

## CINDERELLA SOVEREIGNTY

ANNA GELPERN<sup>†</sup>

### ABSTRACT

*The Blocher-Gulati critique of the barriers to secession under public international law is insightful and thought provoking, an important contribution in its own right. I wish it had not been eclipsed by the authors' clever and provocative fix: turning sovereignty into a tradable commodity. I suspect that this fix would bring about more suffering than the status quo for two reasons. First, a market for sovereign control is unlikely to be a market in any meaningful sense. Therefore, trading sovereignty would not discipline oppressors. Second, should something like a real market materialize, it could diminish the incentives for states to treat their populations better just as plausibly as it could improve them. Distant empires could find it easier to traffic in oppressed people and territories, which would pass from state to state as their masters lose interest. A class of marginal client statelets would grow, endowed with a poor stepchild of sovereignty, which would leave their people defenseless and voiceless.*

### INTRODUCTION

Are international lawyers too squeamish to let market forces save lives? This is the challenge at the heart of *A Market for Sovereign Control*.<sup>1</sup> In their article, which is the centerpiece of a larger body of

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<sup>†</sup> Professor, Georgetown University Law Center. I am grateful to Joseph Blocher and Mitu Gulati for encouraging this thought experiment and for their helpful comments, and to Samuel Bolam, Alexander Dunn, Alexander Severance, and Emma Chapman for excellent research assistance. I owe special thanks to Marilyn Raisch of the Georgetown Law Library for invaluable research advice.

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

work, Professors Joseph Blocher and Mitu Gulati observe that people suffer and die as a consequence of public international law's heavy presumption in favor of territorial integrity for existing states, even in the face of humanitarian crises.<sup>2</sup> At best, this presumption might be overcome when a state's government heinously abuses some of its people.<sup>3</sup> If the abuse of an ethnic enclave is heinous enough, it might create an opening for remedial secession.<sup>4</sup> However, the primacy of territorial integrity is so entrenched that even unspeakable human suffering—"genocide, war crimes, ethnic cleansing and crimes against humanity"—usually draws only the most cautious of challenges.<sup>5</sup>

The authors argue that there would be less suffering if international law let the abused people pay to leave the abuser-state under conditions that fall short of the virtually unattainable standard for remedial secession.<sup>6</sup> The abused could either strike out on their own as a new sovereign state, or sell themselves to the highest acceptable

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2. *Id.* at 803.

3. The Supreme Court of Canada in *Reference re Secession of Quebec*, [1998] S.C.R. 217 thus declared that "international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states," and that the right to unilateral secession "arises in only the most extreme of cases and, even then, under carefully defined circumstances." *Id.* at 280–82.

In the 2006 Ahtisaari Plan, adopted by the United Nations Security Council to address ethnic conflict in Kosovo, the province would have a measure of autonomy short of statehood, in recognition of Serbia's continuing territorial integrity claims. U.N. Secretary-General, Letter dated Mar. 26, 2007 from the Secretary-General addressed to the President of the Security Council, U.N. Doc S/2007/168 (Mar. 26, 2007). As late as 2012, even as Kosovo gained more trappings of a sovereign state, Serbia ensured that Kosovo's international legal status came with an asterisk. *Serbia*, LIDIJA BASTA FLEINER & VLADIMIR DJERIC, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2012) (ebook); see also *Responsibility To Protect: The Lessons of Libya*, ECONOMIST (May 19, 2011), <http://www.economist.com/node/18709571> [<https://perma.cc/4JSH-864C>] (highlighting tensions between protecting human rights and territorial integrity).

4. See U.N. Secretary-General, Letter, *supra* note 3.

5. In the 2005 World Summit Outcome Document, world leaders at the United Nations accepted in paragraph 139 that they "are prepared to take collective action . . . on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity." G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 139 (Oct. 24, 2005). Security Council Resolution 1674 of April, 2006 reaffirmed "the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity." S.C. Res. 1674, ¶ 4 (Apr. 28, 2006).

6. The authors use a too-sterile term, "welfare-enhancing border changes," for their goal of territorial arrangements that kill, torture, and maim fewer people. Blocher & Gulati, *supra* note 1, at 800.

bidder, joining another state that would adopt them as its own. The rule would shift from property (the abused belong to the abuser) to liability (the abused can walk away, but must pay the abuser).<sup>7</sup> They say that the new rule would foster a market for sovereign control,<sup>8</sup> which would create incentives for governments to abuse less, so that fewer people would suffer under oppressive rule and die fighting to escape.

The authors rightly highlight the human costs of the prevailing legal regime.<sup>9</sup> Any presumption-based regime for secession would either condone more suffering or more political instability than most would prefer. In today's world, the abused people are bound to stay in their home state despite extreme abuse; exit is truly a remedy of last resort. If the presumption were flipped, exit might turn into a remedy of first resort. Such a binary structure seems especially problematic in a world where the standards for ill-treatment are evolving and vigorously contested.<sup>10</sup> It is not a comfortable space for line drawing.

The Blocher-Gulati critique is insightful and thought provoking, an important contribution in its own right. I wish it had not been eclipsed by the authors' clever and provocative fix: turning sovereignty into a tradable commodity. I suspect that this fix would bring about more suffering than the status quo for two reasons. First, a market for sovereign control is unlikely to be a market in any meaningful sense. Therefore, trading sovereignty would not discipline oppressors. Second, should something like a real market materialize, it could diminish the incentives for states to treat their populations better just

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7. *Id.* at 803. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (proposing a typology of entitlements).

8. In the authors' words, "[t]hrough there are fundamental differences, the idea of a market for sovereign control shares features with the market for corporate control." Blocher & Gulati, *supra* note 1, at 800 n.7. 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 against corporate law doctrines that favor entrenched management and impede acquisitions where the buyer is willing to pay a premium for corporate control); Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965) (arguing that antitrust law interfered with a competitive market in corporate control, blocking mergers that would improve management and benefit shareholders).

9. Blocher & Gulati, *supra* note 1, at 843.

10. See Press Release, General Assembly, Delegates Weigh Legal Merits of Responsibility To Protect Concept as General Assembly Concludes Debate, U.N. Press Release GA/10850 (July 28, 2009) (citing the statements made by representatives at the Plenary Session of the Sixty-Third United Nations General Assembly discussing various interpretations of the responsibility to protect, which can come in tension with states' territorial integrity).

as plausibly as it could improve them. Distant empires could find it easier to traffic in oppressed people and territories, which would pass from state to state as their masters lose interest. A class of marginal client statelets would grow, endowed with a poor stepchild of sovereignty, which would leave their people defenseless and voiceless.

Here is the crux of my disagreement with the authors: they see the world as already full to capacity with poor stepchildren, and worry that the law would stand in the way of that one lucky waif—Cinderella Sovereign—who might otherwise be rescued by Prince Charming and find a happy home in his kingdom. If Prince Charming shows up on Cinderella Sovereign's doorstep, glass slipper in hand, ready to pay ransom to her evil stepmother, why should the law keep them apart? It should not and, as other commentators have pointed out, it does not.<sup>11</sup> The authors add little to the existing toolkit: at most, Cinderella would gain the legal right to elope when the stepmother would not let go at any price. The cost of this potential benefit to Cinderella is borne by the international system, which risks producing many more orphans than princesses under the Blocher-Gulati legal regime. The authors appear to assume implicitly that better behavior is the oppressor-state's only plausible response to the risk of losing territory in a market for sovereign control. They do not consider the possibility that the parent state would become more oppressive to push Cinderella out or to raise the price of her freedom. Furthermore, because the authors' account ends with Cinderella and Prince Charming living happily ever after, they do not address the possibility of repeat trades, or trafficking in impaired sovereignty, once they make it easier for abusive parent states to raise revenue off secession.

In sum, the authors identify a real doctrinal gap and launch an important conversation about solving an urgent humanitarian problem. However, their preferred solution hinges on a misplaced market analogy and is likely to fail on its own terms. Genuine sovereignty is most likely to emerge in non-market settings; a real market could bring about impaired sovereignty. In the remainder of this Response, I begin by defining the problem the authors seek to address, and the shared assumptions underlying their argument and my

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11. See, e.g., 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, 45–48 (2017) (highlighting that consensual transfers of territory are permissible, and do take place, under the prevailing international legal regime). In other words, if the stepmother could be bought off, she would take the money and let the waif go with the prince. Conversely, Coyle points out that Blocher and Gulati do not help Cinderella enforce her right to walk away from an unwilling stepmother.

response, in Part I. From these assumptions, Parts II and III examine my two principal concerns with the proposal: that a market for sovereign control would not be a market, and that, if it were a market, it would bring about more suffering and less robust sovereignty for the very people the authors want to help. Part II describes perverse incentives for parents and acquirers in cases where a territory secedes from one state to join another. Part III considers an independence scenario, with no acquiring state, and further elaborates on the attributes of “Cinderella Sovereignty” that could become more prevalent in a market for sovereign control.

### I. THE TASK AND THE ASSUMPTIONS

It would be wrong to charge the authors with failing to solve the very problems that they do not attempt to solve, just as it would not do to assume a wildly different institutional setting from the one in which they situate their proposal. In an effort to avoid such pitfalls, I summarize my understanding of the task that Blocher and Gulati set for themselves, and some of the key assumptions embedded in their argument.

*A Market for Sovereign Control* addresses the problem of an ethnically or culturally distinct group of people inhabiting a defined geographic territory.<sup>12</sup> The authors do not take on the problems of bad governments or oppressed people in general. The seceding subset of a state’s population must be identifiable and reachable in order to ascertain its preferences and confer new citizenship.<sup>13</sup> The territory to be transferred—along with its assets, such as natural resources—would need to be demarcated and valued, and its relationship to the oppressed people would need to be established.<sup>14</sup> The parent entity from which the people would secede and to which they might owe compensation must be a state, not an oppressive tyrant acting in his personal capacity.<sup>15</sup> It follows that the Blocher-Gulati proposal would fit neither Syria’s rebels fighting to overthrow Bashar Al Assad, nor the widely dispersed Roma people.<sup>16</sup> It does not appear to address

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12. Blocher & Gulati, *supra* note 1, at 800-01.

13. *Id.* at 817.

14. *Id.* at 818–20.

15. *See id.* at 818 (noting that the entitlement to compensation is with the parent state).

16. Blocher & Gulati, *supra* note 1, at 841–42. For an account of the war in Syria, see generally CHRISTOPHER PHILLIPS, *THE BATTLE FOR SYRIA: INTERNATIONAL RIVALRY IN THE NEW MIDDLE EAST* (2016). Despite its ethnic dimensions and the rebels’ intermittent control of

ancestral claims to land, where the people no longer occupy the territory that might be rightfully theirs—not even in well-documented cases of wholesale forcible population transfers, such as that endured by some Native American nations, or the Crimean Tatars.<sup>17</sup> On the other hand, it might aid the Kurds in Iraq, or the Russians concentrated in parts of eastern Ukraine.<sup>18</sup>

Like the authors, I generally bracket issues related to adjudication. For example, I assume that some international tribunal could determine the extent of oppression, the will of the oppressed people, the appropriate price of their sovereignty, and any other elements that might be necessary to apply the Blocher-Gulati secession doctrine.<sup>19</sup> While making this assumption, it is important to recognize that implementing the authors' proposal would require an elaborate regime of fact-finding, adjudication, monitoring, and enforcement beyond the current practice of the International Court of Justice, and that any forum charged with implementation would have to work much faster

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some territory, the Syrian conflict is not over secession, but rather an attempt to overthrow an oppressive government. *See, e.g.*, ELIZABETH FERRIS & KEMAL KIRICI, *THE CONSEQUENCES OF CHAOS: SYRIA'S HUMANITARIAN CRISIS AND THE FAILURE TO PROTECT* 1–33 (2016). On the Roma, see generally BECKY TAYLOR, *ANOTHER DARKNESS, ANOTHER DAWN: A HISTORY OF GYPSIES, ROMA AND TRAVELLERS* (2014).

17. *See* NORMAN M. NAIMARK, *FIRES OF HATRED: ETHNIC CLEANSING IN TWENTIETH-CENTURY EUROPE* 101–07 (2001) (describing the resettlement of Crimean Tatars); GREGORY D. SMITHERS, *THE CHEROKEE DIASPORA: AN INDIGENOUS HISTORY OF MIGRATION, RESETTLEMENT, AND IDENTITY* 93–114 (2015) (describing the resettlement of Native Americans).

18. For the history of Kurdish nationalism in Iraq and violence against ethnic Kurdish enclaves in the late twentieth century, see DAVID ROMANO, *KURDISH NATIONALIST MOVEMENT: OPPORTUNITY, MOBILIZATION, AND IDENTITY* 92–112 (2006). For discussions of more recent developments, see, for example, Bill Park, *Turkish-Kurdish Regional Government Relations after the U.S. Withdrawal from Iraq: Putting the Kurds on the Map?*, STRATEGIC STUD. INST., U.S. ARMY WAR C. 20–22, 35 (Mar. 2014), <https://permanent.access.gpo.gov/gpo47612/pub1190.pdf> [<https://perma.cc/C93N-MU5P>] and Loveday Morris, *How the Kurdish Independence Referendum Backfired Spectacularly*, WASH. POST (Oct. 20, 2017), [http://wapo.st/2ippR7m?tid=ss\\_mail&utm\\_term=.9987f8fabb94](http://wapo.st/2ippR7m?tid=ss_mail&utm_term=.9987f8fabb94) [<https://perma.cc/7PFR-ADM5>]. On the Russians in eastern Ukraine, see, for example, Sabra Ayres, *Residents in Eastern Ukraine Face Worst Fighting in Years in War with Russian-Backed Separatists*, L.A. TIMES (Feb. 15, 2017, 2:45 PM), <http://www.latimes.com/world/la-fg-east-ukraine-fighting-2017-story.html> [<https://perma.cc/KP85-B8EB>].

Paul Stephan has pointed out that this frame creates incentives to ethnic consolidation. Professor Paul B. Stephan, *Blocher, Gulati, and Coase: Making or Buying Sovereignty?*, 66 DUKE L.J. ONLINE 51, 62 (2017).

19. The norm-setting and fact-finding challenges echo the “odious debt” debate. A. Mechele Dickerson, *Insolvency Principles and the Odious Debt Doctrine: The Missing Link in the Debate*, 70 LAW & CONTEMP. PROBS. 53, 77 (2007); *see also* Symposium, *Odious Debts and State Corruption*, 70 LAW & CONTEMP. PROBS. 1 (2007).

than the current international norm.<sup>20</sup> A specialized tribunal with access to expert fact-finding therefore may be more appropriate than any existing forum; however, it is harder to start new institutions than to expand the remit of the old.<sup>21</sup> That said, the authors' proposal does not depend on forum particulars; for their purposes and mine, these particulars can wait.

In sum, Blocher, Gulati, and I assume an ascertainable and accessible cultural minority population currently occupying a defined parcel of territory within a parent state, and an international institution capable of adjudicating governance quality, consent of the population (including procedural elements), and the price of sovereignty. I also assume, as do the authors, that the enforcement challenge for their liability rule is comparable to any other under public international law.<sup>22</sup>

## II. THIN MARKETS AND OBSOLESCING BARGAINS: SOVEREIGN ACQUISITIONS

The market for sovereign control is meant to create and negotiate a space between parent states' rights to territorial integrity and peoples' rights to remedial secession. As the law currently stands, a parent holds its territory as property and can transfer it without the inhabitants' consent.<sup>23</sup> Meanwhile, the people of the territory can

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20. The average ICJ case takes four years to complete. *Questions and Answers About the International Court of Justice*, INT'L CT. OF JUST. 44 (2016), <http://www.icj-cij.org/70/pdf/24b.pdf> [<https://perma.cc/LJ7K-K52J>].

21. *Compare, e.g.*, Barbara Bean, *Law of the Sea*, AM. SOC'Y INT'L L. (Apr. 27, 2015), [https://www.asil.org/sites/default/files/ERG\\_LOS.pdf](https://www.asil.org/sites/default/files/ERG_LOS.pdf) [<https://perma.cc/3ECU-JFFX>] (discussing the decades-long process of negotiating the UN Convention on the Law of the Sea and establishing the International Tribunal for the Law of the Sea), with Karen J. Alter, *The Evolution of International Law and Courts*, in OXFORD HANDBOOK OF HISTORICAL INSTITUTIONALISM 590–610 (Orfeo Fioretos, Tulia G. Falletti & Adam Sheingate eds., 2016) (explaining the 9-year Uruguay Round of multilateral trade negotiations conducted under the auspices of the General Agreement on Tariffs and Trade that established the World Trade Organization).

22. Professor John Coyle highlights the challenge of enforcing non-consensual transfers of sovereignty against the parent state's objections. Coyle, *supra* note 11, at 37–49. Because Blocher and Gulati generally avoid the enforcement issue, I take it as their assumption that enforcement of their liability rule would rely on the existing machinery of public international law. To the extent the authors believe that their scheme would be more enforceable than your average international commitment owing to the market incentives baked into it or any other factors, their article would benefit from a more explicit argument to that effect.

23. *See, e.g.*, Paul R. Williams, *What Makes a State? Territory*, 106 AM. SOC'Y INT'L L. PROC. 449, 449 (2012); *cf.* Steven R. Fisher, *Towards "Never Again": Searching for a Right to Remedial Secession Under Extant International Law*, 22 BUFF. HUM. RTS. L. REV. 261, 274–75 (2015) (describing a decision by a League of Nations Commission of Rapporteurs that principles of

secede (if at all) only in response to extreme abuse at the hands of the parent.<sup>24</sup> Blocher and Gulati sensibly argue that this binary rule preempts potentially welfare-enhancing outcomes where the abuse falls short of extreme.<sup>25</sup> To fix the problem, they would replace the binary rule with a three-bucket structure: in the *first* bucket, there is no oppression, but the parent or the minority wants to split up, and the two sides negotiate a mutually acceptable price;<sup>26</sup> in the *second*, the parent is “oppressive or genocidal,” so naturally the minority wants to secede and may be able to do so under existing rules;<sup>27</sup> in the *third*, the parent merely “denies representation or equal rights,” which would not be enough to justify secession today.<sup>28</sup> The third bucket is where market forces would determine the price of sovereignty, by auction. In the alternative, the authoritative tribunal, presumably also using market-based metrics, would set the price.<sup>29</sup>

In the remainder of Part II, I compare this proposal to its inspiration in corporate law literature, focusing on potential motives that might drive participants in the market for sovereign control. I conclude that any such market would be unlikely to produce robust price discovery. Using a hypothetical oppressed territory of Arcadia as an example, I then examine time-inconsistency problems that could arise for parent states and potential acquirers, and make the oppressed people suffer more.

#### A. *Corporate Control vs. Sovereign Control*

This market for sovereign control does not look at all like its inspiration, the market for corporate control. The classic articles in the corporate control canon, from Professor Henry Manne in the 1960s<sup>30</sup> to Judge Frank Easterbrook and Professor David Fischel in the early 1980s,<sup>31</sup> address a highly-liquid, competitive marketplace—the U.S.

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territorial sovereignty allowed Finland to block a referendum-backed secession by the Aaland Islands).

24. See *supra* note 5.

25. Blocher & Gulati, *supra* note 1, at 803.

26. *Id.* at 819.

27. *Id.* at 819, 823.

28. *Id.* at 819–20, 823.

29. *Id.* at 821.

30. Manne, *supra* note 8, at 113, 119.

31. Easterbrook & Fischel, *supra* note 8, at 1162; see also William J. Carney, *The Legacy of “The Market for Corporate Control” and the Origins of the Theory of the Firm*, 50 CASE W. RES. L. REV. 215, 233–36 (1999) (explaining the academic development in the value of corporate control).

public equity market, where thousands of firms trade—with an argument premised on robust price discovery.<sup>32</sup> An acquirer is willing to pay more for a controlling share in the target firm than the price at which its stock currently trades in the public market.<sup>33</sup> The target firm’s management deploys all manner of contrivance to resist the welfare-enhancing acquisition.<sup>34</sup> Easterbrook and Fischel argue that the law should block management resistance in most cases.<sup>35</sup>

What would price discovery look like in a market for sovereign control? In a world of fewer than two hundred states, only a handful of which could and would bid for new territory, active trading is improbable.<sup>36</sup> Competitive bidding seems especially far-fetched where, under the Blocher-Gulati proposal, the acquirer must grant full citizenship to the people of the acquired territory.<sup>37</sup> Such narrowly

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32. See, e.g., Easterbrook & Fischel, *supra* note 8, at 1166–67 (arguing that stock prices reflect a collective wisdom of traders on the market). There is also a robust lending market to finance acquisitions of control.

33. “Control premiums” are a common feature of corporate acquisitions across jurisdictions. See Tatiana Nenova, *The Value of Corporate Voting Rights and Control: A Cross-Country Analysis*, 68 J. FIN. ECON. 325, 348–49 (2003) (presenting an analysis across eighteen countries on the value of the controlling block of votes in a firm).

34. See, e.g., Donald J. Wolfe et al., *The Delaware Court of Chancery Reaffirms the Vitality of the Poison Pill in Airgas*, 25 INSIGHTS 2, 2–3 (Mar. 2011) (describing how a firm attempted to resist acquisition by rejecting three different lucrative offers to sell shares).

35. Easterbrook & Fischel, *supra* note 8, at 1199–1204.

36. Territorial expansion is analogous to a major capital investment. Most countries are simply not in the market for new territory at any given time. In addition, potential acquirers are driven by a limited set of motives such as kinship and access to particular resources, which limit the number of suitable acquisition targets.

Professor Mark Weidemaier highlights the thinness of any plausible market and points out that governments do not trade sovereignty even where they are currently unconstrained by law—as the authors acknowledge. See W. Mark C. Weidemaier, *A (Very Thin) Market for Sovereign Control*, 66 DUKE L.J. ONLINE 67, 71–72 (2017). For a discussion of the limited efficiency of thin markets, see, for example, *Corporate Governance, Investor Protection, and Financial Stability in Emerging Markets*, in FOSTERING STABILITY IN A LOW-GROWTH, LOW-RATE ERA, IMF GLOBAL FINANCIAL STABILITY REPORT 2016, at 81–101, Emmanuel O. Nwosu, Anthony Orji & Ogamegbunam Anagwu, *African Emerging Equity Markets Re-examined: Testing the Weak Form Efficiency Theory*, 25 AFR. DEV. REV. 485, 485–98 (2013), and Musarrat Shamshir & Khalid Mustafa, *Efficiency in Stock Markets: A Review of Literature*, INT’L J. ECON., COM. & MGMT., Dec. 2014, at 1, 1–22, <http://ijecm.co.uk/wp-content/uploads/2014/12/21232.pdf> [<https://perma.cc/B7BG-JDFV>].

37. Weidemaier argues that governments can now trade elements of the sovereignty “bundle” relatively freely, which may account for their lack of interest in “bundled sovereignty.” Weidemaier, *supra* note 36, at 69–73. For example, granting full citizenship to the residents of the acquired territory would give them the right to move within the acquiring country. While public opinion about immigrants in destination countries is not necessarily a close proxy for what might ensue in a Blocher-Gulati acquisition of a distant land, it is instructive: a 2015 report by the International Organization for Migration found that 47% of respondents in top-ten destination

constrained acquisition terms, combined with the possibility of price-setting by a public tribunal, are entirely sensible in light of the authors' desire to advance human rights and democratic representation; however, they highlight the vast gap between their proposal and a conventional financial market that inspired it.

Consider what might motivate a state to bid for territory in the market for sovereign control. First, there is kinship: the would-be acquirer's population could share some combination of cultural, linguistic, and historical ties with the oppressed inhabitants of the target territory.<sup>38</sup> This is where a blanket grant of citizenship would seem most plausible, because the acquiring state's people would be eager to welcome their long-lost kin and ready to bear the costs of acquisition and integration.<sup>39</sup> On the other hand, the universe of bidders motivated by kinship would be severely limited, perhaps to one or two neighboring states. To describe it as a market at all would be a stretch.

At the other extreme, an acquiring state might seek new territory for commercial reasons: natural resources, access to trade routes, or simply land to accommodate its own growing population.<sup>40</sup> Unlike the

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countries for migrants supported decreasing immigration, while only 15% were in favor of increasing it. See Neli Esipova et al., HOW THE WORLD VIEWS MIGRATION 14 (Int'l Org. for Migration 2015).

38. For example, the majority of Albanians favor a "greater Albania," which would comprise all areas where ethnic Albanians live, including Albania, Kosovo, and parts of Macedonia. GALLUP BALKAN MONITOR, 2010 SUMMARY OF FINDINGS 47 (2010). Similarly, a 2014 survey shows strong support among South Koreans for unification of the peninsula. Steven Denney, *The Generation Gap on Korean Unification*, DIPLOMAT (Jan. 29, 2015), <http://thediplomat.com/2015/01/the-generation-gap-on-korean-unification/> [<https://perma.cc/HZN7-WKJQ>]. East and West Germans, polled shortly after the reunification of their country, expressed overwhelming support for the outcome. TWO DECADES AFTER THE WALL'S FALL: END OF COMMUNISM BUT NOW WITH MORE RESERVATIONS, PEW RES. CTR. 45 (Nov. 2, 2009).

39. Even this is optimistic, however. A 2014 survey showed that only half of South Koreans would be willing to bear the cost of unification of the peninsula, despite overwhelming majorities supportive of unification generally. *South Korea Says Economic Cost of Unification Would Be \$500bn*, GUARDIAN (Nov. 19, 2014), <https://www.theguardian.com/world/2014/nov/19/south-korea-cost-unification-500bn> [<https://perma.cc/ES23-B22W>]. The costs of reunification can be substantial, and come without a guarantee of success. German reunification cost \$1.6 trillion euros, and opinion polls have found that many Germans still do not feel they live in a united country. Erik Kirschbaum, *The Dark Side of German Reunification*, REUTERS (Sept. 29, 2010), <http://blogs.reuters.com/global/2010/09/29/the-dark-side-of-german-reunification/> [<https://perma.cc/7FEW-XX4T>].

40. See Antony Anghie, *The Evolution of International Law: Colonial and Post-Colonial Realities*, 27 THIRD WORLD Q. 739, 742–46 (2006). Weidemaier cites contemporary cases where states leased real estate, obtained project concessions, and generally acquired elements of the "sovereignty bundle" from other states to accommodate the needs of their growing domestic

kinship example, it is easy to imagine many rich states scrambling to bid for a well-located, well-endowed breakaway enclave, in the fashion of nineteenth century imperial contests.<sup>41</sup> In a commercially-motivated trade, the acquiring state's population would be less likely to support full citizenship for complete strangers in a distant place.<sup>42</sup> The Blocher-Gulati baseline of granting full citizenship rights to the oppressed would operate as a binding constraint on acquisition terms in this case: even if the trade made economic sense, its domestic political costs to the acquirer may be prohibitive.<sup>43</sup> Given the option of leasing or buying particular assets in the target territory from the current parent state—which would require no change in the law—the acquirer might forgo a full-blown sovereignty trade.<sup>44</sup>

Other acquisition motives, such as altruism (saving the oppressed) and security (buying a strategic asset), are no more likely to produce competitive bidding for many of the same reasons.<sup>45</sup> In particular, domestic support for paying the cost of acquisition and integration would be hard to muster in either case.<sup>46</sup>

In sum, a market where states must extend full citizenship to the people of acquired territories would be vanishingly thin, and unlikely to produce robust price discovery with its associated incentive effects.

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economies. Weidemaier, *supra* note 36, at 72.

41. See Anghie, *supra* note 40, at 742–46; see also Roger Southall, *Scrambling for Africa? Continuities and Discontinuities with Formal Imperialism*, in *A NEW SCRAMBLE FOR AFRICA?* 1 (Roger Southall & Henning Melber eds., 2009).

42. See *supra* note 37.

43. See 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).

44. Weidemaier, *supra* note 36, at 72–73 (arguing that states prefer to buy or lease discrete assets and privileges to full-blown sovereignty acquisition). As is the case under existing law, the oppressed people would remain oppressed, losing their most valuable endowments in the bargain.

45. A majority of the top-ten destination countries for migrants spend less on development assistance as a percentage of their gross national income than the average OECD country. Esipova et al., *supra* note 37; *ORG. FOR ECON. CO-OPERATION & DEV., DEVELOPMENT AID IN 2015 CONTINUES TO GROW DESPITE COSTS FOR IN-DONOR REFUGEES* 6 (2016). Even the most altruistic nations spend only a small fraction of their gross national income on aid—which does not require their citizens to accept and integrate strangers. *Id.* Sweden, Norway, Luxembourg, and Denmark have the highest aid spending, while Poland, Slovakia, the Czech Republic, and Spain spend the least. *Id.* U.S. opinion polls show a majority against increasing military spending or foreign aid. *PEW RESEARCH CTR., PUBLIC UNCERTAIN, DIVIDED OVER AMERICA'S PLACE IN THE WORLD* 1, 21 (2016). European polls show an even greater aversion to increased military spending, while a soft majority of 53% support increasing foreign aid budgets. Bruce Stokes, *Key Findings on How Europeans See Their Place in the World*, *PEW RES. CTR.* (June 13, 2016), <http://www.pewresearch.org/fact-tank/2016/06/13/key-findings-europe/> [<https://perma.cc/3XWG-R7J4>].

46. Stokes, *supra* note 45.

On the other hand, if the citizenship constraint were relaxed, it would risk producing a category of second-class subjects—contrary to the authors’ stated objective.<sup>47</sup>

*B. Time Inconsistencies*

In addition to being thin, a market for sovereign acquisition would also be prone to a time-inconsistency problem: governments might make decisions in the near term that may not serve their longer-term interests. Promises made at the time of acquisition are unlikely to stand. Consider a kinship-driven acquisition. Suppose that two countries, acquirer and parent, are vying for the affections of the Arcadia territory. Both have historical, ethnic, or cultural ties with Arcadia.<sup>48</sup> Some years after it receives and spends an up-front lump sum for Arcadia, the old parent might come to miss the lost child: after all, secession does not erase the historical, ethnic, or cultural affinity between the people of Arcadia and their ex-compatriots. Domestic political pressure for Arcadia’s return would grow in the old parent state. To mollify its constituents, the old parent might try to extract some more money from the new parent, foment unrest in the breakaway territory, threaten to invade, or all of the above. Russian-linked violence in eastern Ukraine illustrates the possibility.<sup>49</sup> In an optimistic scenario, such territorial competition might serve as an incentive for the new parent to treat the Arcadians well, consistent with the authors’ objective. It could also exacerbate instability and lead to a series of hold-up scenarios, with Arcadia perennially bouncing between two larger states.<sup>50</sup> Commercial, military-strategic, and even altruistic acquisitions could follow the same pattern. In a legal regime that makes transfers easier, a parent state is free to change its mind after getting paid for the breakaway territory. Unless Blocher and

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47. The most miserably oppressed might even prefer second-class citizenship in a reasonably benign state to living under a brutal tyrant; however, this scenario would be inconsistent with the authors’ essential objective of securing equal treatment for the seceding people, and would certainly not comport with existing human rights norms. *See, e.g.*, G.A. Res. 217 (VII), Universal Declaration of Human Rights (1948) (“All are equal before the law and are entitled without any discrimination to equal protection of the law.”).

48. Compare the territory of Alsace-Lorraine, which passed between Germany and France several times in the late 19th and early 20th centuries. *See infra* note 50.

49. *See* Ayres, *supra* note 18.

50. To wit, Alsace-Lorraine was made part of Germany in 1871, was returned to France after World War I, was annexed by Germany on the eve of World War II, and was transferred back to France thereafter. *Alsace-Lorraine*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Alsace-Lorraine> [https://perma.cc/R8MF-B96P].

Gulati further constrain the new market, Arcadia could become an attractive source of budget revenue for the parent, as it is sold and repurchased, leased and bought back, pledged and rehypothecated.

The acquirer also faces time-inconsistency problems. Suppose a wealthy state buys Arcadia to gain a foothold in a vital region, or a buffer against adversaries. Some years later, the acquirer's strategic imperatives have changed. Meanwhile, Arcadia has become a drain on the new parent's treasury, and Arcadians are migrating to the metropolis in droves to escape poverty, taking advantage of their full citizenship rights. The acquirer's population is grumbling. Arcadia turns out to be an "obsolescing bargain."<sup>51</sup> Should it go back on the auction block? Should it just be cut loose, left to fend for itself? And if it does not want to leave, should it be nudged out with a bit of maltreatment, paid to exit, or both?<sup>52</sup> Obsolescence scenarios can also arise in altruistic and resource-driven acquisitions. They might be less likely in a kinship case, simply because it assumes a less contingent, more durable link between the acquirer and the target.

In the market for corporate control, it is not particularly disturbing to see asset bundles or entire firms repeatedly passing from one owner to the next, so long as they are run more efficiently with each transfer.<sup>53</sup> In its sovereign counterpart, the political instability attending successive transfers would be a serious matter, likely to reverberate beyond the immediate transaction participants.

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In sum, implementing the Blocher-Gulati proposal would not lead

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51. The term became popular beginning in the early 1970s to describe capital-intensive foreign investment in developing countries, where large-scale up-front expenditure created incentives for later nationalization. RAYMOND VERNON, *SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES* 46–53 (1971) (pioneering the term); *see also* Erik J. Woodhouse, *The Obsolescing Bargain Redux? Foreign Investment in the Electric Power Sector in Developing Countries*, 38 N.Y.U. J. INT'L L. & POL. 121, 127–28 (2006) (discussing the origins of the "obsolescing bargain" and investor responses).

52. *See generally* Joseph Blocher & Mitu Gulati, *Forced Secessions* 80 LAW & CONTEMP. PROBS. 215 (2016) (reviewing the law governing expulsion of constituent parts by a parent state ("forced secession"), and arguing for a limited right of expulsion coupled with a compensation mechanism for the departing region).

53. *See, e.g.*, Gregor Andrade et al., *New Evidence and Perspectives on Mergers*, 15 J. ECON. PERSP. 103, 105, 116–19 (2001) (presenting evidence that corporate mergers are becoming more common, with successive mergers associated with more efficient deployment of corporate assets).

to a competitive acquisition market capable of disciplining abusive governments. It could facilitate some territorial transfers that would not happen under the current regime, albeit on non-market terms. Because parent and acquirer preferences are likely to change over time, the proposed framework could lead to further political instability and more oppression, as the territory becomes a pawn in power games among bigger players. In the worst-case scenario, instead of having big countries compete for their affections as Blocher and Gulati intend, the abused people and their territory might be shunted from one reluctant master to the next.<sup>54</sup>

### III. CINDERELLA SOVEREIGNTY

What if Arcadia chooses to buy independence, rather than join an existing state? It could finance this bid with its own funds (unlikely if it is oppressed), loans or grants from other (sponsoring) states, bank loans, private capital markets borrowing, or charitable donations. A well-located or well-endowed Arcadia might well attract multiple sponsors for its independence. Most bids would be driven by some mix of commercial and strategic motives; however, altruistic bidders might also participate.<sup>55</sup> Larger, wealthy states might find sponsorship more attractive than acquisition, since a sponsor does not have to grant citizenship or make a permanent commitment to the oppressed population and could negotiate additional favorable sponsorship terms on the side. For private and charitable funders, financing independence would be the most direct way to get involved in the market for sovereign control.

If a funder's motives are purely altruistic, it might sponsor

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54. What if the people of the territory do not want to leave? In one of the companion pieces, the authors observe that public international law and U.S. federal jurisprudence appear to permit expulsion, and they argue that the expelled people should receive compensation under some circumstances. See Blocher & Gulati, *supra* note 52, at 215–19. In this case, it would be cheaper for the parent to “persuade” the people to leave of their own accord by resorting to the very kind of repression and ill treatment that Blocher and Gulati seek to relieve in *A Market for Sovereign Control*.

55. The role of altruism in foreign aid has been vigorously debated. Compare Carlos Seiglie, *Altruism, Foreign Aid and Humanitarian Military Intervention*, 17 CONFLICT MGMT. & PEACE STUD. 207, 207–33 (1999) (modeling foreign aid and humanitarian intervention as driven in an important part by the altruism of the median voter in the donor states), and Andrea Civelli, Andrew W. Horowitz & Arilton Teixeira, *A Signal of Altruistic Motivation for Foreign Aid*, 16 B.E. J. ECON. ANALYSIS & POL'Y 1, 1–31 (2016) (finding that altruism accounted for a significant portion of major donors' foreign aid), with Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 521–22 (2006) (describing cross-border altruism as “minimal”).

Arcadia's exit without asking for anything in return—or might require the new government to observe human rights, environmental concerns, and development safeguards. Private investors and states that seek to advance their own economic or strategic interests might insist on commercial privileges, political allegiance, and other forms of payback.<sup>56</sup> A long-term loan from a sponsoring government to buy Arcadia's independence might be tied formally or informally to air base access, diplomatic cooperation, exclusive mining concessions, below-market oil sales, or a combinations of these and similar conditions. The seceding people's quid pro quo with a private funder might entail similar commercial concessions, exemptions from labor and environmental laws, and other commercial benefits. To guard against time-inconsistent behavior on the part of Arcadia, the funders might structure the financing so that the new government remains bound to them after the secession—for example, disbursing money over time or taking control of valuable assets until the loan is repaid.

In more abstract terms, the people of Arcadia would mortgage their voice in the new sovereign state in order to exit the old parent state.<sup>57</sup> Sovereign Arcadia's domestic politics would be constrained to meet the demands of those who funded its secession. Until it can stand on its own and cut the ties with its funders, Arcadia would enjoy a constrained form of sovereignty. Meanwhile, new funders might decide to make a play for Arcadia's resources or loyalties. If the bidders keep coming, Arcadia might have more scope to negotiate favorable deals, securing more domestic political autonomy. Then again, if Arcadia were such a prize, the old parent would want a higher price for letting it exit in the first place.

To be sure, Blocher and Gulati did not invent the problem of compromised sovereignty, which is commonplace under the prevailing international legal regime. Examples range from nominally independent Abkhazia and Ossetia, sandwiched between Russia and

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56. The idea of tying foreign aid expressly to commercial privileges for donors is hardly new. See, e.g., *Untied Aid*, ORG. FOR ECONOMIC CO-OPERATION AND DEV. (OECD), <http://www.oecd.org/dac/untied-aid/> [<https://perma.cc/BJ7A-P6VA>]. A market for sovereignty would expand the scope for such arrangements.

57. See generally, ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 3–5, 44–54 (1970) (theorizing the respective roles of “voice” and “exit”—for example, political expression and secession—in response to economic or political adversity). Hirschman also elaborates on the challenges of combining voice and exit in the same polity. I depart from the original framing to consider what happens when the seceding population has no voice in the old parent state, and can only exit it in exchange for giving up its voice in the new state.

Georgia, to U.S. territories such as Puerto Rico and Guam, which enjoy a subset of sovereign attributes accruing to U.S. states and sovereign nations.<sup>58</sup>

The story of Nauru illustrates the extent to which states can already mortgage their sovereignty under international law. The tiny island had no shortage of suitors: Germany, Australia, Japan, New Zealand, and the United Kingdom had all asserted military and commercial claims over Nauru since the 19th century.<sup>59</sup> A German colony, then an Australian protectorate under the League of Nations and the United Nations trusteeship system, Nauru had rich phosphate deposits, which even after decades of exploitation by foreign powers, helped finance its independence in 1968.<sup>60</sup> When the phosphate ran out, leaving the island an environmental wasteland, the government turned to a succession of short-term revenue measures that eventually turned it into “an archetypal ‘client state’” of Australia.<sup>61</sup> Today, Nauru hosts detention camps for refugees rejected by Australia, where conditions are dismal and accusations of human rights violations abound.<sup>62</sup>

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58. See, e.g., Gerard Toal & John O’Loughlin, *How People in South Ossetia, Abkhazia and Transnistria Feel About Annexation by Russia*, WASH. POST (Mar. 20, 2014), [https://www.washingtonpost.com/news/monkey-cage/wp/2014/03/20/how-people-in-south-ossetia-abkhazia-and-transnistria-feel-about-annexation-by-russia/?utm\\_term=.16185560e441](https://www.washingtonpost.com/news/monkey-cage/wp/2014/03/20/how-people-in-south-ossetia-abkhazia-and-transnistria-feel-about-annexation-by-russia/?utm_term=.16185560e441) [<https://perma.cc/Q8ZA-FHKX>] (reporting on Ossetia and Abkhazia); see also Blocher & Gulati, *supra* note 52, at 222–26; Eric A. Posner, *The Limits of Limits*, NEW REPUBLIC (May 5, 2010), <https://newrepublic.com/article/74824/the-limits-limits-0> [<https://perma.cc/9QP5-KHEP>] (discussing, *inter alia*, the compromised sovereignty of U.S.-controlled territories in the wake of the Spanish-American war). See generally, BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006) (analyzing U.S. jurisprudence that granted only abridged citizenship rights to the inhabitants of Puerto Rico, Guam, and other islands taken over by the United States after the Spanish-American war); Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005) (interpreting the Insular Cases as permitting territorial deannexation).

59. Antony Anghie, *The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT’L. L.J. 445, 449–54 (1993).

60. *Id.*

61. Ben Doherty, *A Short History of Nauru, Australia’s Dumping Ground for Refugees*, GUARDIAN (Aug. 9, 2016), <https://www.theguardian.com/world/2016/aug/10/a-short-history-of-nauru-australias-dumping-ground-for-refugees> [<https://perma.cc/BZA9-DMGR>]; see also *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judgment, 1992 I.C.J. (June 26); Anghie, *supra* note 59, at 449–54; Anthony Anghie, *Certain Phosphate Lands in Nauru*, 87 AM. J. OF INT’L L. 282, 282–88 (1993); Keri Phillips, *How Nauru Threw It All Away*, ABC (Mar. 11, 2014), <http://www.abc.net.au/radionational/programs/rearvision/how-nauru-threw-it-all-away/5312714> [<https://perma.cc/7LR8-BGRG>].

62. Doherty, *supra* note 61; see also Daniel Flitton, *Push To Charge Operators of Private Companies for Alleged Abuses on Nauru and Manus*, SYDNEY MORNING HERALD (Feb. 13, 2017), <http://www.smh.com.au/federal-politics/political-news/push-to-charge-operators-of-private-companies-for-alleged-abuses-on-nauru-and-manus-20170213-gublsk.html> [<https://perma.cc/K>].

All else equal, a competitive market for sovereign control should make it easier to create more Naurus, endowed with variants of its securitized rump sovereignty. A rule that allows oppressed ethnic groups inhabiting discrete territories to buy their right to secede may lead to robust sovereignty when the outside buyers and sponsors are driven by altruism or kinship—the Cinderella-meets-Prince Charming scenario. However, it would be hard to limit potential bidders to Prince Charming. Such a limit would do away with any pretense of a market or market discipline. This might be just as well, since in a real market, where funders are motivated by self-interest, they would have powerful incentives to create nominally independent captive states, and to prevent them from becoming self-sufficient—lest their loyalties weaken before the funders lose interest. The new states' sovereignty would be a poor stepchild of the real thing.

#### CONCLUSION

Professors Blocher and Gulati identify an important problem: the existing binary regime does a poor job of managing the tradeoff between territorial integrity of the state and protecting minority groups within the state from oppression. The heavy presumption in favor of territorial integrity promotes external stability at the expense of the oppressed people, who have no practical recourse under international law until oppression becomes extreme. The authors' proposal would open the possibility of secession for ethnic groups inhabiting defined territories, without the parent state's consent and under circumstances that do not reach the extreme level of oppression used to justify exit under the status quo.

A market for sovereign control is an elegant and provocative solution to the problem the authors have identified. If they could show that it would result in less human suffering and more human flourishing—or even if those liberated from oppression would outnumber those who suffer more abuse or abridged sovereignty in the market for sovereign control—the proposal should be adopted. I am skeptical that the proposal could deliver on its promise of a robust market and worry that it is wildly optimistic in the picture of sovereignty it paints for the oppressed. Table 1 below sums up my concerns: robust sovereignty is plausible in thin or non-market settings (kinship and altruism), but robust markets are likely to yield a poor

stepchild, Cinderella Sovereignty.

*Table 1*

<b>Acquisition Motive</b>	<b>Competitive Bidding</b>	<b>Likely Exit Scenario</b>	<b>Acquirer/Sponsor Citizenship</b>	<b>Time Inconsistency</b>	<b>Voice/Political Expression in the New State</b>
Kinship	Thin	Join acquirer	Yes	Yes (parent)	Yes
Altruism	Thin	Independence	No	Yes (support for continued sponsorship weakens over time)	Yes
Resource	Yes	Cinderella sovereignty	No	Yes (acquirer/sponsor loses interest as its need or target's resources diminish)	No
Strategic	Yes	Cinderella sovereignty	No	Yes (acquirer/sponsor loses interest as its strategic needs change)	No

In this Response, I suggest that the number of potential bidders for sovereign control in any given case would be tiny, effectively eliminating price as a mechanism to convey information and discipline market actors. Where one state acquires territory from another and extends citizenship to the territory's inhabitants, the bidders would most likely be limited to states that share the same language, culture, or history. Others would have a hard time mobilizing domestic political support for absorbing strangers en masse.

A territory that seeks to become a state in its own right may find more sponsors that are willing; however, it is unlikely to achieve robust independence in a market for sovereign control. The most likely result instead would be a second-class "Cinderella sovereignty," where the new state remains heavily dependent on outside support, and funders continue to extract commercial and security concessions for

generations. Only when the sponsor is purely altruistic would the authors' desired outcome prevail—a non-violent exit followed by full sovereignty.

Yet when the motive is altruistic, support may be hard to maintain. Circumstances change, funders lose interest, old parent states want more money, or else try to get their old land back using force and disruption. Unless the new sovereign economy has become self-sufficient by the time the sponsor quits, the young government may have to search for new patrons, shuttling from one to another, dissipating its chances of building a healthy domestic political system, and threatening external stability.

In sum, a market for sovereign control would be a tall order, even assuming improbably robust enforcement and expert, authoritative adjudication. With or without a real market, the Blocher-Gulati rule would have important consequences for states and groups: more people and territories would change hands. The authors do not show that this state of affairs would lead to fewer orphans and less suffering than the old. They hope it would, partly because the oppressed peoples already suffer so much that it is hard to fathom things getting worse. But without more, there is no telling whether the benefits of letting altruistic sponsors and generous kin buy freedom for the downtrodden would exceed the costs of letting the cynical buy dependent, powerless clients.

The authors could avoid such an awkward and likely intractable cost-benefit calculus by abandoning the pretense of a market and lowering the bar to secession under international law, subject to robust human rights safeguards—but that would be an altogether different project from *A Market in Sovereign Control*. Meanwhile, if there comes to be such a market, it would be reasonable to expect more trading at the margins, but no more glass slippers in a world teeming with poor orphans.