

## SHOULD WE BUY SELLING SOVEREIGNTY?

STEPHEN CLOWNEY†

### INTRODUCTION

In 2016, refugees poured across international borders in record numbers.<sup>1</sup> Yet, as the horrific pictures from Myanmar, Syria, and Somalia demonstrate, escaping from the injustice and economic hardships imposed by failed states remains extremely difficult. Refugees must take enormous personal risks to find safe havens, often while leaving behind beloved family members and vibrant social networks. Joseph Blocher and Mitu Gulati's Article, *A Market for Sovereign Control*, provides an opportunity to reconsider how best to improve the lives of individuals stuck in poorly governed areas and also to think more broadly about how to encourage good government in other countries.<sup>2</sup> These are vital questions because, as Blocher and Gulati observe, the stakes are so high.<sup>3</sup> People and nations continue to fight (and die) to protect territory, cross borders, and alter geographies.<sup>4</sup>

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† Professor of Law, University of Arkansas School of Law.

1. "The Syrian refugee crisis is the largest refugee crisis since the Second World War." E. Tendayi Achiume, *Syria, Cost-Sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687, 688 (2015). Many European countries are processing record numbers of refugees. See Madison Park, *Europe Received Record-Breaking 1.3 Million Asylum Applications in 2015*, CNN (Aug. 3, 2016, 7:33 AM), <http://www.cnn.com/2016/08/03/europe/europe-record-refugees> [<https://perma.cc/G7ME-N96G>].

2. Joseph Blocher & Mitu Gulati, *A Market for Sovereign Control*, 66 DUKE L.J. 797, 799–800 (2017).

3. *Id.* at 799.

4. *Id.*

Blocher and Gulati's basic insight is that it is too hard for populations who feel ill-served by their countries to exit.<sup>5</sup> Thus, rather than waiting for oppressed people to scrape their way into countries with better governance, Blocher and Gulati argue in favor of bringing better governance to oppressed people. They would accomplish this by making international borders less sacred and easier to change.<sup>6</sup> Specifically, they propose that a nation's control over its territory should become subject to a liability rule rather than a property rule if it discriminates against one of its constituent regions.<sup>7</sup> Under Blocher and Gulati's proposal, a nation that denies equal treatment to a local area would lose the ability to prevent secession. The disfavored region could elect to strike out on its own or join up with a friendlier neighboring country. However, the authors also insist that governments receive compensation for their lost land—compensation that would be set by a global “market” for sovereign territory.<sup>8</sup>

This is bold, inventive work. Blocher and Gulati's ideas make three enormous contributions to scholarship on sovereignty. First, the authors illuminate a glaring hole in modern international law: there is currently no sound mechanism to help regions that are substantially underserved by their parent nation, but not quite oppressed. Second, the authors articulate a novel way to improve the lives of people in regions surrounded by the “wrong” border. Their proposal is truly elegant. Rather than relying on creaky international institutions or UN peacekeepers for assistance, Blocher and Gulati want to harness the power of markets and self-interested competition to improve the lives of the politically powerless. Almost all previous reform efforts have focused on public-law solutions rather than private-law mechanisms. Finally, Blocher and Gulati show that their market for sovereignty can encourage the spread of good government without the deprivations of war or the failures of colonialism. By setting up a quasi-market for repressed territories, the authors' proposal encourages all nations to treat their regions with dignity and respect under the law.

*A Market for Sovereign Control* does leave some intriguing questions unanswered. To start, some critics have raised concerns that the authors are a bit nonchalant about the granular details of their proposal. What counts as a “region”? What role will international

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5. *Id.* at 804 (“[S]ome populated regions are in the ‘wrong’ countries . . .”).

6. *Id.* at 801.

7. *Id.* at 803.

8. *Id.*

institutions play in the scheme? How will we accurately value the places that choose to secede? While these are certainly important questions, small issues of practicality should not derail an innovative idea. The law, for example, has put values on far stranger things than sovereign territory.<sup>9</sup> Pushing aside these second-order questions of workability, however, reveals a deeper worry. Although Blocher and Gulati's proposal has great merit, the success of their plan seems to turn on an assumption that nations will act in a rational, value-maximizing fashion. But even a cursory review of recent history shows that is not always the case. In particular, the authors need to consider more fully that disputes over land are often about far more than money and access to resources. They are about emotion, honor, revenge, and the echoes of history. Given that, how will this proposal—based largely on economic theory and market mechanisms—fare when confronted with actual human institutions fueled by politics and irrational human desires? It seems all too plausible that a repressive nation, pushed to accept treasure in return for the loss of its land and sovereignty, may react with anger rather than casual acceptance. If that happens, what becomes of the peoples Blocher and Gulati seek to help? Who will protect them? Simply changing a border does not actually remove vulnerable minorities from the reach of their former tormentors. Unless a committed enforcer emerges from the mists, bigger and stronger nations will still have the power to make life hellish for any regions that attempt to secede.

To sum up: Blocher and Gulati have proposed a sweeping vision for the future of international law and their proposal will surely generate important new discussions about whether private law can better solve the problem of good governance. However, to show that their proposal can effect significant change, the authors must gather more evidence that offering a nation monetary compensation for land (and peoples) has the power to bury generational disputes about who owns contested geographies.

## I. BUYING SOVEREIGNTY

*A Market for Sovereign Control* is exciting, audacious, and insightful. While Blocher and Gulati's case for selling sovereignty is not

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9. Courts and state statutes routinely allow recovery for the loss of limbs, defamation, pain and suffering, loss of consortium, invasion of privacy, and many other injuries that have no conventional market value. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 11-108(a)(2)(i) (LexisNexis 2013).

without real weaknesses, they mount a formidable challenge to some of the calcified thinking that has prevented innovation and the reform of global institutions. In particular, they critique the failure of international law to assist mildly oppressed peoples, propose new rules to govern border changes, and show that international law could do more to encourage the spread of good government.

A. *The Hole in International Law*

The first important contribution of *A Market for Sovereign Control* is that it reveals a peculiar gap between how global institutions treat severely oppressed places and how they treat moderately oppressed places.<sup>10</sup> When a country commits some brutal form of oppression against one of its constituent regions, international bodies generally respond with appropriate power and concern.<sup>11</sup> In these instances, the law recognizes the rights of the affected area to secede, the nations of the world often intervene, and aid dollars flow to the subjugated people.<sup>12</sup> But what happens in the far more common scenario where a parent nation bullies and harasses a region, but the actions do not quite amount to genocide? The authors build a case that international law provides no real mechanism to assist regions that are harassed, denied equal treatment, and starved of adequate political representation.<sup>13</sup> The law, for example, grants them no right of remedial secession and global armies rarely intervene to fix problems of institutionalized discrimination.

Blocher and Gulati believe this is unjust. As they point out, there are many people around the world who would be safer, happier, and wealthier if surrounded by different borders and governed by different leaders.<sup>14</sup> But the law does nothing for them. Instead, the current

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10. *Id.* at 803, 806–07, 814.

11. This is not to say that the international community always responds as quickly as it should to mass atrocities. See generally SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 329–390 (2002) (arguing that America has, at best, a mixed record of acting to stop genocide).

12. For more on remedial secession, see LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* 220 (1978); Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 *DENV. J. INT'L L. & POL'Y* 373, 380–84 (2003).

13. Blocher & Gulati, *supra* note 2 at 813–14; see also Joseph Blocher & Mitu Gulati, *Ukraine and Russia—You Break It, You Bought It*, ERIC POSNER (Feb. 4, 2015), <http://ericposner.com/guest-post-ukraine-and-russia-you-break-it-you-bought-it> [https://perma.cc/83PM-T4FZ] [hereinafter Blocher & Gulati, *Ukraine and Russia*] (arguing that current international law provides moderately oppressed countries “a disappointing menu of options”).

14. Blocher & Gulati, *supra* note 2, at 804–05.

system leaves people from poorly governed regions to pursue self-help remedies without the sword and shield provided by international law. The mildly oppressed can engage in the political process, choose to revolt against their parent countries, or attempt to find refuge in nations that will have them. But according to Blocher and Gulati, these self-help “solutions” to the problem of bad governance are wildly inefficient. Despised minorities have little leverage in politics, violent uprisings rarely succeed, and immigration, they write, “is difficult—particularly for the poor, weak, or oppressed—and breaks up families and communities.”<sup>15</sup> Rather than leave these regions adrift, Blocher and Gulati argue that global institutions should provide some mechanism to assist communities that want greater voice in their governance. If *A Market for Sovereign Control* succeeds at nothing else, it is worth reading because of this clear-eyed insistence that more needs to be done for people who live under misbehaving governments and whom the law has untapped potential to help.

### B. *Helping International Law Help Others*

Blocher and Gulati’s most important contribution is that they articulate a paradigm shifting proposal to improve the lives of peoples in poorly governed countries. This is a real accomplishment, in part because international law is muddled on this point. Early in the Article, the authors show that a tension between two foundational concepts of international law makes it extremely difficult to excavate solutions on behalf of the mildly oppressed.<sup>16</sup> They explain, correctly, that the time-honored principle of territorial integrity grants nations near-absolute control over their borders. Central governments, for example, routinely reject boundary changes proposed by neighboring states or internal secessionist movements.<sup>17</sup> At the same time, however, the increasingly relevant principle of self-determination demands that all peoples have the opportunity to choose their own national affiliations, govern themselves, and develop free political institutions.<sup>18</sup> The

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15. *Id.* at 801.

16. *Id.* at 799 (“The challenge is designing a framework that respects, to the degree possible, both popular sovereignty and nations’ territorial integrity.”).

17. For example, Finland blocked the Åland Islands from becoming part of Sweden, showing how a state may exercise its right to territorial integrity over the objections of the local people. Steve 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).

18. Blocher & Gulati, *supra* note 2, at 811–13 (explaining, in broad strokes, the principle of self-determination).

difficulty is this: any proposal that calls for increased intervention in repressive countries probably undermines territorial sovereignty, while any solution that disregards the suffering in poorly treated regions ignores the right of self-determination.

Blocher and Gulati manage to thread the needle by importing property theory into the realm of international law. In a nutshell, their idea is that a nation's control over its borders should become subject to a liability rule rather than a property rule if the nation discriminates against one of its constituent regions.<sup>19</sup> Under Blocher and Gulati's framework, a nation that denies equal treatment to a local area would lose control over its borders; it could no longer prevent the secession of a disaffected area. However, the authors also insist that the government receive compensation for its lost land—compensation that would be set by a global “market” for sovereign territory.<sup>20</sup> Such compensation, the authors explain, “could take a range of forms, from lump sum financial transfers to land swaps and military and political obligations.”<sup>21</sup>

For example, imagine that the Hmong people of northern Thailand believe their lives would improve under a different government. Under the current legal order, the Hmong have few options—the national government of Thailand can quash any proposed border change, no matter how reasonable. Blocher and Gulati argue that this should not always be so. They contend that if Thailand has denied the Hmong meaningful access to the government, then the Hmong's desire for self-determination should trump the Thais' absolute control over the region. Under their proposal, the Hmong region could exit Thailand with the support of the international community, provided that it compensates the government in Bangkok for the loss of territory.

If all this were not radical enough, Blocher and Gulati further argue that regions have a quasi-property right to approve a sale of their sovereignty to the highest bidder.<sup>22</sup> Thus, the Hmong could purchase their independence directly from Thailand, or they could solicit offers for their sovereignty from other nation states. The authors envision that neighboring countries like Laos, China, and Myanmar might all lodge bids with Bangkok to bring the Hmong lands under their

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19. *Id.* at 807.

20. *Id.*

21. *Id.* at 817–18.

22. *Id.* at 818–19.

sovereign control. To safeguard the principle of self-determination in this framework, Blocher and Gulati suggest that a supermajority of the voters in a transacted area endorse any final transfer.<sup>23</sup> Thus, the Hmong could not end up as part of a Chinese province without significant support of voters.

It is worth pausing for a moment to admire Blocher and Gulati's considerable achievement. Their scheme provides overlooked and underrepresented peoples with a new exit option. The power to leave would endow entire regions with the opportunity to live under police forces of their own making and courts of their choosing. Just as importantly, Blocher and Gulati do not ignore the incentives of the parent nation. The compensation provided by the liability rule could work to real effect—it gives a reluctant parent nation a significant inducement to let disgruntled regions find their own way. Why fight to prolong a relationship that is not working for either party when there is an opportunity to change course and reap significant financial rewards?

Finally, it is worth pointing out explicitly that Blocher and Gulati's idea accomplishes all this without upsetting the broad contours of international law. The principle of territorial integrity remains intact; so long as a nation grants all of its people equal treatment under the law, its borders remain secure. And, as mentioned above, the proposal also respects the right to self-determination. No region can be pushed toward independence or transferred to the control of a different sovereign without its consent.

### C. *Spreading Good Government*

Another strength of Blocher and Gulati's proposal is that it has the potential to improve the lives of peoples well beyond the transacted region. Borrowing from the ideas of Charles Tiebout,<sup>24</sup> *A Market for Sovereign Control* shows that the mere threat of border changes and interjurisdictional competition for sovereign lands would quickly induce at least some governments to treat disfavored areas with more respect.<sup>25</sup> The reasoning is easy to follow. Right now, roguish nations

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23. *Id.* 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.”).

24. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (describing the benefits of interjurisdictional competition for citizens).

25. Blocher & Gulati, *supra* note 2, at 835.

have little incentive to respond to the protests and complaints of minority populations. As long as the parent nations' behavior does not tip into genocide (or some other form of severe oppression), they can exploit and humiliate their constituent regions with few consequences.<sup>26</sup> An active market for sovereign control, however, would force misbehaving nations into a difficult choice. They can either grant new rights to previously disfavored peoples or risk losing chunks of their territory to sovereign bidders who may win the approval of the disaffected region.

Although this application of interjurisdictional competition in the international context would be novel, the concept is not. The behavior of cities, for example, has long been constrained by the ability of residents to pick up and move to nearby suburbs.<sup>27</sup> Detroit, for example, cannot increase taxes unreasonably or its residents will decide to move across the border to neighboring Dearborn, Grosse Pointe, or Oak Park. A host of empirical studies support the basic theory that competition between jurisdictions for residents creates a constant pressure to design legal regimes that reflect local citizen's preferences.<sup>28</sup> Thus, as long as the threat of exit remains credible and the costs of switching between sovereigns are not prohibitive, Blocher and Gulati's proposal should achieve the same salubrious effects at the international level. The authors' idea is, in effect, a method of scaling good government that uses market mechanisms rather than conquest as the fulcrum for change. By pushing the most abusive nations to abandon their worst practices, Blocher and Gulati's scheme has the potential to eliminate much human suffering, and that makes the idea worth pursuing.

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26. *Id.* at 813.

27. See Wallace E. Oates, *The Many Faces of the Tiebout Model*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 35 (William A. Fischel ed., 2006) (stating that “[t]he conventional wisdom is that Tiebout sorting is most likely in a metropolitan setting where an individual who works in the center city (or elsewhere in the area) will have a wide choice among communities in which to live”).

28. See, e.g., Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 *COLUM. L. REV.* 473, 521–23 (1991) (summarizing the empirical evidence); Keith Dowding, Peter John & Stephen Biggs, *Tiebout: A Survey of the Empirical Literature*, 31 *URB. STUD.* 767, 775–79 (1994) (surveying two-hundred articles on empirical tests of the Tiebout hypothesis).



## II. SELLING SOVEREIGNTY

Blocher and Gulati's Article makes many important contributions to the current debates about international governance, refugees, and the right of self-determination. It is an extremely valuable offering—well-researched, well-written, thought provoking, and full of captivating hypotheticals. But the authors' focus on economic theory over the gritty details of politics and human behavior may prove a stumbling block for some readers. The easiest critique to launch at Blocher and Gulati is that they do not discuss the specifics of their proposal in detail.<sup>29</sup> *A Market for Sovereign Control* is one of the few modern law review articles that would benefit from more pages devoted to legal minutiae. The authors, for example, do not flesh out exactly what kind of oppression is sufficient to trigger their liability rule or who will make the relevant decisions.<sup>30</sup> Moreover, the Article also only briefly discusses what constitutes a "region" and does not explain how the international community would determine what compensation is due to a parent nation in the aftermath of a secession.<sup>31</sup>

Blocher and Gulati must find answers to these practical questions if their proposal is to move forward. Nevertheless, this review focuses on other issues. The authors' stated goal is not to provide model legislation for consideration at the UN, but rather to establish a conceptual framework to encourage more transfers of sovereign land.<sup>32</sup> Does the piece meet this more limited goal? While Blocher and Gulati's scheme contains much promise, a few broad issues remain tantalizingly unaddressed. First, the authors fail to provide a coherent story to explain why there are not more transfers of sovereign territory under the current international regime. Second, the authors do not address whether a market for sovereign control is really an adequate form of exit for regions that have been ill-treated by their parent nation. And third, Blocher and Gulati expend little effort defending one of their core assumptions: that nations will act as rational wealth-maximizers in a market for sovereign territory.

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29. The authors openly acknowledge that their article does not provide some essential details. Blocher & Gulati, *supra* note 2, at 822 ("This raises difficult questions of institutional design and authority that this [a]rticle does not attempt to answer.").

30. *Id.* at 821 (discussing the challenge of defining "what kind of oppression is sufficient to trigger the liability rule").

31. *Id.* at 840–41 (briefly discussing what counts as a "region").

32. *Id.* at 804 (noting that "[a]s with any conceptual framework, we do not expect this proposal to translate directly into practice").

A. *Why Doesn't a Market for Sovereignty Already Exist?*

Blocher and Gulati argue that a market for sovereign land would have the power to reduce armed conflict, improve governance, and protect minority rights. But if swapping sovereignty for cash really contains such promise, we should expect nations currently fighting over territory to occasionally settle their disputes with negotiated land transactions. Such transactions are fully sanctioned under the current international order. While traditional law does not recognize the liability rule put forth by Blocher and Gulati, it does permit nations to engage in voluntary, arms-length bargaining over land.<sup>33</sup> For example, the United States could purchase large swaths of Canadian territory if the governments in Washington and Ottawa could reach a mutually agreeable price. In some respects, it is actually easier to buy and sell land under current international law than it would be under the framework proposed in *A Market for Sovereign Control*. Blocher and Gulati, for example, would only allow transfers if residents in the transacted region give their consent—modern international law imposes no such restriction.<sup>34</sup> Thus, if the Canadian government acquiesced, the United States could make Quebec the 51st state, even over the vociferous objections of the Québécois.

Looking at the sweep of evidence assembled in *A Market for Sovereign Control*, it is difficult to conclude that countries seem eager to sell land to their neighbors. Blocher and Gulati expend a lot of effort demonstrating that nations flog sovereignty-like things: they confer servitudes to one another, they lease military bases to foreign powers, they transfer territory to foreign investors, and they engage in cooperative efforts to build things like canals and ports.<sup>35</sup> But these grants of quasi-sovereignty seem markedly different than permanently surrendering control of land and severing relationships with discrete groups of people. In *A Market for Sovereign Control*, Blocher and Gulati mention only a few examples of fulsome transfers of sovereign territory, and the cases they rely on—the Louisiana Purchase, the sale of the Virgin Islands, the gift of Mumbai from Portugal to Britain, the purchase of Hong Kong—all occurred over one hundred years ago.<sup>36</sup> This slight historical record suggests that border changes are more

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33. *Id.* at 806–10 (showing that nations can acquire territory as they see fit, with no need for approval from the transacted peoples).

34. *Id.* at 813 (declaring that “we would require regional approval for cessions”).

35. *Id.* at 801–02.

36. *Id.* at 808–09.

fraught than the authors acknowledge. It also complicates their argument that sales of sovereign territory will result in Pareto-efficient outcomes. It seems that countries either find it difficult to agree on price or, more likely, they simply resist the idea that governance can be bought and sold.

In my view, the authors do not focus adequate attention on the drought of negotiated transactions. How to explain the lack of transfers under the current international order? Blocher and Gulati only acknowledge the issue indirectly, indicating that they do not expect their framework to get robust use. They state, “[h]opefully a market for sovereignty can—even if rarely employed, and even if used just once—offer a workable solution to actual problems . . . . Our goal here is to add an option, not to ensure that nations frequently employ it.”<sup>37</sup> But this is unsatisfying. What Blocher and Gulati propose will not be easy to implement. By their own admission, they are pushing for a significant addition to international law. Such schemes do not spring to life fully formed, like Athena from the head of Zeus. The global community will need to constitute new agencies to oversee and administer the secessions of ill-treated regions. Committees will argue about rules and make compromises about ambiguities. Treaties may need to be signed. Given the time and extraordinary effort required to erect any international framework, Blocher and Gulati have the obligation to show that their scheme would justify the costs. Based on the evidence presented in *A Market for Sovereign Control*, they have not (yet) met that burden.

### B. *Exit and Enforcers*

The easiest defense of *A Market for Sovereign Control* is that the scheme does not solely rely on *voluntary* transfers. Under Blocher and Gulati’s proposal, if a nation fails to provide representation or equal treatment to a constituent region, it automatically loses the right to prevent a secession and the compensation it is due can be set by an international tribunal.<sup>38</sup> No meeting of the minds is necessary to effectuate a border change. But the possibility of involuntary transfers raises a host of other, darker problems. What happens if an ill-treated region declares independence by invoking Blocher and Gulati’s scheme, but the parent nation refuses to accept a realignment? This is

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37. *Id.* at 837.

38. *Id.* at 803 (“The parent nation . . . loses the power to forbid a cession but remains entitled to compensation set by the market (subject to review by a third party such as the ICJ).”).

not just academic conjecture. It is painfully easy to come up with examples that might fall into this category: Palestinians in Israel, Kurds in Turkey, Turks on Cyprus, Basques in France, Chechens in Russia, Serbs in Bosnia, Ambazonians in Cameroon, and Rohingya in Myanmar. China alone could see eruptions in Tibet, Taiwan, Hong Kong, and the Uyghur homelands.

Who, exactly, will enforce the claims of these peoples? The international community? The purchasing nation? The regions themselves? Blocher and Gulati do not say. *A Market for Sovereign Control* would be a stronger offering if the authors sketched, in general terms, how they envision disputed cases unfolding. Right now, it is difficult to see how a people like the Rohingya or the Chechens can escape their (more powerful) antagonists, at least without the backing of a muscular enforcer.<sup>39</sup> In fact, the only regions that seem poised to immediately benefit from Blocher and Gulati's scheme are the ethnically Russian enclaves scattered throughout the former Soviet states—they alone have a patron who can pay the mandated compensation and then follow up with credible threats of violence if a parent nation (Ukraine? Kazakhstan? Estonia? Georgia?) resists a secession. Arguably, the moral force underlying Blocher and Gulati's proposal ebbs if their framework is perceived as a tool to consolidate the power of rich nations rather than as a means to further the liberation of subjugated peoples.

Even assuming that I have underestimated the number of regions that can initially extricate themselves from the grip of discriminatory central governments, Blocher and Gulati's framework may still hit a few speedbumps. The success of the authors' proposal turns on the ability to provide regions with a genuine exit option.<sup>40</sup> But altering a border does not physically remove vulnerable populations from the reach of their former tormentors. Establishing an invisible boundary between tyrant and the terrorized, without more, accomplishes little. Consider two examples. First, in 2011, the black population of Sudan overwhelmingly voted to break free from its oppressive central

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39. For a primer on the Rohingya, see generally Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar's Rohingya*, 23 PAC. RIM L. & POL'Y J. 683 (2014). And for background on the Chechens, see generally Johanna Nichols, *The Chechen Refugees*, 18 BERKELEY J. INT'L L. 241 (2000).

40. Tiebout models of intra-jurisdictional competition rest on the ability of citizens to reveal their preferences through exit. See, e.g., Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 419 (1990) (stating that exit is “pivotal to the efficiency of Tiebout's system”).

government and form its own nation, South Sudan.<sup>41</sup> The international community affirmed this vote and drew new borders upon the map.<sup>42</sup> The government of Sudan, however, has sporadically ignored the border change; it continues to harass the South Sudanese people and meddle in the affairs of the new nation.<sup>43</sup> Life for the South Sudanese hardly seems to have improved in the aftermath of independence.<sup>44</sup> Second, in 1999, the people of East Timor voted for independence from Indonesia, only for an Indonesian-backed militia to initiate a campaign of terror.<sup>45</sup> The newly liberated region was saved only when the world community intervened and the UN assumed administration of the region.<sup>46</sup> In this small, Connecticut-sized nation, the peacekeeping mission lasted over a decade.<sup>47</sup> Is this the template that *A Market for Sovereign Control* envisions?

Blocher and Gulati might respond that although their proposal is not perfect, “[t]he availability of a market solution gives [a] region an exit option it did not have before[.]”<sup>48</sup> No one is worse off and the scheme may occasionally help a marginalized people achieve greater

41. See Maggie Fick, *South Sudan: 5 Key Questions Answered*, CHRISTIAN SCI. MONITOR (July 21, 2011), <http://www.csmonitor.com/World/Africa/2011/0721/South-Sudan-5-key-questions-answered/Why-did-the-Republic-of-South-Sudan-secede-from-the-North> [https://perma.cc/JC88-E5TF] (describing the Sudanese government’s consistent marginalization of the non-Arab South).

42. Jeffrey Gettleman, *Struggle Over, Independent South Sudan Rejoices*, N.Y. TIMES, July 10, 2011, at A6 (discussing the involvement of the United States in crafting the treaty between North and South Sudan).

43. See Hannibal Travis, *Genocide, Counterinsurgency, and the Self-Defense of UN Member States Before the International Criminal Court*, 22 U.C. DAVIS J. INT’L L. & POL’Y 139, 194–97 (2016); Charlton Doki & Dam Mohamed, “Africa’s Arms Dump”: *Following the Trail of Bullets in the Sudans*, GUARDIAN (Oct. 2, 2014), <https://www.theguardian.com/world/2014/oct/02/sp-africa-arms-dump-south-sudan> [https://perma.cc/TVB4-VK92] (discussing reports that the Sudanese government supplies arms to rebels fighting in South Sudan). The South Sudanese have been no angels in this dispute. Many observers hold them largely responsible for the 2012 crisis in Heglig.

44. See generally Harjot Dhillon, *Lofty Goals in Dire Times: South Sudan’s Obstacles to Achieving the New SDGs*, 16 SUSTAINABLE DEV. L. & POL’Y 14, 14 (2016) (discussing the political and humanitarian challenges in South Sudan).

45. Cheah Wui Ling, *Forgiveness and Punishment in Post-Conflict Timor*, 10 UCLA J. INT’L L. & FOREIGN AFF. 297, 304–07 (2005) (describing the violence in the immediate aftermath of East Timor’s independence vote).

46. *Id.* at 305–06.

47. See UNMIT: *The United Nations Integrated Mission in Timor-Leste*, UNITED NATIONS (Nov. 13, 2012), <http://www.un.org/en/peacekeeping/missions/past/unmit> [https://perma.cc/6E2H-DH9N] (“The United Nations Integrated Mission in Timor-Leste completed its mandate on 31 December 2012.”).

48. Blocher & Gulati, *supra* note 2, at 825.

security. And yet, there is a nontrivial danger that their proposal could spark increased levels of armed conflict around the globe. It does not take much imagination to envision a world where an ill-treated people, whose cause is suddenly injected with the righteousness of international law, might decide to initiate violence against the central government that refuses to allow secession. Blocher and Gulati's framework may also draw outside enforcers into what had been regional tensions, thereby risking the spread of new conflicts with different peoples and providing a spark for the enlargement of disputes.<sup>49</sup> I do not believe this critique poses a fundamental challenge to Blocher and Gulati's proposal. It does, however, bring onscreen some downside risks of the framework that the authors might consider in their future writings.

### C. *Politics and Psychology*

Blocher and Gulati are correct, in my view, to worry that regions denied representation by their parent countries need better exit options. In *A Market for Sovereign Control*, the authors ably use the tools of markets and economic theory to disrupt current thinking about self-determination, the inviolability of borders, and how best to protect disfavored minority groups. The discussion, however, would have been enriched with a sober focus on international politics and the psychology that accompanies questions of sovereign territory. Specifically, Blocher and Gulati's market-based proposal assumes that nations are rational actors who seek to maximize their economic welfare above other goals. They maintain that parent countries will quickly snap up compensation for lost land rather than fight over troublesome regions that desire to join another sovereign. This view of international affairs seems incomplete. While nations certainly respond to monetary incentives, they also sit atop the fault lines of history, honor, and vengeance.

The most obvious complication for Blocher and Gulati's market is that sovereign territory is not a fungible good that can be easily replaced. Specific places and landscapes continue to play a hugely significant part in the construction of national identities.<sup>50</sup> For example,

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49. See Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 U. ILL. L. REV. 59, 104–07 (discussing the danger of enforcing one's own entitlements).

50. Blocher and Gulati make a glancing reference to this issue. See Blocher & Gulati, *supra* note 2, at 815.

it's difficult to conceive of the United States ever assenting to a sale of the Statue of Liberty or Independence Hall, even if the surrounding areas become inhabited by some ungovernable minority. These sites are too rich with symbolic meaning to relinquish for money, access to military bases, or promises to open new markets. "Ordinary" landscapes, too, are often seen as integral to the national identity.<sup>51</sup> For example, idyllic versions of the Western United States and the small New England town have, in different contexts, come to symbolize the wider nation. This is true all around the globe. In versions of Welsh nationalist discourse, for example, "the mountains are seen as the heart of the nation, somehow symbolizing a Wales untainted by outside . . . influences."<sup>52</sup> And in England, images of the rural landscape reinforce ideas about English history and its collective character.<sup>53</sup> That territory remains so interlaced with the construction of national identity casts some dark shadows across Blocher and Gulati's optimistic vision for a market in sovereign territory. In a world where altering boundaries is often akin to a betrayal of a people's history, offering monetary compensation for land loss might not provide as strong an incentive as Blocher and Gulati hope.<sup>54</sup> What politician will accept thirty pieces of silver to sanction the loss of territory where national heroes lived, battles were won, and prophets lay buried?

Visions of national honor may also have a warping effect on Blocher and Gulati's proposal. Recall the recent troubles in Crimea. The authors have argued that their proposal would have improved outcomes in the dispute between Russia and Ukraine.<sup>55</sup> Under the current legal regime, Russia had every incentive to manufacture unrest in Crimea and then use the resulting chaos to justify a "humanitarian" military intervention to protect the region's Russian population. According to Blocher and Gulati, a market would have given Russia a different and better alternative.<sup>56</sup> The Russians could have directed their military spending toward a compensation package, which could

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51. See David Storey, *Territory and National Identity: Examples from the Former Yugoslavia*, 87 GEOGRAPHY 108, 109–10 (2002).

52. *Id.* at 110.

53. See MICHAEL BUNCE, *THE COUNTRYSIDE IDEAL: ANGLO-AMERICAN IMAGES OF LANDSCAPE* 33–34 (1994).

54. Storey, *supra* note 51, at 113 (arguing that for Serbs, relinquishing claims to Kosovo is a "betrayal of their own history").

55. Blocher & Gulati, *Ukraine and Russia*, *supra* note 13.

56. *Id.*

have led to “a voluntary and more legitimate cession.”<sup>57</sup> But this vision assumes too much. It presumes a Ukrainian politician could accept money from Russia for Ukrainian land without incurring the rage of the people.<sup>58</sup> And it imagines that Russia’s only motivation was to control the resources of Crimea. Many observers have argued, however, that Russia’s behavior was not driven primarily by economic considerations.<sup>59</sup> Rather, the point of the Crimea excursion was to humiliate the West and punish Ukrainians for electing a pro-European government.<sup>60</sup> These goals could not have been accomplished through a negotiated purchase.

The most basic problem is this: Blocher and Gulati’s proposal allows sales of sovereign land, but it does not make it particularly honorable or politically feasible to do so. This hitch is not insurmountable, but it requires changing some very sticky norms. Consider the ongoing conflict between Britain and Argentina over the Falkland Islands. Britain spends enormous sums of money each year to defend the Falklands, a group of islands in the South Atlantic Ocean, almost eight thousand miles away from London.<sup>61</sup> Argentina desperately wants to govern the archipelago, which sits off its coast and is still home to three thousand people.<sup>62</sup> Reason dictates that Britain should buy out the inhabitants and sell the territory to Argentina (or purchase Argentina’s claim). And yet this seems an impossibility. For the British public, the Falklands are the site of a rousing British military

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57. *Id.*

58. See Issac Chotiner, *How Putin Won Crimea, and Lost Ukraine*, SLATE (Oct. 18, 2016, 9:15 AM), [http://www.slate.com/articles/news\\_and\\_politics/interrogation/2016/10/tim\\_judah\\_on\\_how\\_putin\\_won\\_crimea\\_and\\_lost\\_ukraine.html](http://www.slate.com/articles/news_and_politics/interrogation/2016/10/tim_judah_on_how_putin_won_crimea_and_lost_ukraine.html) [<https://perma.cc/U3WD-22LZ>] (discussing how the invasion of Crimea turned “millions” of Ukrainians against Russia).

59. See, e.g., Daniel Treisman, *Why Putin Took Crimea*, FOREIGN AFF., May/June 2016, at 47, 48 (discussing Putin’s many motivations for the invasion); Leonid Bershidsky, *Why Russia Stopped at Crimea*, BLOOMBERGVIEW (Feb. 22, 2016, 12:20 PM), <https://www.bloomberg.com/view/articles/2016-02-22/why-russia-stopped-at-crimea> [<https://perma.cc/PB9C-8TB5>] (“In Ukraine, [Putin] wants to cripple the country enough that the West will be wary of taking it in, integrating it into European institutions.”).

60. See Nina Khrushcheva, *What Does Vladimir Putin Really Want in Ukraine?*, REUTERS (Feb. 2, 2015), <http://blogs.reuters.com/great-debate/2015/02/01/what-does-vladimir-putin-really-want-in-ukraine> [<https://perma.cc/85FV-MKEW>] (“Some political analysts assert that Putin is all about asymmetrical retaliation: Every time he feels his power is disrespected, he lashes out.”).

61. Adam Taylor, *The UK’s Defense of the Falkland Islands Costs a Staggering Amount Per Islander*, BUS. INSIDER (Feb. 14, 2012, 8:45 AM), <http://www.businessinsider.com/falkland-islands-cost-2012-2> [<https://perma.cc/8AMY-KLUJ>].

62. Steven Swinford, *Theresa May Extends Olive Branch to Argentina Over Falkland Islands*, TELEGRAPH (Aug. 12, 2016, 1:22 AM), <http://www.telegraph.co.uk/news/2016/08/11/theresa-may-asks-argentina-to-discuss-falklands-flights-and-oil> [<https://perma.cc/FZ9E-ZBGY>].



victory and stand as a symbol of martial courage and national pride.<sup>63</sup> Moreover, the ability to defend such a far-flung place demonstrates British national greatness to the world and serves as a reminder of the country's former imperial reach.<sup>64</sup> To sell the Falklands is to sell off British history and leave behind the graves of British soldiers who died defending the island. All of this should depress supporters of Blocher and Gulati's scheme. If two wealthy Western countries (that share many of the same values) cannot agree to sell a group of islands that has no strategic significance and only contains a handful of settlements, it demonstrates how much work still needs to be done.

### CONCLUSION

In *A Market for Sovereign Control*, Joseph Blocher and Mitu Gulati have accomplished something rare and vitally important. For the better part of the past century, international law has assumed that borders are inviolable, except in the most extreme cases. Blocher and Gulati disrupt this thinking by proposing to protect international boundaries with a liability rule rather than a property rule. Their case against the sanctity of borders is a powerful one, and they convincingly argue that where the people of a region are clearly denied equal rights they should have the ability to exit, provided they compensate their parent nation. Blocher and Gulati deserve plaudits because they are pushing for a way to bring functioning government to oppressed people, rather than forcing oppressed people to flee their homes in search of security.

Unfortunately, the devil is in the details. And, right now, Blocher and Gulati's alternative vision lacks concrete details in crucial areas. In other places, their framework borrows too heavily from law and economics concepts at the expense of more granular thinking about on-the-ground political realities. Will the threat of a market for sovereignty really inspire rogues to treat disfavored regions with a lighter touch? Will bigger, stronger nations (China, Russia, the United States) really accede to any limits on their sovereignty? Is there any good evidence that offering monetary compensation for land can bury generations-long disputes about who owns contested territories? Against this background, perhaps the greatest virtue of Blocher and Gulati's framework is that it might spark important debates between

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63. WENDY WEBSTER, *ENGLISHNESS AND EMPIRE 1939–1965*, at 219–20 (2005) (discussing Margaret Thatcher and the memory of the Falklands War).

64. *Id.*

nations, shift norms about borders, and make transactions for sovereign territory more politically palatable.