition of these problems? Under what conditions would it be plausible to expect such consent?

Perhaps their optimism is motivated by scholarship indicating that the ICJ has a decent (though far from perfect) record in resolving territorial disputes to the satisfaction of the parties.<sup>23</sup> The cases that induced this satisfaction, however, involved economically valuable but uninhabited offshore claims. And as the recent China-Philippines dispute shows, even states that agree in advance to third-party arbitration (here the Permanent Court of International Arbitration, not the ICJ, but the difference is insignificant) over unpopulated territory may walk away from a process that is not heading their way.<sup>24</sup> There is simply no evidence that states would trust the ICJ to supervise and set a price for secessions or could be induced to do so.

Alternatively, states might fashion arbitration tribunals as needed. International law has many examples of states creating an ad hoc tribunal to address a dispute that already has arisen.<sup>25</sup> States might even agree in advance to construct a mechanism for running ad hoc arbitration, perhaps along the line of the World Bank's International Centre for Settlement of Investment Disputes (ICSID) facility, without conveying any jurisdiction *ex ante* to the mechanism.<sup>26</sup> The ICSID treaty does this: the treaty establishes an arbitral mechanism, but it takes a separate treaty to trigger that mechanism's jurisdiction and the relevant substantive obligations.

There is some evidence that ad hoc arbitration does a better job than permanent tribunals of inducing sovereigns to submit their

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22. Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 1060, 3 Bevens 1179, 1186. The statement in text does not comprise the advisory-opinion jurisdiction of the ICJ, *id.* arts. 65–68, as its exercise does not produce binding judgments.

23. Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1319–22 (2004).

24. Republic of Philippines v. People's Republic of China, PCA Case No. 2013-19, Award (Perm. Ct. Arb. July 12, 2016), <http://www.pccases.com/pccadocs/PH-CN%20-%2020160712%20-%20Award.pdf> [<https://perma.cc/6JBY-KAZ3>].

25. The United States has agreed to many of these, from the Jay Treaty's Commission to the Iran-U.S. Claims Tribunal.

26. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

disputes to their competence and to comply with the resulting award.<sup>27</sup> From the perspective of states, ad hoc arbitration has the benefit, compared to a permanent tribunal such as the ICJ, of greater control over the selection of the arbiters, and thus over the range of possible outcomes.<sup>28</sup> Most of our experience with this mechanism, however, involves claims for money damages rather than in-kind awards.<sup>29</sup> It would take a leap of faith to believe that a significant number of states might consent to disposing of restive minorities and the land they occupy in this fashion.

Perhaps instead Blocher and Gulati anticipate a nonconsensual means to compel states to treat with aggrieved populations with a view to territorial separation. The U.N. Security Council, for example, could impose this outcome, as long as the permanent members go along. One might note, however, the recent Declaration of the Russian and Chinese governments on the promotion of international law.<sup>30</sup> They state, among other things:

The Russian Federation and the People's Republic of China fully support the principle of non-intervention in the internal or external affairs of States, and condemn as a violation of this principle any interference by States in the internal affairs of other States with the aim of forging change of legitimate governments.<sup>31</sup>

This pronouncement underlines the obvious: neither China nor Russia, two permanent members of the U.N. Security Council with unlimited veto power, are likely to permit the creation of any mechanism that will arbitrate secessions, especially ones based on the grievances of minority populations.

One might respond that Russia, notwithstanding its professed commitment to non-intervention and sovereign integrity, has

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27. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 51–54 (2005).

28. Paul B. Stephan, *The Political Economy of Judicial Production of International Law*, in THE POLITICAL ECONOMY OF INTERNATIONAL LAW: A EUROPEAN PERSPECTIVE 202, 209–10, 225–26 (Alberta Fabbriotti ed., 2016).

29. A rare, if not unique, instance of ad hoc arbitration that both determined international boundaries and ordered monetary reparations was the Eritrea-Ethiopia dispute. *See generally* Eritrea v. Ethiopia, Decision Regarding Delimitation of the Border Between Eritrea and Ethiopia, 25 REPTS. INT'L ARB. AWARDS 83 (2002).

30. MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FED'N, THE DECLARATION OF THE RUSSIAN FEDERATION AND THE PEOPLE'S REPUBLIC OF CHINA ON THE PROMOTION OF INTERNATIONAL LAW (Jun 25, 2016), [http://www.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/2331698](http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698) [<https://perma.cc/B3VR-AFCY>].

31. *Id.*

cheerfully embraced secession and territorial transfers in its own favor in Abkhazia and Crimea. In the case of Crimea, the relevant legal instruments cite ethno-nationalism and human rights as justifications for the violation of Ukraine's sovereignty.<sup>32</sup> What these examples show, however, is opportunistic flexibility, not some broader commitment to peaceful settlement of disputes concerning oppressed minorities. It remains inconceivable that the current Russian regime would ever accede to a structure in which the Chechens, for example, might gain advantage, any more than China would give even indirect support for mechanisms that might apply to Tibetans or Uighurs.

This leaves a potential rule of customary international law that states might apply on a self-judging basis, which, as institutional arrangements go, is the worst. It gives aggressor states an excuse to ignore the principle of territorial integrity when their interests so move them. The German Reich, we should never forget, invoked the protection of German populations as its rationale for invading Austria, Czechoslovakia, and Poland. Russia did the same when it absorbed Crimea in 2014 and has threatened to intervene in Latvia and Estonia for similar reasons. Self-judging intervention on behalf of supposedly beleaguered national minorities has a lot to answer for as a principle.

## V. SYSTEMIC EXTERNALITIES IN MARKETS FOR SOVEREIGNTY

There remains another problem with the proposed liability rule, one that rests on a different kind of market failure. Blocher and Gulati begin their argument by assuming the validity of the principle of national self-determination outside of the decolonization process.<sup>33</sup> In doing so, they link the concept of ethnic-group identity to particular

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32. Angela Di Gregorio, *Treaty Between the Russian Federation and the Republic of Crimea on the Admission to the Russian Federation of the Republic of Crimea and the Formation of New Components Within the Russian Federation*, DIPEO (Mar. 19, 2014), <http://users2.unimi.it/dirpubbesteuropa/2014/03/treaty-between-the-russian-federation-and-the-republic-of-crimea-on-the-admission-to-the-russian-federation-of-the-republic-of-crimea-and-the-formation-of-new-components-within-the-russian-federation> [https://perma.cc/72N3-CPMJ] (referring in the preamble to “the historic commonality of their peoples and taking account of the ties established between them” as well as “all peoples have an inalienable right to determine their political status freely and without outside interference and to implement their own economic, social and cultural development” and “the common will of their peoples, indissolubly linked by a common historic destiny”).

Out of perhaps an excess of caution, I should disclose that I am taking part in an international arbitration on behalf of Ukrainian investors in the territory absorbed by Russia. One should discount my references to these events accordingly.

33. Blocher & Gulati, *supra* note 8, at 811–13.

international-law entitlements. In particular, their liability rule privileges ethnic minorities by bestowing on them a capacity to trigger a territorial transfer, what I have described as a call right. I assume, although they do not say so expressly, that the same right might extend to other groups identified by other means, such as religious commitment.<sup>34</sup>

The market failure here is one of externalities produced by the systemic effect of the transactions encouraged by the proposed mechanism. Put simply, I worry that the liability rule will lead to more ethnically or culturally concentrated states, rather than greater multiculturalism and ethnic pluralism within states. Ethnic or cultural secessionists might either carve out their own state, both reducing the pluralism of the state suffering the secession and concentrating the ethnic homogeneity of the new state, or move into a preexisting state, still reducing pluralism in the seceded-from state but also concentrating homogeneity in the seceded-to state. The Crimea-to-Russia example illustrates the latter phenomenon: Ukraine lost some of its ethnic-Russian population while the Russian Federation became more Russian as a result of the transaction.

These developments might produce threats to international peace and security that would not be limited to the parties to the sovereignty-transfer transaction. First, the effort to achieve greater homogeneity threatens existing international arrangements. The German Reich's efforts during the 1930s to bring all Germans within the boundaries of the German state remains the paramount example, but others exist. The partition of India at the end of the Raj produced massive loss of life.<sup>35</sup> Here ethnicity was bound up with religion, but it is not clear which group identity did the dirty work. Perhaps murders would have occurred on the same scale if coexistence had been tried first, but one can wonder. The Balkans wars of the 1990s also illustrate the terrible costs of forming ethnically or culturally concentrated states out of multinational sovereignties.

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34. What distinguishes the Serbs from the Croats, the Irish Republicans from the Loyalists, Bosniaks from the Bosnian Serbs, and Shiites from Sunnis in Iraq and Syria, for example, are religious and cultural, rather than ethnic, differences. At earlier moments in history, such as the Thirty Year War, ethnic identity simply made no sense, while creedal commitments were matters of life and death.

35. A precise number for the deaths resulting from communal violence occasioned by partition is deeply contested. Almost all agree that at least several hundred thousand people were murdered, and estimates of a million or more are not implausible. *See generally* PARTITION: THE LONG SHADOW (Urvashi Butalia ed., 2015).

Second, once formed, states based on ethnic identity face particular insecurities that can aggravate international tensions. Because complete ethnic, much less cultural, purity is unattainable, minorities typically remain within the ethnic state and serve as a source of dissent and anxiety. Moreover, secession normally will leave the oppressed group and their oppressors as contiguous states. This situation is fraught with the potential for future conflicts.

One might counter this argument by asserting that ethnically or culturally homogenous groups provide a more supportive and secure environment for their members, and that states with calmer, more fulfilled subjects pose less of a threat to peace. In extreme cases, states based on homogeneity provide safe havens to populations under dire threat, perhaps even at risk of genocide. Allowed to live with those with whom they have close cultural affinities, the argument might go, the population of such states will find greater opportunities to flourish and enjoy lives free from invidious discrimination. Fulfilled at home, they will live comfortably with their neighbors. At least they will not be murdered en masse, setting off a spiral of violence.

We are speaking here, of course, in gross generalizations. Still, the counterargument seems problematic, at least in many instances. First, it assumes that ethnic or cultural identity itself is a secure and stable thing, rather than a deeply contingent social construction that often produces deep anxiety among those seeking to cling to it. Second, it ignores the possibility of pacific socialization that pluralist communities may promote.

Many important ethnic and cultural identities are sufficiently unstable to pose serious problems for those who would like to find them meaningful. Germans in the first half of the twentieth century provide an apt example: many failed to live up to the blond, blue-eyed ideal, not the least the Führer himself. The Nazis planned breeding programs to produce German prototypes who would inspire the German masses, who themselves mostly did not live up to the standard.<sup>36</sup> Or consider the Serbs and the Croats, who claim distinct and hostile ethnicities even though, for some observers, only religion and alphabet distinguish them. Finally, recall the influence of skin tone as a means of social differentiation among people of color.<sup>37</sup> The

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36. See Kjersti Ericsson, *Introduction*, in *CHILDREN OF WORLD WAR II: THE HIDDEN ENEMY LEGACY* 4–7 (Kjersti Ericsson & Eva Simonsen eds., 2005).

37. See e.g., RONALD E. HALL, *AN HISTORICAL ANALYSIS OF SKIN COLOR DISCRIMINATION IN AMERICA* (2010).

human propensity to create group identity seems matched by the capacity to differentiate and divide.

The argument for ethnically or religiously homogenous states confuses a short-term imperative to create a refuge to forestall genocide with a long-term justification for sovereign boundaries. One may concede the necessity of the former while rejecting the latter. The confusion, however, is dangerous. An unfortunate tendency of contemporary practice is to let solutions to immediate problems become entrenched features of the international landscape. The right to trigger a sovereignty transfer that Blocher and Gulati advocate seems a perfect example. It runs the risk of promoting transactions that can generate systemic costs that could fall on those who would not be parties to the transaction. These externalities provide a reason to resist this particular proposal, however attractive the Blocher and Gulati project otherwise seems.

#### CONCLUSION

This Response to Blocher and Gulati seeks to identify areas for further work and to put limits on some of their proposals, but not to stifle the fundamental ingenuity of their Article. They raise the Coasean question in an area where few, if any, scholars have done so. They seek to open up the international system to a mechanism that may save lives and reduce misery. They offer yet another reminder of the problematic nature of modern sovereignty in a world of global transactions and a wide range of non-national identities. All of this is good and useful.

It is not the authors' fault that they leave implementation of their project for later development. Yet I worry about the opportunistic exploitation of a valuable concept in areas where it should not apply, especially as the article itself does not identify such limits. Russia's absorption of Crimea comes to mind. Whatever one might think of this transaction, one should hope that the Russian Foreign Ministry does not start invoking Blocher and Gulati as justification for it. This Response seeks to respond in advance of such claims.

More broadly, this Response unlinks the idea of Coasean bargaining over sovereignty from the privileging of ethnic or religious identity in international law. This connection is supplementary, rather than fundamental, to Blocher and Gulati's main argument. There are many ways to think about a market for sovereignty and the need to

protect local minorities without conflating these two problems. I would embrace their proposal but oppose this particular application.