GLOBALISTS AND THE CORRUPTION OF SOURCES

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I. INTRODUCTION

In early 2017, an obscure U.N. official by the name of Dainius Puras—acting in his capacity as "Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"—sent a remarkable letter to the Trump Administration via the representative of the United States' permanent mission in Geneva, Switzerland.[1] Puras had learned of the Administration's plans to encourage Congress to repeal core elements of the Affordable Care Act (popularly known as "ObamaCare"), and he wished to alert Congress to the fact that such repeal would violate international law. How precisely would it do that? Simple: Repeal would violate the Universal Declaration of Human Rights,[2] which allegedly is an "expression of international customary law" binding on all states, including the United States.[3] Repeal would also violate the International Covenant on Economic, Social and Cultural Rights,[4] which the United States allegedly is bound to uphold even though it is not a state party but merely a signatory.[5] Puras urged the Trump Administration to put in place "all necessary interim measures" to prevent the purported rights violations,[6] and advised of his intention to go public with his concerns owing to their felt urgency.[7]

It would be easy to laugh this letter off as just another hubristic twitch on the part of a minor U.N. bureaucrat – and one not even legally trained at that.[8] Puras's claims should have struck any lawyer versed in the secondary rules of international law formation as highly contestable. Yet I would argue that not only should we not laugh too soon at Puras; we should not laugh at all. For his foray deep into the heart of American politics was not the isolated and aberrant adventure it may have seemed at the time. A mere ten months later,

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1 *See* Letter from Dainius Puras to Theodore Allegra (Feb. 2, 2017), https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2017/04/25/Editorial-Opinion/Graphics/103_17_ACA_Repeal_Request_for_Information.pdf?tid=a_inl_manual [hereinafter Puras Letter].

2 G.A. Res 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

3 Puras Letter, *supra* note 1, at 3.

4 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, 993 U.N.T.S. 3 [hereinafter ICESCR].

5 *See* Puras Letter, *supra* note 1, at 3.

6 *Id.* at 4.

7 *See id.* at 5.

8 Puras is a doctor, with no discernible legal training. *See* Dana Milbank, *Apparently Repealing Obamacare Could Violate International Law*, WASH. POST (Apr. 25, 2017), https://www.washingtonpost.com/opinions/apparently-repealing-obamacare-could-violate-international-law/2017/04/25/2794a77c-29f4-11e7-b605-33413c691853_story.html?utm_term=.d8f26ce294eb.

no less esteemed an international lawyer than Philip Alston visited the United States in his role as "UN Special Rapporteur on Extreme Poverty and Human Rights" and made similar problematic claims about the sources of international legal obligation, this time in a not-so-subtle bid to get the Trump Administration to back away from its tax-reform agenda.[9] Alston's public statement, issued in December 2017 after a two-week "poverty tour" of the United States, reads in pertinent part:

> Successive administrations, including the present one, have determinedly rejected the idea that economic and social rights are full-fledged human rights, despite their clear recognition not only in key treaties that the US has ratified (such as the Convention on the Elimination of All Forms of Racial Discrimination), and in the Universal Declaration of Human Rights which the US has long insisted other countries must respect. But denial does not eliminate responsibility, nor does it negate obligations. International human rights law recognizes a right to education, a right to healthcare, a right to social protection for those in need, and a right to an adequate standard of living. In practice, the United States is alone among developed countries in insisting that while human rights are of fundamental importance, they do not include rights that guard against dying of hunger, dying from a lack of access to affordable healthcare, or growing up in a context of total deprivation.[10]

Alston's tone was matter-of-fact to the point of being blasé. However, the substance of his statements and suggestions should have turned heads–and not in a good way. Is it really the case that a state's determined denial of an obligation fails to relieve it of responsibility to fulfil that obligation under international law? Or that formally non-binding and aspirational resolutions passed in the U.N. General Assembly impose duties that states may neither ignore nor honor in the breach? Or that non-conforming state practice is to be regarded as irresponsible state self-ostracism from the international community rather than legitimate self-protection from it? Surely given his prior scholarship in the area of sources of international law Alston would

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9 *See* Jake Johnson, *UN Report Condemns Trump Admin for 'Deliberately' Creating Devastating Inequality*, ZEROHEDGE (June 4, 2018), https://www.zerohedge.com/news/2018-06-04/un-report-condemns-trump-admin-deliberately-creating-devastating-inequality.

10 *Statement on Visit to the USA, by Professor Philip Alston*, UNITED NATIONS HUM. RTS. OFF. HIGH COMMISSIONER (Dec. 17, 2017), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22533.

know to give highly qualified answers to each of these questions.[11] And yet there he was, sitting on the doorstep of a newly-minted Presidency, loudly proclaiming the United States to be effectively an international outlaw, and lamenting the fact that U.S. officials were not prepared to defer to legal and political decisions made at the international level. An unnecessarily officious exercise on Alston's part? Perhaps.[12] Yet in truth it was hardly surprising. Whether Alston knew it or not, both he and Puras were taking a page out of a very old playbook, one written twenty-five years earlier by American legal scholar Jonathan Charney.[13]

The year was 1993. Charney looked out on the world and saw a set of brewing and formidable crises. Problems that presented as global in nature—climate change, international terrorism, and economic instability—seemed to require global solutions, yet the Westphalian-based ideal of state sovereignty was standing stubbornly in the way.[14] The ability of any given state to dissent from, and opt out of, a course of remedial action agreed to at the international level was imperiling the achievement of crucial public goods on a worldwide scale.[15] Charney's mission, as he saw it, was to find a way to steamroll the dissenters.[16] This would require, at the very least, circumventing the principle of state consent as the basis of international legal obligation. Charney astutely recognized a potentially useful tool of coercion in the doctrine of sources:

> The secondary rules of recognition govern the process by which rules of international law are established. . . . Thus, if the secondary rules require unanimity before a primary rule

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11 *See* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRL. Y.B. INT'L L. 82 (1992).

12 Alston's invocation of the International Convention on the Elimination of All Forms of Racial Discrimination was a particularly cheap shot. 660 U.N.T.S. 195 [hereinafter CERD]. CERD does mention social and economic rights, but only for the purpose of prohibiting discrimination relative to their exercise should they be recognized, not of declaring them as such. The U.S. Senate that ratified the CERD clearly understood the difference: "States are not required by [CERD] Article 5 to ensure observance of each of the rights listed in that article, but rather to prohibit discrimination in the enjoyment of those rights to the extent they are provided by the domestic law." S. REP. NO. 103-29 (1994), at 28 [hereinafter Senate Report]. The Senate made this distinction against the backdrop of both persistent legislative resistance to the ICESCR and settled law holding that economic rights are not protected under any provision of the U.S. Constitution. For background on these points, see Barbara Stark, *At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 107 (2011).

13 Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993).

14 *See id.* at 529-30.

15 *Id.*

16 *See id.* at 531 ("In this article, I explore the limits of state autonomy to determine whether some or all of international law may be made universally binding regardless of the position of one or a small number of unwilling states.").

> may enter into international law for all states, as a practical matter, the possibility of universal rules will be foreclosed unless the secondary rules are changed.[17]

And changed they have been. Over the course of the last twenty-five years, international legal scholars—aided by sympathetic officials in intergovernmental and non-governmental organizations (IGOs and NGOs, respectively)—have taken up Charney's challenge of altering the doctrine of sources to get the international community past that all-important point at which "state sovereignty gives way to the legal and political supremacy of global institutions."[18] They have sought to evolve the old doctrine of sources into a new one that redounds to international power structures and detracts from national ones. In reality their task has been two-fold: (1) To secure adjustments to the rules of international law-formation which make it easier for international actors to bind dissenting states to their decisions as a matter of international law; and (2) to secure adjustments to domestic rules of international law internalization which make it harder for national actors to ignore or act counter to international legal standards. The need for this second prong of what I shall call the "Sources Project" will be readily apparent, as it would make little sense (from a globalist's perspective) to go to the trouble of building a Cadillac of international law only to have to leave it idling out on the road because one could not get it parked inside the domestic garage. Hence the need for scholars like former Yale Law School dean (and senior State Department official) Harold Koh, who has assiduously worked the domestic level of the Sources Project for the last thirty years. In one of his most recent bids to get the new international law "in," Koh echoed Charney in warning his colleagues that unless they abandon traditional constitutional doctrine regarding presidential authority to conclude international agreements, the international-law project will stall:

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17 *Id.* at 533-34. Charney was by no means the first legal scholar to think along these lines, though his formulation of the perceived challenge was arguably the most compact and candid. Writing over ten years earlier, Jeffrey Blum and Ralph Steinhardt had claimed to see a similar inadequacy in an international system that lacked ways to bind states legally to rules they opposed. *See* Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981). In 1986, Louis Sohn urged states "to adapt the methods of law-creation to the needs of the rapidly growing and changing world community." Louis B. Sohn, *'Generally Accepted' International Rules*, 61 WASH. L. REV. 1073, 1079 (1986). And in 1990, Theodor Meron cited "the enlightened interest of the international community in extending the reach and in strengthening the effectiveness of essential norms of international public order" in encouraging the International Court of Justice to be bolder in its findings of customary norms. THEODORE MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 114 (1991).

18 Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1266 (2005).

> As we move from diplomatic dialogue to political commitments to soft regimes to shared norms to legal rules to international institutions, we should not impose a formal triptych on novel ways of negotiating international arrangements, because such rules make such arrangements nearly impossible to achieve.[19]

The sense of mission and sheer enthusiasm of the scholars who responded positively to Charney's challenge was evident early on. Writing in 1999, Paul Stephan—one scholar who did not so respond—noted with alarm that:

> [I]t seems surprising how infrequently the community of international law scholars contemplates arguments against the expansion of international law's domain. . . . [T]o a far greater extent than in other fields, academic specialists seem to accept the fundamental desirability of the subject in which they are expert and to believe that the world needs more international law, not less.[20]

Indeed, so uncritically did the international lawyers of his day view the expansion of international law's empire that Stephan felt the need to admonish them to "get beyond the simple equation of international law with progressive development and invite the kind of wide-open inquiry that we have come to take for granted elsewhere."[21] Motivated by similar concerns, and writing just a few years later, Kenneth Anderson suggested that the evidence of the collapse of traditional state sovereignty was being "wildly exaggerated" in the scholarly literature on global governance.[22] Even the International Law Commission (ILC)—a body not easily moved to gratuitous action—recently felt the need to chide sources scholars for their tendency to forsake analysis for advocacy.[23]

Equally palpable has been these scholars' sense of their own power and influence. Unlike their political scientist colleagues, globalist legal scholars have long been aware that, courtesy of Article 38(d) of the Statute of the

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19 Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. F. 338, 365 (2017).

20 Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 COLO. L. REV. 1555, 1586 (1999).

21 *Id.* at 1587.

22 Anderson, *supra* note 18, at 1300.

23 *See* Int'l Law Comm'n, Draft Conclusions on Identification of Customary International Law, with Commentaries, U.N. Doc. A/73/10 (2018) at Conclusion 14, cmt. (3) [hereinafter Draft Conclusions]. Charney's own 1993 article had a highly prescriptive feel to it even though he claimed merely to be describing a newly emerging process of CIL-formation.

International Court of Justice (ICJ),[24] they do indeed have a formal seat at the table when it comes to identifying the rules of international law, including the identification of the secondary rules of recognition. In 2002, Ernest Young went so far as to accuse certain scholars of harboring "delusions of grandeur" in regard to their role in the formation and articulation of customary international law (CIL) norms.[25] Yet Young's criticism, while understandable, was arguably misplaced. As Stephan was quick to perceive, there was nothing delusional about the scholars' sense of power, for the power was very real. Stephan saw it clearly at work in the pre-*Sosa v. Alvarez-Machain*[26] debate concerning the self-execution of the CIL of human rights, where the scholars had helped to build a "great edifice" of doctrine out of two suggestive Supreme Court cases.[27] "Either human rights law will fulfil the ambitions of its academic supporters through increasingly bold accomplishments," Stephan predicted in 2000, "or it will fall back . . . ."[28] He left his readers with the distinct impression that he thought the scholars would win.[29]

Having a sense of mission and of power, however, has not insulated globalist scholars from criticism, nor assured them victory. They have indeed faced opposition, albeit from a fairly small minority from within the academic community. Writing in 1988, Arthur Weisburd took aim at Blum and Steinhardt's work and expressed sheer exasperation at the notion that one might, via scholarly *ipse dixit*, alter the doctrine of sources to achieve a "world order."[30] He specifically contested the then-blossoming view that CIL could be derived almost automatically from any provision of a norm-creating character of any treaty or convention.[31] Curtis Bradley and Jack Goldsmith all but accused their fellow scholars of committing an intellectual coup d'etat by inserting the so called Modern Position regarding the self-executing nature of CIL under U.S. law into the Restatement (Third) of the Foreign Relations Law of the United States.[32] Stephan went so far as to suggest that American scholars' influence in CIL-formation "seem[ed] the antithesis of

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24 Statue of the International Court of Justice art. 38, ¶ 1, Jun. 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 [hereinafter ICJ Statute].

25 Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 391 (2002).

26 542 U.S. 692 (2004).

27 Paul B. Stephan, *International Governance and American Democracy*, 1 CHI. J. INT'L L. 237, 241 (2000).

28 *Id.* at 242.

29 *Id.* at 246.

30 Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 42-45 (1988).

31 *Id.* at 23-30.

32 Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 341-45 (1997) (recounting the authors' criticism of the origins of the Modern Position).

democracy."[33] And passion seems to have begotten passion. On the globalists' side, Koh has reacted to the nationalistic bent of the Trump Administration with some highly unconventional proposals and calls-to-action that are designed to keep the Sources Project moving forward at all cost.[34] The unusual bitterness that has characterized some of these debates—with references to "heated criticism,"[35] "heated spats," [36] "fierce arguments," [37] "pitched and occasionally intemperate debate,"[38] "angry responses," [39] "distorted" accounts,"[40] views put forward "without a sense of . . . intellectual history and without any effort to explain [their] justifications," [41] and "polarization" that is "unhelpful and inaccurate" [42]—is incomprehensible unless one realizes that the more nationalistically minded scholars have not only been staking out alternative positions of a technical, academic nature. These scholars have been throwing wrenches into a well-oiled machine that at one point had been well on its way to delivering a massive shift in power away from the most democratically accountable institutions of the modern nation-state toward far less accountable "others."[43]

If one takes stock of the scholarly discourse as a whole, it is clear that a quiet war has been raging around the Sources Project for some time. Bradley, who has fought many intellectual battles for the nationalist camp, seemed to sense as much when in a footnote to a 2007 article about unratified treaties he noted that:

> [t]he effort to increase the obligations on signatory nations can be seen as part of a more general effort by advocacy groups, international institutions, and some scholars to relax formal and consent-based requirements for the imposition of international obligations. Other examples might include a less practice-based conception of customary international law, restrictions on the ability of nations to opt out of customary international law, concepts of jus cogens norms that are

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33 Stephan, *supra* note 27, at 246.

34 *See* discussion *infra* Part II.C.

35 Stephan, *supra* note 27, at 242.

36 Young, *supra* note 25, at 366.

37 Stephan, *supra* note 27, at 237.

38 *Id.* at 241.

39 Young, *supra* note 25, at 367.

40 Bradley & Goldsmith, *supra* note 32, at 341.

41 Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 206 (2010).

42 JAMES A. GREEN, THE PERSISTENT OBJECTOR RULE IN INTERNATIONAL LAW 282 (Oxford Univ. Press 2016).

43 As will be discussed *infra* Part II, these "others" comprise not only the almost wholly unaccountable class of international actors but also the least accountable national ones, *viz.* the judiciary and the bureaucracy.

> binding without regard to state consent, and severability of purportedly invalid treaty reservations.[44]

However, while Bradley limned the contours of this "more general effort," neither he nor any other scholar has explored it with the scrutiny it deserves. As he and Goldsmith acknowledged in their recent comprehensive study of presidential power to shape U.S. commitments under international law,[45] sometimes only a broad canvassing of the many specific manifestations of a phenomenon can give us a sense of what precisely is at stake—of what we have lost, what we have saved, and what we may yet regain. This Article aspires to be that broader chronicle. In Parts I and II, I undertake a mostly descriptive survey of the main battles that have been fought on both the international and domestic levels of the Sources Project. In doing so, I hope not only to afford an appreciation of the ways in which globalist scholars have sought to mobilize the doctrine of sources against the authority of the nation-state, but also to provide a more perceptive account than is currently available of the current state of that doctrine. In Part III I explore an interesting normative aspect of the Sources Project, viz. the key historical and theoretical assumptions that seem to have legitimized the Project in the eyes of its scholarly promoters.

My own opinion of the Sources Project will undoubtedly be clear from this Article's title. The word "corruption" is a strong word, far stronger than the morally neutral "change" or even the negatively-connotative "manipulation." Like a small group of other international law scholars, I am a proudly unreconstructed democratic-sovereigntist who believes the Sources Project is flawed from a political-morality standpoint owing to the highly questionable end that it serves, namely "globalization." This overused term has different meanings depending upon the context. Here I shall use it to denote the diffusion of national political power upward toward trans-, supra- and international organizations and authorities, often via the activities of the least politically accountable elements of domestic officialdoms (viz. civil servants and judges).[46] I use the word "corruption" for the further reason that globalist legal scholars have at times been so result-oriented in their approach to sources that they have not always adhered to the standards of intellectual honesty, consistency of principle, and restraint that we usually take for granted

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44 Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 331 n.114 (2007).

45 Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201, 1205 (2018).

46 If judged by its fruits, globalization is the process by which "the residuum of authority left in our national government seems an ever-diminishing domain." Stephan, *supra* note 27, at 237. *See also* Stephan, *supra* note 20, at 1578 ("[I]ncreasingly the rules that shape what [domestic actors] may or must do represent the choices of international organs rather than national parliaments and bureaucracies").

in academic discourse.[47] This is not to say, of course, that such scholars are bad men and women. In fact, quite the opposite is true. More than anyone else, they recall the civil-rights lawyers of the mid-twentieth century who passionately tried to bring forth a better society based on a reinterpretation of the secondary rules of the U.S. Constitution relating to the reach of the federal government's power over the states.[48]

Yet there are differences. The federal government whose power those twentieth-century lawyers were seeking to vindicate was a reasonably transparent and democratically-accountable one; the international governance structure is not. Stephan noted the obvious in 1999 when he wrote that:

> [t]he processes that generate the new international law are several steps removed from the usual mechanisms that hold lawmakers accountable for their decisions. . . . To be sure, accountability is not completely absent in the new international law. . . . But, on the whole, the makers of the new international law find it easier to avoid the consequences of their decisions than do most national lawmakers.[49]

That, I submit, was putting it mildly. Writing a few years later, Rubenfeld rightly refused to pull any punches:

> There is, among international lawyers, a hazy notion that the emergence of the international community in the world of law and politics is itself a democratic development. The unfortunate reality, however, is that international law is a threat to democracy and to the hopes of democratic politics all over the world. For some, that may be a reason to support internationalism; for others, a reason to oppose it. Either way, the fundamental conflicts between democracy and international law must be recognized.[50]

Another important difference between then and now is that the secondary rules at issue in the civil rights era were reinterpreted not so much in order to create new power as to reflect it. The federal government's conclusive power

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47 I shall call attention to such lapses as they present themselves.

48 This reach is most notable with the commerce power and the power to implement the Fourteenth Amendment.

49 Stephan, *supra* note 20, at 1578-79.

50 Jed Rubenfeld, *The Two World Orders*, 27 WILSON Q. Autumn 2003, at 22, 34 (2003). *See also* Amy Baker Benjamin, *The Many Faces of Secrecy*, 8 WM. & MARY POL'Y REV. 1, 43-48 (2017) (analyzing the international order's transparency-deficit); Anderson, *supra* note 18, *passim* (analyzing the international order's democracy-deficit). I return to this topic *infra* Part III.C.

over the states originated in the crucible of the Civil War. A massive de facto event—literal northern boots on the southern ground—eventually resulted, many decades later, in substantial de jure innovation, not the other way around. Holmes acknowledged as much when, in narrowly interpreting the scope of the 10th Amendment's reservation of powers to the states, he observed:

> It was enough for [the Framers of the Constitution] to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. . . . *We must consider what this country has become in deciding what that amendment has reserved*.[51]

Contrast that order of events with Koh's contemporary "high-stakes gamble" (his term) to legitimize easier ways for the President to commit the United States to international agreements—the goal of which, not the cause of which, is the "transform[ation] [of] national identity."[52] In globalism's case a small cadre of rule-writers are seeking to transform an entire national identity. Simply to describe such an effort is, I submit, to condemn it.

The bottom line is that for the past twenty-five years globalist legal scholars have been embarked on a mission of dubious merit for which there is little precedent. The story is not a pretty one, nor flattering of its would-be protagonists. Thankfully its ending has yet to be written.

II. PART I: THE SOURCES PROJECT AT THE INTERNATIONAL LEVEL

A. Retooling CIL to Cure the Mischief of Treaties and of Aspiration

i. Charney's Authoritarian, yet Transparent, CIL

Charney's foundational article was based on a subtle act of misdirection. He began his analysis of the then-existing doctrine of sources with two quick paragraphs suggesting that the rules relating to treaty-making did not pose a danger to globalization.[53] The role of state consent in treaty-making, he assured his readers, was "limited, at best."[54] It was not until the final page of his essay that Charney revealed his actual opinion, which was that treaty-making represented the biggest impediment to globalization precisely because

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51 Missouri v. Holland, 252 U.S. 416, 433-34 (1920) (emphasis added).

52 Koh, *supra* note 19, at 365.

53 *See* Charney, *supra* note 13, at 534-35.

54 *Id.* at 534.

of its sovereignty-protecting attributes.[55] His reasoning was candid and highly revealing:

> Much of the demand for international law has been filled by treaties accepted as binding by state parties. Treaties, however, are unable to serve all the international legal requirements of the contemporary world. Treaties often require considerable time to be negotiated, adopted and brought into force. It is also impracticable to have treaties on all subjects of international law. Most importantly, states' adherence to treaties rarely approaches universal participation. Domestic law usually requires complex formal acts before treaties are accepted as binding. In contrast, general international law [i.e. CIL] may be established on the basis of less formal indications of consent or acquiescence. This makes worldwide law possible; it cannot be done through treaties alone.[56]

Charney was right. Treaty-making as it was then understood and practiced was too grounded in state consent to be of use to globalists.[57] Indeed, the entire treaty-making process was rife with opportunities for states to withhold their consent from proposed international rules and thereby avoid being bound. States could refuse to sign treaties either out of dislike of substantive treaty provisions or of the treaty form itself.[58] If they signed, they could refuse to ratify. If they ratified, they could interpose reservations, understandings, or declarations (RUDS) that tailored the treaty to their own special needs and concerns. Provided their constitutional processes were dualist in nature, they could decline to implement a ratified treaty. Finally, even if they signed, ratified, and implemented a treaty, they could successfully withdraw from it at a later date if they changed their mind in most instances. For a globalist legal scholar trying to build a non-consensual body of international law, treaties and their various flexibility mechanisms posed nothing but headaches.[59] CIL, on the other hand, not only rested on "less formal

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55 *See id.* at 551.

56 *Id.* at 551.

57 As I discuss *infra* Part I.B, globalists have recently implemented a range of strategies, internal to the treaty form and/or its application, that are designed to diminish the consensual nature of treaty commitments.

58 Some states, for example, opposed adopting the document that became the UDHR in binding treaty form. *See* Hilary Charlesworth, *Universal Declaration of Human Rights* (1948), in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 7 (2008), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e887.

59 *Accord* Mario Prost, *Hierarchy and the Sources of International Law*, 39 HOUST. J. INT'L L. 285, 303-04 (2017). Prost writes:

> [T]he notion of non-consensual law-making has always appealed to scholars committed to the ideal of universal law and frustrated with the

indications of consent or acquiescence;" it was admirably self-executing even in many otherwise dualist states.[60] It also denied states a right of unilateral exit post-crystallization.[61] Charney saw in CIL an appealing alternative to treaty-making precisely because of its coercive potential. His attitude represented an abandonment of the early post-war academic enthusiasm for treaties (and, indeed, for nationalism) as the preferred vehicles for delivering improvements in the human condition.[62]

But before CIL could step into its new role, it would need a new doctrinal look, and this new look would require some justification. Here again Charney resorted to misdirection. He first tried to convince his readers that the need for a CIL retooling was grounded in genuine concerns over transparency and sovereignty.[63] The presumption that state silence during the period of CIL norm-gestation equalled knowing and voluntary consent, he cautioned, masked "the reality that many states do not know that the law is being made and thus have not formed an opinion."[64] Yet if Charney had been genuinely

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> strict contractual nature of treaties and the limits inherent in voluntary law-making. . . . Many scholars have highlighted what they see as the inherent inadequacy of treaty law and its emphasis on state consent in dealing with global public good challenges . . . . In this context, treaty-making becomes problematic as it gives any state the right to object to the formation of any proposed rule of international law.

For a fairly recent example of scholars' and activists' displeasure with treaties, see Monica Hakimi, *Custom's Method and Process: Lessons from Humanitarian Law*, *in* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 148, 155 (Curtis A. Bradley ed., 2016) (describing how the lack of universal ratification of the Additional Protocols to the 1949 Geneva Conventions became "untenable" with the maturation of international human rights law and required rectification by an "ambitious" customary international humanitarian law project).

60 Including, to some extent, the pre-*Sosa* United States. *See infra* Part II.A.

61 Bradley and Gulati label as the "Mandatory View" the conventional wisdom that once a CIL rule becomes established, nations never have the unilateral right to withdraw from it. *See* Bradley & Gulati, *supra* note 41, at 204-05. Their research indicates that the Mandatory View emerged during the years 1890-1920 at the instigation of Western states concerned to ensure that emerging non-Western states would not be able to opt out of the customary rules that had been developed during the centuries of European imperial rule. *See id.* at 226-31.

62 *See* Prost, *supra* note 59, at 305-06 (noting this enthusiasm among Third World scholars in particular). Charney was by no means alone. Writing in 1998, Charlesworth confirmed that "[m]any jurists regard custom as a useful mechanism that can compensate for the rigidity of treaty law, and have argued for the expansion of the category." Hilary Charlesworth, *The Unbearable Lightness of Customary International Law*, 92 AM. SOC'Y INT'L L. PROC. 44, 44 (1998). For a more recent confirmation of this attitude, *see* Timothy Meyer, *Collective Decision-Making in International Governance*, 108 AJIL UNBOUND 30, 34 (2014).

63 Charney, *supra* note 13, at 537.

64 *Id.*; *see also id.* at 538. Charney writes:

> For political purposes . . . it may be desirable to engage in the fiction that failure to object constitutes consent or acquiescence. In fact, law is made

concerned to secure for states meaningful opportunities to express their consent to the rules that would bind them, he presumably would not have been trying to marginalize treaty-making as a source of international law. It was not until deep within his article that Charney disclosed his real reason for advocating a "new look" CIL, via these few quick remarks:

> Traditional textbook accounts of customary international lawmaking describe an amorphous process in which a pattern of behaviour developed by states acting in their self-interest over a long period of time is coupled with opinions that the practice reflects a legal obligation (*opinio juris*). . . . Traditional customary law formation may have sufficed when both the scope of international law and the number of states were limited. Today, however, the subject matter has expanded substantially into areas that were traditionally the preserve of states' domestic jurisdiction. In addition, the number of states has dramatically increased, together with their diversity. The relatively exclusive ways of the past are not suitable for contemporary circumstances.[65]

Translation: In a world of economically and culturally diverse states, no significant CIL rules were likely to emerge as long as CIL-formation remained rooted in the physical (and self-interested) practices of states.[66] The real problem with traditional CIL for Charney was therefore not its claimed authoritarian nature, but just the opposite. Given the inductive methodology by which it was assessed, traditional CIL could not help but reflect, to a large if imperfect extent, the very needs, wishes, and judgments of states that Charney thought were preventing the global community from dealing with urgent global problems and concerns. A universal law of human rights would

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> without the conscious acceptance of most states. Traditionally, customary law has been made by a few interested states for all.

Id. This type of criticism of traditional CIL has appeared almost as a matter of course in the works of globalist scholars. For a small but representative sampling over the past twenty-five years, see GREEN, *supra* note 42, at 248-49; Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 141-44 (2005); Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 767 (2001). Its purpose has generally not been to lay the groundwork for sovereignty-protecting reforms but, somewhat perversely, to make the scholars' sovereignty-limiting proposals seem less threatening. Roberts's own proposal was to enlist certain philosophical ideas of John Rawls and Ronald Dworkin as tie-breakers in cases of ambiguous physical state practice.

65 Charney, *supra* note 13, at 543.

66 *Cf.* Bradley & Gulati, *supra* note 41, at 244 (noting that "wide variations in ethnicity, culture, politics, resources, and economics" across the world's 192 nations "make it less likely that the aggregation of state practice, which is the basis for traditional CIL-formation, will generate efficient rules") (citation omitted).

be particularly difficult to forge on the back of the traditional practice-based CIL, in part because it was "still customary for a depressingly large number of States to trample upon the human rights of their nationals,"[67] but also because the content and scope of human rights was (and to a significant extent remains) contestable.[68]

Given that, for his purposes, Charney needed a more authoritarian version of CIL-formation than existed at the time, the substance of his proposal for a new type of CIL was hardly surprising. A "newly evolving process"[69] of CIL-formation was emerging, Charney announced, one rooted in the work-product of IGOs, regional organizations, and multilateral diplomatic conferences instead of in the physical practice of states.[70] These fora would consider norms presented in many different types of procedural dress (e.g. "proposals, reports, resolutions, treaties or protocols"[71]). What was important was not the "technical legal status of the form in which [solutions] emerged from the multilateral forum,"[72] but the clarity of "the intention to promote a norm of generally applicable international law"[73] and the strength of "the consensus in favor of the norm."[74] Eminent scholars would be on hand to assess fora debates with a keen eye and a sensitive touch to determine whether a norm had definitively emerged.[75] Most importantly, dissenting states—which Charney invariably chose to describe pejoratively (viz. "obstinate,"[76] "recalcitrant"[77])—could be outvoted with prejudice.[78]

Charney did not acknowledge the disenfranchisement that the world's citizenries were likely to suffer as a result of the ascendancy of this new authoritarian CIL. Owing to its relatively slow formation, as well as its roots

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67 Charney, *supra* note 13, at 551.

68 *See* Rubenfeld, *supra* note 50, at 30 ("The American view holds that democratic nations can sometimes differ on matters of fundamental rights."). Space for reasonable disagreement and alternative regulatory approaches would seem to exist, at a minimum, apropos the issues of hate speech, abortion, the death penalty, gun control, and human migration.

69 Charney, *supra* note 13, at 551.

70 *Id.* at 543-44.

71 *Id.* at 544.

72 *Id.* at 545.

73 *Id.* at 546.

74 *Id.*

75 *See id.* at 545 n.62-63 (noting that "[s]ensitive analyses of the results produced by such forums are necessary" and appearing to endorse Antonio Cassese for the position of norm-caller-in-chief).

76 *Id.* at 551.

77 *Id.* at 529.

78 *See id.* at 544 ("[O]pposition by a small number of participating states may not stop the movement of the proposed rule toward law."); *id.* at 545 (suggesting that the objections of "relatively isolated states" could be overridden); *id.* at 550 ("If universality is chosen, notwithstanding the objections of a small minority, it will be only after all interests have been considered . . . .").

in a physical state practice that usually involved more than just a handful of appointed officials, traditional CIL was arguably far more visible to the attentive portion of a national demos—and thus more subject to its scrutiny and criticism—than Charney's new CIL could ever hope to be. Indeed, how could any citizenry hope to preserve an *ex ante* voice in a system of "rapid" CIL-formation in which "one clearly phrased and strongly endorsed declaration at a near-universal diplomatic forum could be sufficient to establish new international law"?[79] His silence on this point was perhaps to be expected: the word "democracy" did not appear a single time in his article, not even in the few brief sentences he devoted to discussing the merits of sovereignty,[80] and he seems to have been little troubled by the concept. Charney did, however, keenly appreciate the level of opposition his proposals were likely to meet from national governments,[81] and he sought to reassure them in a variety of ways.

First, by describing potential dissenting states as obstinate and recalcitrant,[82] Charney conveyed a high level of confidence in the substantive normativity of the CIL that would emerge from the new process. The possibility of good-faith dissent—of disagreeing and opposing because the nominated way forward on any given issue is subject to reasonable criticism—did not seem to occur to him.[83] Second, he noted that rulemaking by majority vote already existed in certain IGOs and rhetorically asked why it should not

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79 *Id.* at 546-47. Sovereignty-minded scholars had little difficulty seeing the democratic deficit inherent in Charney's new CIL. *See, e.g.*, J. Patrick Kelly, *The Twilight of Customary International Law,* 40 VA. J. INT'L L. 449, 519 (2000) ("[T]he majority of nations and peoples of the world rarely participate in the creation of customary rules that limit their policy choices and sovereignty"); Stephan, *supra* note 27, at 238 (describing the new CIL as "a prefabricated system of rules and norms constructed by a loose alliance of like-minded academics and international law specialists through a form of advocacy that involves no democratic checks").

80 *See* Charney, *supra* note 13, at 530.

81 *See id.* at 550 ("Government officials are jealous of their state's sovereignty and autonomy and are loathe to adopt rules that bind dissenters. For they know that at some point their state may be on the dissenting side of an issue.") (citation omitted).

82 *See supra* notes 76-77 and accompanying text.

83 Nor has it occurred to many globalist scholars writing in his wake. Charlesworth, for example, felt comfortable asserting without argument in 1998 that a positivistic international system catering to the self-interests of sovereign states "leads us to an unbearably light, bleak, ethically unsatisfying dead end." Charlesworth, *supra* note 62, at 46. Several years later, her protégé, Anthea Roberts, noted with no apparent qualms that:

> [t]he international community discounts the importance of dissenting states and contrary state practice because it is not prepared to recognize exceptions to the maintenance of certain fundamental values. . . . The substantive normativity of modern custom can therefore be used to justify a reduced focus on procedural normativity and descriptive accuracy.

Roberts, *supra* note 64, at 766.

also exist for CIL.[84] Third, by misrepresenting the role state consent played generally within the international system, Charney sought to mute the revolutionary nature of the coercive new CIL he was proposing.[85] Fourth, he repeatedly assured his readers that international officials and scholars could be trusted not to abuse their new power to make and find CIL for the world community.[86] Fifth, and somewhat relatedly, he pledged that the new CIL would not deviate unduly from physical state practice.[87] Sixth and finally, he touted the procedural normativity of the new CIL process. All states, regardless of their wealth or power, would have the opportunity to participate fully in consideration of proposed CIL norms,[88] and there would be heightened transparency regarding the precise status of each debated norm.[89]

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84 *See* Charney, *supra* note 13, at 544 n.61. In making this point Charney neglected to mention that, although it may be costly to do so, any state outvoted in the IGO context can avoid the reach of adverse rules by invoking the nuclear option of exiting the IGO altogether. *See* Stephan, *supra* note 27, at 249-50. As noted *supra* note 61 and accompanying text, unilateral withdrawal has not traditionally been a legal option for states in the CIL context.

85 In difference to Charney, Louis Henkin, an ideological ally, did not seek to downplay the radical nature of CIL's transformation. *See* LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 37 (1995) (noting that the changes in the way CIL was beginning to be created marked "a radical innovation, and indeed reflect[ed] a radical conception.") Other scholars hewed to a middle position that applauded the new CIL while cautioning against going too far, too fast, lest a backlash ensue. *See, e.g.*, Meron, *supra* note 17, at 114; Charlesworth, *supra* note 62, at 46.

86 *See* Charney, *supra* note 13, at 540-41 (risk of abuse of new lawmaking authority is "slight"); *id.* at 548 ("While it is possible that the [new CIL] process may be abused, it is less open to abuse and miscommunication than classical customary lawmaking"); *id.* at 550 (sovereignty and autonomy interests will be taken into account before universality is chosen); *id.* at 551 (international legal system will invoke new lawmaking authority "sparingly"). Regarding this last assurance, Charney almost immediately contradicted himself. *Compare id.* at 530 ("Today, the enormous destructive potential of *some* activities and the precarious condition of *some* objects of international concern make full autonomy undesirable."), *with id.* at 531 ("I explore the limits of state autonomy to determine whether *some or all* of international law may be made universally binding regardless of the position of one or a small number of unwilling states.") (emphases added).

87 *See id.* at 546 n.71 ("Certainly, if the state practice is inconsistent with the principle adopted at the international forum, that principle would be open to serious question."). This promise, however, was belied by the near-contemporaneous assessment of Simma and Alston, who saw in the new approach "a law-making process which is more or less complete in itself, even in the face of contrasting 'external' facts." Simma & Alston, *supra* note 11, at 90.

88 *See* Charney, *supra* note 13, at 547, 550-51.

89 Charney seems to have envisioned a deliberative, legislative-like process in which proposed norms would come with clear labels indicating whether they reflected "a refinement, codification, crystallization or progressive development of international law." *Id.* at 544, 547. Among other things, such labels would "permit[] states more accurately to distinguish legal from political solutions." *Id.* at 547.

It is this last element that I wish to focus on, because, unlike Charney's other selling points, it represented a significant and beguiling inducement for sovereigntists. Charney was essentially proposing a grand bargain by which states would surrender their right of dissent in exchange for the right to be effectively heard. Even if one could not fully agree with the charges of authoritarianism and opacity levelled against traditional CIL,[90] and even if one did not think the proposed trade a fair one,[91] the promise of increased clarity in any lawmaking enterprise was nothing to be sneezed at. That said, it was an empty promise from the beginning and it is vitally important to understand why—not merely to settle old academic scores, but because the failure of the promise explains much about the nature of contemporary CIL that would otherwise be either incomprehensible or underappreciated.

ii. Of Funhouses, Fake Custom, Sheepdogging and Alchemy

Recall that Charney's main target was treaty-making and the lack of universality that often attended it.[92] In other words, his target was states that did not wish to be bound. How, exactly, would CIL be able to help with this situation? In its 1969 opinion in the *North Sea Continental Shelf* cases, the ICJ had confirmed that a norm-creating provision of a treaty could generate a new, identical rule of CIL that would be universally binding.[93] The Court indicated that if all states having an interest in the provision became parties to the treaty, CIL might arise rather easily.[94] However, the presence of any hold-outs would present a very different scenario. In that case, there would be no steamrolling. Interested non-party states would become bound only if they, in effect, reconsidered their opposition to the norm-creating provision and began acting consistently with it out of a sense of legal obligation.[95] Such a change in disposition was "not lightly to be regarded as having been attained."[96] The ICJ's approach to treaty-based CIL-formation made it unlikely that the kind of transparent process of CIL-adoption envisioned by Charney would deliver the results he wanted. Why would any state knowingly affirm support for a CIL rule that would nullify the choice it had made in rejecting or reserving to

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90 *See supra* note 64 and accompanying text.

91 Stephan questioned early on the conventional belief that increased transparency could serve as an adequate substitute for more direct forms of political accountability. *See* Stephan, *supra* note 20, at 1581-82.

92 *See supra* notes 55-59 and accompanying text.

93 *See* North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, 42 ¶ 71 (Feb. 20).

94 *See id.* at 43, ¶ 73.

95 *See id.* at 44-45, ¶¶ 74, 76.

96 *Id.* at 42, ¶ 71. Indeed, the ICJ's analysis of Germany's behavior made clear that the evidence of the change in disposition would have to be unequivocal. *See id.* at 45-46, ¶¶ 77-78.

a treaty? Indeed, why would even non-reserving states-parties knowingly affirm support for a subsequent, identical CIL rule given that doing so might render their treaty-based rights of withdrawal meaningless?[97] While Charney did not address this clear stumbling block to his proposal and avoided discussion of *North Sea* altogether,[98] some otherwise sympathetic commentators could not help but acknowledge it,[99] and opponents clearly saw where things were headed. To paraphrase Prosper Weil, if the new CIL was going to succeed in its universality mission, it would have to "cunningly outflank," rather than "frontally assault," the flexibility mechanisms of treaties.[100]

Much the same point could be made regarding the second type of work-product of multilateral fora that Charney hoped would serve as a source of the new CIL, viz. instruments, whether formally nonbinding or binding in nature, that do not purport to codify or reflect existing CIL. Such instruments grace the world under cover of various titles (e.g. "declaration," "programme of action," "agenda," "compact," and "framework"). For ease of reference I shall refer to them collectively as "resolutions." Resolutions express normative *opinio juris*—affirmations that reveal what states believe the law should be. They are to be distinguished from instruments that express descriptive *opinio juris*—affirmations that reveal what states believe the law actually is.[101] States

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97 Bradley and Gulati support a post-crystallization exit right from CIL partly because it would spare states from the "anomaly" of being trapped in a CIL norm that is based on a treaty from which withdrawal is possible. *See* Bradley & Gulati, *supra* note 41, at 262-63.

98 He did appear to acknowledge the *North Sea* precedent indirectly when he stated that he did not "intend to suggest that all generally applicable treaty texts become ipso facto and ab initio customary international law upon adoption or entry into force." Charney, *supra* note 13, at 547.

99 *See* Roberts, *supra* note 64, at 768-69 ("It is also not clear that states know that treaties will become customary law, or that they wish them to, though this may be changing.") (citation omitted).

100 Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 438 (1983). Some commentators might argue that the ICJ's analysis in *North Sea* was not intended to govern CIL-derivation from treaties seeking to address the kind of global problems identified by Charney. They would have something of a point; the Court's language ("specially affected" state interests and the like) makes little sense in the "global concern" context. That said, the Court neither expressed nor implied a limitation in the application of its rule, and the ILC recently poured cold water on the notion that different areas of international law are governed by different subsets of secondary rules. *See Draft Conclusions*, *supra* note 23, at Conclusion 2, cmt. (6) (describing international law as "a single legal system . . . not divided into separate branches with their own approach to sources") (citation omitted). Moreover, if certain "global concern" treaties, such as human rights instruments, are indeed "different," it may be because—as Weisburd argued long ago—their typical lack of enforcement and reparations mechanisms warrants the assumption that they do not give rise to CIL. *See* Weisburd, *supra* note 30, at 23-29.

101 *See* Roberts, *supra* note 64, at 763-64 (explaining the difference between these two types of *opinio*). For an example of a formally nonbinding expression of descriptive *opinio juris*, see G.A. Res. 2625 (XXV), Declaration on Principles of International Law

like resolutions because they allow them to signal support for a goal without being legally bound to achieve it. Globalists like such instruments because their non-threatening "soft" quality can result in greater state participation.[102] However, could states be counted on to knowingly assent to a CIL rule that would change the nature of their commitment from a political to a legal one? One need only consider states' spotty track record in agreeing to the conversion of their political commitments into legally binding treaty obligations to understand that this was far from likely.[103] Moreover, the ICJ indicated in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* that even an expression of normative *opinio juris* strong enough to border on nascent descriptive *opinio juris* can fail to give rise to CIL if it is stubbornly resisted by a small minority of highly relevant states.[104] This secondary-rule interpretation cast doubt on the very idea of aspiration-driven, super-majority customary lawmaking in multilateral fora. In doing so, it further ensured that stealth, not transparency, would become the tactic of necessity in engineering the new universal CIL.

We can see this stealth at work in what are arguably the two most important CIL-formation developments of the last twenty-five years. The first concerns the well-documented increase in the number of actors that might legitimately bid a CIL norm for consideration by the community of states. While Charney had seemed to reserve for state representatives working the halls of IGOs the exclusive right to formulate and propose new CIL norms, other scholars were not nearly as deferential to state authority on this point. Koh, for example, advocated a "transnational legal process" in which the content of new international legal norms, both customary and conventional, would be worked out in conversations between "norm entrepreneurs" (a collection of nonstate actors (NSAs) consisting chiefly of private transnational organizations and charismatic individuals) and "governmental norm sponsors" (sympathetic

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Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, at 121, U.N. Doc. A/8028 (Oct. 24, 1970).

102 *See* Meyer, *supra* note 62, at 34 ("Soft law, by making obligations nonbinding, may ease resistance among dissenting states."). Of course, soft language that is designed to ease national resistance must be distinguished from soft language that is designed to circumvent it. I discuss this latter type *infra* Part I.B.

103 *Accord* Roberts, *supra* note 64, at 769. Roberts writes:

> [V]otes in the General Assembly usually receive little media scrutiny and are generally not intended to make law. For example, the General Assembly resolution on torture was adopted unanimously, while a much smaller number of states ratified the Convention Against Torture and others entered significant reservations to it.

Id.

104 *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 255 ¶ 73 (July 8).

national government officials).[105] Such conversations would generate "political solutions" concrete enough to be tabled in any number of "law-declaring fora," where they would be further refined, elaborated, and tested by an "interpretive community" before being formally presented to the community of states for collective consideration.[106] The implications of this proposed process were at once understated and stunning. Instead of generating the relevant state practice through physical acts (traditional CIL), or via the activity involved in proposing, debating, and voting on norms in multilateral fora (Charney's new-look CIL), states and their representatives began to be cast in the role of mere respondents to norms authored off-stage by an assortment of globe-trotting, transnational "others."[107]

This, to say the least, represented a considerable demotion. It was a demotion that became cemented as faith in the virtue and salutary effect of NGOs, already frothy in the 1990s,[108] bubbled over completely in the early 2000s,[109] leading globalist scholars to offer increasingly bold proposals regarding NGO/NSA participation in, and normative significance for, the CIL-formation process. A good example in this regard is the work of Monica Hakimi. After scrutinizing—and ostensibly criticizing—certain CIL claims made by certain NSAs, Hakimi dons the mantle of legal realism to advise her fellow scholars to shed their preoccupation with CIL-finding methodology and adopt instead the view that many CIL claims are, in whole or in part, pure advocacy that should be judged as such (i.e. judged by their success in gaining traction within the international community).[110] Although Hakimi insists that her advice not be taken to mean that "'anything goes" in CIL,[111] it is hard to see how it does not mean precisely that given that it paves the way for NSAs to become full-fledged norm-makers whose own *opinio juris* might trump any inconsistent state practice not affirmatively supported by a counter-*opinio.* In fact, Hakimi quotes without criticism Jean-Marie Henckaert et al.'s study of the International Committee of the Red Cross for just such a proposition:

> It appears that international courts and tribunals on occasion conclude that a rule of customary international law exists when the rule is a desirable one . . . for the protection of the human

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105 *See* Harold Hongju Koh, *How Is International Human Rights Law Enforced?* 74 IND. L.J. 1397, 1409-10 (1999).

106 *See id.*

107 Despite its otherwise conservative approach to CIL-formation, the ILC appears to accept the idea of states playing the role of respondents to norms proposed by NSAs and private individuals. *See Draft Conclusions*, *supra* note 23, at Conclusion 4, cmt. (8).

108 *See* Anderson, *supra* note 18, at 1264.

109 For a description of the many ways NSAs were seeking to become involved in CIL-formation circa 2001, see Roberts, *supra* note 64, at 775.

110 *See* Hakimi, *supra* note 59, at 170-71.

111 *Id.* at 171.

> person, *provided that there is no important contrary opinio juris.*[112]

If this ever were to become accepted practice we would find ourselves well beyond the boundary of the rule, controversially laid down by the ICJ in *Nicaragua v. United States*, that uniform and descriptive state *opinio juris* (*not* NSA *opinio*) could trump inconsistent practice unsupported by a counter-*opinio*.[113]

One question sure to arise in such a new legal landscape is whether states will need to heed and object to NSA *opinio juris* in order to preserve their right of unilateral CIL-exemption post-crystallization. If they will, we can expect to see a significant increase in the monitoring burden placed on potential persistent objectors.[114] Even if they will not, the already elevated status of NSAs as legitimate semi-participants in the arena of CIL-formation goes some way toward transforming Louis Henkin's august "cathedral" of international law[115] into something more akin to a funhouse, in which norm proposals are capable of popping out of any odd nook and cranny. In a world in which CIL-finders may just as well be deemed CIL-makers, anything truly does go.

The second major CIL-formation development, somewhat related to this first one, has been the frequent resort to ambiguity in presenting the nature of the norms that emerge from Koh's transnational, NSA-dominated brainstorming sessions. Charney's hopes notwithstanding, norm-proposals representing *lex ferenda* have repeatedly been camouflaged in resolutions as *lex lata.*[116] This has been done through the use, in some instances, of mandatory language,[117] and in others of such a tremendous amount of regulatory detail and specificity as to deprive proposals of any hortatory

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112 *Id.* at 169 (emphasis in original) (internal quotations omitted) (citation omitted).

113 *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 207-209 (June 27).

114 I discuss the persistent-objector rule in greater detail *infra* Part I.A.iii.

115 It apparently was Koh who attributed this metaphor to Henkin. *See* Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 308 (2002).

116 As Roberts explained:

> [D]eclarations do not merely photograph or declare the current state of practice on moral issues. Rather, they often reflect a deliberate ambiguity between actual and desired practice, designed to develop the law and to stretch the consensus on the text as far as possible. . . . As a result, modern custom often represents progressive development of the law masked as codification by phrasing *lex ferenda* as *lex lata.*

Roberts, *supra* note 64, at 763 (citations omitted).

117 *See, e.g.*, G.A. Res. 61/295, annex, United Nations Declaration of the Rights of Indigenous Peoples (Sept. 13, 2007) (providing that states "shall" take effective measures to secure a number of the rights identified).

feel.[118] The effect of such *lata* packaging is not only, or even principally, to "stretch the consensus on the text" (Roberts's surmise), but to induce enough actual implementation of the norm by sympathetic officials at the national level to justify a later finding of CIL-formation at the international level. The dynamic is at once simple and clever: *Lata*-esque resolutions are used to convey to states strong expectations of desired behavior; once a number of states respond positively to these cues, their responsive practice is cited in support of a conclusion that a custom has emerged.[119] Such custom might best be conceptualized as "Fake Custom," in that international actors instigate, through soft-law agreements, the very state practice they later rely on to norm-declare. In effect, states deliver up the practice they are admonished to deliver and then, as their "reward," they find themselves caught in the webs woven of their own good intentions.[120]

It does not take a great deal of imagination to see how these two developments, as they unfolded together, created an environment in which norms could pass into the corpus of CIL without anybody knowing precisely how or why they did so. Consider, as an example in this regard, the recently-concluded Arms Trade Treaty, a multilateral treaty that regulates the international trade in conventional weapons.[121] As of this writing one hundred

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118 *See, e.g.*, U.N. GAOR, 46th Sess., Agenda Item 21, U.N. Doc. A/Conf.151/26 (1992).

119 This dynamic was foreshadowed as early as 1962 by the U.N. Secretariat when it noted that a General Assembly declaration "may be considered to impart . . . a strong expectation that Members of the international community will abide by it. . . . [I]n so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States." Memorandum of the Office of Legal Affairs of the Secretariat, U.N. Doc. E/CN.4/L.610, para. 4, (quoted in 34 U.N. ESCOR Supp. (No. 8) at 15, U.N. Doc. E/3614/Rev.1 (1962)). *See also* Charlesworth, *supra* note 62, at 46. Charlesworth wrote:

> [T]he use of international law in national laws itself contributes to the formation of custom. In this way the 'state practice' requirement for custom can be met through the activities of particular arms of the state, such as the judiciary, which may have views that differ markedly from those of the executive or legislative branches.

Id.

120 Koh essentially described Fake Custom when he wrote:

> A state-to-state process account simply does not capture the full picture of how international human rights norms are currently generated, brought into domestic systems, and then brought back up to the international level. . . . Once again, an international law norm trickled down, was internalized, and bubbled back up into new international law.

Koh, *supra* note 105, at 1412, 1414.

121 Final U.N. Conference on the Arms Trade Treaty: Draft Decision, art. 1, Mar. 27, 2013, U.N. Doc. A/CONF.217/2013.L.3. On April 2, 2013, the U.N. General Assembly passed a resolution adopting the treaty as contained in the annex to the draft declaration and recommending that nations join the treaty. G.A. Res. 67/234, Arms Trade Treaty (Apr. 2, 2013) [hereinafter ATT].

states have ratified the ATT, a modest number that does not include major arms-exporting countries like China, Russia and the United States.[122] Despite the fact that the ATT's prohibitions and constraints on state action had no basis in pre-existing CIL,[123] civil society activists began claiming, even prior to the treaty's entry into force in 2014, that it would soon give rise to identical CIL norms that would be binding on non-party states.[124] Precisely how CIL would arise to accomplish this feat of coercion the activists did not say.[125] But one can be forgiven for thinking that their own advocacy and self-appointed role in monitoring treaty implementation,[126] combined with the growing campaign to cast gun violence as a human-rights issue,[127] will have something to do with it. To call this process of CIL-formation "little-understood," as Bradley and Goldsmith did in the late 1990s,[128] was a kind understatement.

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122 Arms Trade Treaty Status, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-8&chapter=26&clang=_en (last updated Oct. 02, 2019).

123 *See* Anna MacDonald, *UN Arms Trade Treaty Can Save Many Lives – If It Is Robustly Enforced*, GUARDIAN (Sept. 25, 2014) https://www.theguardian.com/global-development/poverty-matters/2014/sep/25/un-arms-trade-treaty-exports-sales ("This treaty demands a radical shift in behaviour by the major arms exporters who must lead the way in demonstrating a new sense of responsibility when it comes to trading in arms.").

124 MacDonald writes:

> Once the treaty enters into force and becomes binding international law, it will create a strong deterrent for all countries – even those not a party to it – to end uncontrolled arms transfers. It has happened before, for example, following the development of the mine ban treaty and it will happen again. A comprehensive treaty will help accelerate and develop a specific international norm which, over time, simply cannot be ignored.

Id.

125 *See id.*

126 The umbrella NGO behind the ATT (Control Arms) has vowed that "civil society will closely monitor implementation of the Treaty, and press their national governments to produce and to make public the most comprehensive national reports possible." Control Arms, *Summary Analysis of the Arms Trade Treaty*, SAFER WORLD (May 2013), https://www.saferworld.org.uk/resources/publications/737-summary-analysis-of-the-arms-trade-treaty.

127 The NGOs have taken the lead in this campaign. *See, e.g.*, Lois Beckett, *'A Human Rights Crisis': US Accused of Failing to Protect Citizens from Gun Violence,* GUARDIAN (Sept. 12, 2018), https://www.theguardian.com/us-news/2018/sep/12/us-gun-control-human-rights-amnesty-international. But scholars are not far behind. *See, e.g.*, *Interdisciplinary and Human Rights Approaches to the Gun Violence Crisis in the United States*, WASH. UNIV. SCH. OF LAW (Nov. 2, 2018), https://publichealth.wustl.edu/events/interdisciplinary-and-human-rights-approaches-to-the-gun-violence-crisis-in-the-united-states/.

One tactical advantage for globalists in dressing policy goals like stricter gun regulation in the garb of "human rights" is that state exemption from any prohibitive norms that develop may become more difficult. *See* GREEN, *supra* note 41, at 208-25 (exploring the view that persistent objection is not available apropos norms of customary international human rights law deemed "fundamental" but not *jus cogens*).

128 Bradley & Goldsmith, *supra* note 32, at 328.

To call the process "greatly under-analyzed," which they also did,[129] was a syntactical error, for it lends itself to analysis about as much as legislative horse-trading in the proverbial dark-and-smoke-filled back room. I myself propose the function-focused term "sheepdogging" to describe CIL's activity in this context, as CIL mimics a sheepdog in the way it rounds up wayward treaty-refusers and reservers and gets them into the treaty corral. James Green has recently given this surprisingly candid example of sheepdogging:

> [N]ot all states are parties to the Ottawa Convention on antipersonnel landmines (APLM), but there are strong indications that an equivalent customary ban is evolving, if it has not already evolved. This prohibition, of course, catches (or will catch) any remaining dissident states that have not already gained exemption through prior persistent objection.[130]

In addition to the ATT we might also consider the recently concluded "Global Compact for Safe, Orderly and Regular Migration," which by its own terms presents a "non-legally binding cooperative framework" [131] (i.e. a set of aspirational/political commitments) on the subject of migration. In a 2018 interview in which he urged his government to reject the Compact, the leader of the opposition party in New Zealand (Simon Bridges) appeared resigned to the inevitability of the Compact's commitments eventually hardening into law. His choice of words was revealing:

> [The Compact] is creating a situation where we know even if it is not binding, over time it will become part of our laws, it will become interpreted by the judiciary. We don't need to do that. What part of our settings is wrong in immigration and why would we cede this?[132]

Exactly what the "situation" was that Bridges was referring to is unclear, and I suspect that not even he could describe it with any precision. But two things are clear: (1) Whatever the nature of the "situation" might be, it is unlikely to resemble anything like the formal, legislative-like process

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129 *Id.*

130 GREEN, *supra* note 42, at 149 (citations omitted).

131 Global Compact for Safe, Orderly and Regular Migration (July 11, 2018), ¶ 7, https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf [hereinafter Global Migration Compact or Compact].

132 *Simon Bridges on UN Migration Pact: We Already Have 'Good, if Not Excellent' Immigration Policy*, RADIO NZ (Dec. 10, 2018), https://www.radionz.co.nz/news/political/377887/simon-bridges-on-un-migration-pact-we-already-have-good-if-not-excellent-immigration-policy.

envisioned by Charney; and (2) Bridges's sense of inevitability is fully justified by history. He undoubtedly would have been aware of the significant effort his country had to make in order to avoid becoming legally bound by the aspirational provisions of the United Nations Declaration on the Rights of Indigenous Peoples.[133] He also presumably would have known of the United States' bruising experience in trying to remain legally free of the economic and social-rights provisions of the UDHR. In this latter case, it was not enough for the United States to successfully lobby for and secure what everyone agrees was a purely hortatory instrument at its inception.[134] Nor was it enough for the United States to decline to ratify the treaty that was eventually crafted to offer these provisions in legally binding form (the ICESCR). No, in the eyes of many—excluding, perhaps, Messrs. Puras and Alston—the United States has succeeded in remaining free of the legal obligation to comply with these provisions only because it has taken the additional step of persistently objecting to them.[135] Notice how the burden has been shifted onto treaty-rejecters to prove to the satisfaction of the international community that they well and truly wish to remain free of a treaty norm. The sovereignty-respecting "opt in if you'd like" spirit of *North Sea* has been imperceptibly transformed into an "opt out if you dare and can" warning.

These examples, though few in number, illustrate what may be the ultimate moral of the "new CIL" story, which is that in many instances the absorption into CIL of hortatory norms and purely conventional obligations has become a foregone conclusion. Absorption simply will occur via an opaque, alchemical process that evinces no particular methodology other than the "by-hook-or-by-crook" kind.[136] Perhaps Hakimi was right after all (at least in her descriptive intuitions): Modern CIL-formation really does seem to come down

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133 Similar efforts were made by Australia, Canada and the United States. *See* GREEN, *supra* note 42, at 232-33.

134 *See* Charlesworth, *supra* note 58, at ¶ 7 ("[T]he US supported the idea of a declaration of principles whose force would be primarily moral"); Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 317 (1995) ("It is, of course, unanimously agreed that the Universal Declaration of Human Rights was not viewed as imposing legal obligations on states at the time of its adoption by the General Assembly in 1948.").

135 *See* GREEN, *supra* note 42, at 102-03, 102 n.73, 180-81 (confirming consensus that U.S. qualifies as persistent objector to UDHR- and ICESCR-based CIL right to adequate food).

136 Weil foresaw this development with his characteristic blend of insight and dread:

> [T]he intention manifested by a state in regard to a given convention is henceforth of little account: whether it signs it or not, becomes party to it or not, enters reservations to such and such a clause or not, *it will in any case be bound* by any provisions of the convention that are recognized to possess the character of rules of customary or general international law.

Weil, *supra* note 100, at 440 (emphasis added).

to the force of advocacy, with NGO-generated media-buzz and spin counting as an important factor. Indeed, I would go so far as to suggest that, from a methodological standpoint, the only truly debatable question that remains for contemporary CIL is whether states have taken the steps needed to secure exemption via persistent objection from its near-inevitable rule-formation. Again, the shifting of the burden should be more than clear.

iii. Persistent Objectors Need Not Apply

And it is here where the rubber finally meets the road, for in the hands of globalist scholars this burden has become virtually impossible to meet. James Green's recent well-received study[137] argues in favor of recognizing several severe attributes of modern persistent objection. First, states must monitor and be prepared to object to virtually any instrument that comes out of a multilateral forum, and they must do so even if they have previously lodged a formal rejection of or reservation to the instrument.[138] In so far as treaties and resolutions are concerned, this persistency requirement means that a state's formal decision to withhold its consent from an instrument, or to reserve to a part thereof, is just the beginning of its involvement with the instrument, not—as might reasonably be expected—the end. This, again, flips the logic of *North Sea.* Second, given the rapidity with which the new CIL can form,[139] and the claimed unavailability of objection post-crystallization,[140] states may have a very small temporal window in which to make their objections known.[141] Third, in addition to expressing their objection persistently, states must refrain from any action or statement, including "acts" of pregnant silence, which might be construed as being inconsistent with their objection.[142] Fourth and finally, once an exemption is legally secured, a state will nonetheless forfeit it if at any time post-crystallization it ceases voicing its opposition to the norm.[143]

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137 *See* GREEN, *supra* note 42. The study won the 2017 Book Prize of the European Society of International Law. *2017 ESIL Book Prize*, ESIL, https://esil-sedi.eu/2017-esil-book-prize/ (last visited Nov. 15, 2019).

138 *See* GREEN, *supra* note 42, at 85-87.

139 Charney touted this rapidity and predicted that two major resolutions that had been adopted shortly before the publication of his article–the 1992 Agenda 21 and the 1993 Vienna Declaration and Programme of Action–would birth new CIL in short order. *See* Charney, *supra* note 13, at 549.

140 *See* GREEN, *supra* note 42, at 135-53. I address this claim *infra* note 160.

141 *See* GREEN, *supra* note 42, at 153-62, 170-73.

142 *See id.* at 116-30. Whether he intends to or not, Green gives the impression of pro-norm state representatives and NGO activists prowling the halls of multilateral conferences looking to document any small slip-of-the-tongue or failure-to-speak by anti-norm representatives.

143 *See id.* at 182-84.

Neither logic nor consistency of principle can explain this draconian set of rules.[144] As even Sohn acknowledged, logic would seem to dictate that the easier it becomes for international actors to form CIL, the easier it should be for states to exercise their right of unilateral exemption.[145] Logic dictates that as the procedural normativity of CIL dims and the possibility of genuine *ex ante* state voice declines,[146] the opportunity for *ex post* state exit should expand.[147] Logic dictates that as CIL (and international law in general) increasingly concerns itself with matters traditionally lying within states' domestic jurisdictions, and as an increasing number of states adopt the democratic form, exemption should become easier, not harder.[148] Logic dictates that states should enjoy roughly the same subsequent unilateral withdrawal rights from CIL that they enjoy from treaties.[149] Finally, logic dictates the limits of the claim that a narrow-exemption rule is needed across all areas of international law in order to protect states' reliance interests.[150] How, for example, are France's legitimate expectations even remotely upset, or its need for confidence in the stability of the international legal environment even remotely frustrated, by the fact that the United States, or any other country, seeks exemption from a human rights norm? Green does not tell us, and for good reason. They are not.[151]

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144 Green himself describes the rules as "onerous." *Id.* at 246. The ILC describes them as "stringent." *See Draft Conclusions*, *supra* note 23, at Conclusion 15, cmt. (1).

145 *See* Sohn, *supra* note 17, at 1080 ("[T]he easier it becomes to develop new principles and rules of international law, the more a safety valve is needed to safeguard national sovereignty and vital state interests.").

146 *See supra* Part I.A.ii.

147 *See* Bradley & Gulati, *supra* note 41, at 242-44.

148 Like Charney before him, Green ignores the reality of democratic politics at the national level and fails to consider its implications for his analysis. He assumes, for example, that when a state seeks to alter its stance toward an existing CIL norm, it does so for unprincipled and opportunistic reasons rather than because a majority of its citizens, via participation in the electoral process, have exercised their sovereign right to change their collective mind and reorient national policy around a new norm. *See* GREEN, *supra* note 42, at 131.

149 *See* Bradley & Gulati, *supra* note 41, at 204-05, 270-75.

150 Green makes this claim repeatedly throughout his analysis. *See, e.g.*, GREEN, *supra* note 42, at 145-47.

151 Charney claimed that certain gross violations of human rights (such as apartheid and genocide) that are committed within a single state "might threaten international peace and security worldwide." Charney, *supra* note 13, at 530. Fair enough; one could grant him this point even though he chose to assert it rather than argue it. However, the claim's plausibility does not easily extend to less systemic violations of human rights, such as, allegedly, the use of the juvenile death penalty. If the rehabilitation of youthful offenders is an "object[] of international concern," it is not because one state is directly affected by another state's judgment on the issue, but because *all* states must, in the course of their own self-administration, render a judgment. *Id.* Globalist scholars and officials muddy the intellectual waters when they conflate common or shared problems, in the latter sense, with

As for consistency of principle—or more precisely, lack thereof—it would take a small article in its own right to fully explore the double standards that animate Green's analysis. Here is a brief summary of the main ones:

- States need not publicly affirm their desire to continue enjoying their rights under treaty in order to maintain them. Rather, treaty rights are deemed extinguished (via the process of desuetude) only if a state fails to exercise its right for an extended period of time and/or fails to protest physical conduct that violates or interferes with the right. Why, then, should mere post-crystallization silence, pregnant or otherwise, be enough to work a forfeiture of an established right of CIL-exemption?
- In the human-rights context, lack of objection is typically not deemed acquiescence in the formation of permissive norms,[152] yet it typically is deemed behavior sufficiently indicative of acquiescence to defeat a later claim of exemption from prohibitive norms. How is it that a state can "object without objecting" in the former context but not in the latter?
- In attacking the procedural normativity of classical CIL-formation, scholars have made much of the fact that smaller states lacked the resources to keep track of all norms bid by wealthier and more powerful states through their physical state practice.[153] However, when it comes to protecting smaller states' ability to keep track of bid norms for the purpose of timely objection, scholars tend to show no such concern. Green, for example, takes no issue with the fact that under the current set of rules "*even the most vigilant state* may still find that its objections come too late."[154]
- It is widely understood and accepted that CIL can be not only shockingly indeterminate in its formation but also messily unstable in its evolution. Making new CIL can often be done only by violating old CIL; and states that grow dissatisfied with an existing CIL norm, but lack the numbers to change it, can still opt out of it via treaty (provided the rule is not *jus cogens*). Yet when it comes to arguing for a narrow exemption for persistent objectors, scholars like Green rather suddenly awaken to a grave need for certainty and stability within the CIL realm.[155]

externalized ones requiring international regulation and enforcement. *Accord* Anderson, *supra* note 18, at 1305.

152 *See* Roberts, *supra* note 64, at 778.

153 *See supra* note 64 and accompanying text.

154 GREEN, *supra* note 42, at 278 (emphasis added).

155 *See id.* at 148, 153.

- Charney proposed that "one clearly phrased and strongly endorsed declaration at a near-universal diplomatic forum could be sufficient to establish new international law."[156] If that is so then it is reasonable to ask why one clearly phrased and strongly endorsed objection should not be enough to establish an exemption from such international law. To his credit, Green hedges slightly in claiming that persistency is needed to ensure adequate notice to other states.[157] He appears to value the persistency criterion mostly for the enriching effect it can have on interstate discourse.[158] Tellingly, however, he offers no evidence to suggest that discourse will fail to take place unless it is *legally* incentivized.

Green would be hard-pressed to deny the result-oriented nature of his analysis given that, in his more candid moments, he all but admits that the goal is to build out the power of the international legal system, not infuse it with principle. The rules, he writes, are designed to force dissenting states to remain at the table of norm-discussion until, essentially, they fold.[159] Subsequent objection and withdrawal cannot be tolerated because, if they were, CIL would be disabled from performing its critical sheepdog function of binding non-states-parties to treaty norms.[160] This is why rational choice-

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156 *See supra* note 79 and accompanying text.

157 *See* GREEN, *supra* note 42, at 277 ("The need for persistence tests the will of the objector to ensure that the rule is not used frivolously and, *at least to an extent*, promotes clarity and certainty") (emphasis added) (citation omitted).

158 *See id.* at 269-70.

159 *See id.* at 97, 105, 126.

160 *See id.* at 149. Green argues that the rule disallowing subsequent objection can be derived from state practice, citing two cases in the post-World War II era in which subsequent objection was attempted and failed. *See id.* at 140-43. But neither case supports his position. In Case 1 the failure of the equatorial states to exempt themselves from a rule permitting the geostationary orbit of satellites foundered in significant part on the fact that most of the objecting states were parties to a treaty (the Outer Space Treaty of 1967) that forbade the very territorial claims they were trying to protect via objection. It is far from clear that the rejection of the objectors' position would have been as universal as it was had pro-custom treaty law not been involved. In Case 2, France was not claiming a right of exemption from the pre-existing CIL relating to treaty interpretation, but just the opposite: France contended that it was bound by that pre-existing CIL rather than by similar, but allegedly non-identical, provisions of the Vienna Convention on the Law of Treaties, to which it was not a party. Notably, when the ILC restated the persistent-objector rule in 2015, it did not adduce any precedential state practice, relying instead on a single line of dicta from the *North Sea* decision. *See Draft Conclusions*, *supra* note 23, at Conclusion 15, cmts. (1) & (5).

Green makes much of the fact that states do not tend to invoke the right of subsequent objection. Yet, he concedes that many states would readily do so if they thought they could. *See* GREEN, *supra* note 42, at 140, 150. The question is: Why don't they think they can? Green is not especially curious on this point, but he should be. States are likely deterred by

inspired analyses of the persistent-objector rule, to which Green is otherwise sympathetic,[161] make so little headway with him when it comes to some of their discrete findings—most notably their conclusion that the availability of subsequent objection and exit would strengthen international law, not weaken it.[162] As any good systems analyst knows, strengthening a system is not the same as tightening it. Since Green's and the globalists' priority is tightening, strengthening holds relatively little attraction for them.[163]

In one sense it may be unfair to single Green out for criticism, as there are scholars who are far less sympathetic to the persistent-objector rule than he. Some scholars, for example, reject the de jure nature of the exemption altogether.[164] Others advance ideas that have the effect of drastically lessening the rule's utility, such as that of "accelerated custom," which collapses the temporal window for objecting,[165] and of "fundamental" norms, which allegedly share with *jus cogens* the happy quality of being immune to objection.[166] To his credit Green rejects each of these moves.[167] That said, his work shows just how unfriendly toward sovereignty-rights even the milder works of globalist scholarship can be. Further, there is no denying that Green's approach does reflect mainstream scholarly opinion on the subject of persistent objection.[168] The upshot, therefore, is a contemporary CIL that is arguably every bit as coercive as Charney had hoped, minus the charm of transparency.

Indeed, engineering universal compliance with norms expressed in treaties and resolutions seems to be CIL's main role these days, as it rarely generates the content of first-order rules on its own. The twentieth-century phenomenon

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the fact that "the considerable majority of scholars"—a group that includes Green himself—"reject the notion of subsequent objection." *Id.* at 140.

161 *See* GREEN, *supra* note 42, at 257-60.

162 *See, e.g.*, Bradley & Gulati, *supra* note 41, at 241-75; Guzman, *supra* note 64, at 164-72.

163 *See* GREEN, *supra* note 42, at 278. Green writes:

> Providing states with an 'opt-out' from emerging norms of customary international law has its systematic benefits, but there is no reason to make it easy for the objector: the dice are, and *should be*, loaded in favour of the majority.

Id. (emphasis in original) (citation omitted). Green's preference here is undoubtedly motivated by his belief—more asserted than argued—that universalism "has a greater overall utility" than a system characterized by permissible state deviation. *Id.* at 259.

164 *See id.* at 5 n.27 (citing these scholars).

165 *See, e.g.*, Michael P. Scharf, *Accelerated Formation of Customary International Law*, 20 ILSA J. INT'L & COMP. L. 305 (2013).

166 *See* GREEN, *supra* note 42, at 210 n.8 (citing scholars who promote this idea).

167 *See id.* at 55, 173, 224.

168 It is also consistent with the ILC's recent restatement of the rule, especially as regards the unavailability of subsequent objection and the requirement that objection continue to be voiced after the point at which an exemption has been legally secured. *See Draft Conclusions*, *supra* note 23, at Conclusion 15, cmts. (5) & (9).

known as the "CIL of the gaps" is fast disappearing. It is hard to imagine any issue on which true physical state practice stands a chance of beating international-conference-cooperative-frameworking to the punch—excepting, of course, those rare instances in which physical state practice actually *serves* globalist purposes. Rebecca Crootof, for example, has recently urged the recognition of the dominance of practice-based CIL in cases where a state or group of states seek to modify, through their behavior, the terms of a multilateral treaty against the wishes of states counter-parties.[169] Crootof touts her proposal as "radical"[170] and I sadly must agree, for it does represent a new and unusual example of the doctrinal weaponization of CIL against treaties.

Yet for all of contemporary CIL's coercive mission and effect one important caveat must be lodged, and that is that coercive power should not be mistaken for enforcement power, nor even for enforcement pretensions. For the most part, contemporary CIL is content to form as a theoretical matter and then stop, leaving the prosaic and sometimes bitter work of enforcement to sympathetic national officials (viz. the janus-faced judges and bureaucrats who man the vertical networks that feature so prominently in the works of Koh[171] and like-minded political scientist Anne Marie Slaughter[172]). One wonders, in this vein, whether Puras and Alston even cared whether their statements accurately reflected international law. Their obvious common audience was not the international but the American one; their obvious common goal, not to lay the groundwork for hauling the United States before an international tribunal, but to make claims colorable enough to serve as ammunition for domestic allies seeking to align national law with international standards. *The Washington Post* reporter who broke the story of the Puras Letter seems to have appreciated this very point, writing:

> Though of questionable legal value, the U.N. letter is at least a bit of moral support for those defending Obamacare. Those attempting to deny health care to tens of millions of Americans

169 *See* Rebecca Crootof, *Change Without Consent: How Customary International Law Modifies Treaties*, 41 YALE J. INT'L L. 237 (2016).

170 *Id.* at 286.

171 *See, e.g.*, Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN. ST. INT'L L. REV. 745 (2006); Koh, *supra* note 105; Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); *see also* Koh, *supra* note 19, at 361 ("I long ago described a pervasive phenomenon in international affairs that I call 'transnational legal process,' which holds that international law is primarily enforced not by coercion, but by a process of *internalized compliance*.") (emphasis in original).

172 *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

> would hurt their own constituents in a way that falls short of the standards we hold for ourselves and other countries.[173]

This globalist strategy of eschewing the overt and external imposition of international law in favor of its more subtle internalization via elements of the "disaggregated state" [174] has two important implications. First, it goes a good way toward rendering irrelevant the long-debated concern about the compliance deficit at the heart of the international order, as that concern rests in significant part on an assumption of unitary states uncompromised from within.[175] Second, the strategy marginalizes, and in so doing neutralizes, the more conservative approach to CIL-formation taken by the ICJ and, to a lesser extent, the ILC. This is because the success of internalization depends not on what international law is authoritatively declared to be by international institutions, but on what it is plausibly portrayed as being by key domestic actors speaking to domestic audiences. I shall address the work of these domestic actors in some detail in Part II of this Article.

B. Retooling Treaties to Cure Their Own Mischief

The previous section examined how globalist legal scholars have sought to refashion CIL into a tool for indirectly undermining the consensual nature of treaty obligations. However, in recent years their attack on treaties has become more direct and frontal (to paraphrase Weil). They have not only employed several strategies for making international agreements themselves as sticky as possible, but have sought to work a subtle reconceptualization of the very nature of conventional commitment in order to insulate agreements from any "reactionary" forces of change that might emerge at the domestic level.

i. The Government Is Dead. Long Live Its International Commitments!

Let's begin with the reworking of the treaty concept, for it is the bolder and more ambitious of the two phenomena. When President Trump entered office, he announced his intention to end U.S. participation in the Paris Climate Change Agreement, the Iran Nuclear Agreement, the Trans-Pacific

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173 Milbank, *supra* note 8.

174 Slaughter originated this term in opposition to what she considered to be the fiction of unitary statehood. *See* SLAUGHTER, *supra* note 172, at 12-13.

175 *See* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); Francis A. Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT'L L.J. 193 (1980).

Partnership, and the North American Free Trade Agreement.[176] Globalist scholars and commentators were predictably appalled, and there ensued "a flurry of scholarship examining presidential power to withdraw from international commitments."[177] The most intriguing rhetorical device used to impugn the integrity of the Trump Administration's plans was the suggestion that treaties do not represent binding commitments unless and until withdrawn from (the traditional view), but rather eternal commitments on the part of a state which hover above the realm of its politics. This suggestion lurked in Koh's combative declaration in a 2017 article that, "[u]nlike Trump's, America's commitment to fighting climate change is irreversible,"[178] as well as in Tess Bridgeman's warning that "[i]f the United States cannot be counted on to carry out our commitments when the Presidency changes political parties, it will erode trust in future Presidents of any political party to enter into agreements with partners."[179] The suggestion was advanced more directly by French President Emmanuel Macron, who in the run-up to the 2018 G-7 meeting in Canada told the press:

> None of us who have been elected by the people can say 'all prior commitments disappear.' It's just not true, there is a continuity in state affairs at the heart of international laws. Sometimes we've inherited some commitments that weren't core to our beliefs, but we stuck to them, because that is how it works for nations. And that will be the case for the United States—like for every great democracy.[180]

By weaving notions of permanence and immutability into the fabric of conventional obligation, globalists have been able to defend a highly specific substantive-law status quo under the guise of defending "the rules-based, interconnected international order."[181] If commitments contained in

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176 *See* Catherine Amirfar & Ashika Singh, *The Trump Administration and the 'Unmaking' of International Agreements*, 59 HARV. INT'L L.J. 443, 443 (2018).

177 *Id.*

178 Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413, 436 (2017).

179 Tess Bridgeman, *Paris Is a Binding Agreement: Here's Why That Matters*, JUST SECURITY (June 4, 2017), https://www.justsecurity.org/41705/paris-binding-agreement-matters/.

180 Tyler Durden, *"The Old Order Is Over": Trump To "Confront" G-7 As Macron Plans On "Standing Up" To US President*, ZEROHEDGE (June 7, 2018), https://www.zerohedge.com/news/2018-06-07/trump-plans-adopting-confrontational-tone-g-7-response-g-6-pressure.

181 Amirfar & Singh, *supra* note 176, at 443; *see also id.* at 459 ("[I]f our foreign partners feel that they can no longer rely upon the United States . . . to keep its international commitments, the foundations of that order are threatened"); Koh, *supra* note 178, at 418

international agreements are "meant" to be fixed and stable, then withdrawing from such agreements necessarily equates to "gratuitously break[ing]" international law[182] and taking a box cutter to rule of law values.[183] This is apparently the case even if withdrawal is attempted in accordance with a treaty's own terms (e.g. the Paris Agreement), and even if the entire agreement was expressly concluded as a nonbinding political commitment (e.g. the Iran Nuclear Agreement).[184] On this logic, a new leader's rejection of a previous leader's responses to complex international regulatory challenges is as lawless as a declaration of intent to wage aggressive war; in either case the new leader is threatening the "universal rights . . . that form much of the foundation of modern international law."[185] And since no sane and balanced person would issue such a threat, much less act on it, any leader who does do so, namely President Trump, must suffer from some type of psychological disorder. Nativist tendencies? Undoubtedly.[186] A mercurial and capricious temperament? Very likely.[187] A will-to-power[188] that must be resisted[189] at all costs? Most certainly.

But whose temperament and judgment are questionable here? I suggest not the President's. Surely the globalist commentators cited above would, in their calmer moments, concede that treaty commitments—even ones reflecting core principles of international public policy, such as the Geneva Conventions and the Nuclear Non-Proliferation Treaty—are generally deemed revocable,

(suggesting that nations that do not adhere to "existing, recognizable legal frameworks" act "based on power or expedience alone").

182 Koh, *supra* note 178, at 419.

183 *See* Amirfar & Singh, *supra* note 176, at 459 (implying that Trump's decisions to terminate U.S. involvement in Obama-era agreements herald "a return to a global order that is a Hobbesian free-for-all, where power is the only arbiter"); Koh, *supra* note 178, at 420 ("The Trump approach . . . claims that there are no rules that bind our conduct.").

184 *See* KENNETH KATZMAN ET AL., CONG. RESEARCH SERV., R44942 U.S. DECISION TO CEASE IMPLEMENTING THE IRAN NUCLEAR AGREEMENT 1 (2018), https://fas.org/sgp/crs/nuke/R44942 ("[O]fficials in the Obama Administration asserted that the JPCOA is a nonbinding political commitment, and Trump Administration officials continued that assertion.") (citation omitted).

185 Koh, *supra* note 178, at 420.

186 *See* Amirfar & Singh, *supra* note 176, at 443 (claiming the Trump Administration is motivated by a desire "to scrub the U.S. body politic clean of what it appears to view as pesky 'foreign' entanglements").

187 *See id.* at 459 (implying that Trump's withdrawal decisions were "born not from a genuine response to changed conditions, but from arbitrary and capricious impulse."); Koh, *supra* note 178, at 420 (describing Trump as "mercurial").

188 *See* Koh, *supra* note 178, at 419 (describing Trump as a "willful president arriving at the White House with a self-proclaimed radical agenda to change how America engages the world.").

189 *See id.* at 442 ("The main message is that the Trump Administration does not own our climate policy. We all do. . . . There are many resisters, and many ways to resist").

not eternal.[190] And they are deemed revocable for one simple and compelling reason: They serve a state's self-interests, perceptions of which can change. Indeed, treaty-making has traditionally been understood as an exercise in what Anderson calls "sovereign state multilateralism,"[191] a process of horizontal interaction in which the extent, type, and duration of multilateral cooperation rests, ultimately, within each state's judgment.[192] To suggest that treaties represent instead a type of irrevocable Hobbesian social contract, or that a state acts lawlessly in availing itself of express or implied exit rights, or that the rule of law brooks no changes of mind or of course, is essentially to say that nation-states and their citizenries exist to serve the international order, not the other way around. The problem with that proposition is, I think, obvious.

Additionally, there is the pesky issue of democracy when treaty withdrawal is motivated—as it can be in a democracy—not by a change in material external circumstances but in the internal distribution of political power. While campaigning for the presidency in 2016, President Trump made withdrawal from the Paris Agreement an important campaign pledge.[193] While his solid victory in the Electoral College (his 306 votes to Clinton's 232[194]) concededly cannot be interpreted as a mandate on any specific platform plank, it did lend his subsequent withdrawal decision substantial democratic legitimacy—more than enough, I should think, to take it out of the category of *Dauphin*-esque whim that some globalists would cast it in.[195] While I do not doubt the sincerity of globalists' belief that President Trump's

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190 This is evidenced by both the widespread use of express withdrawal clauses and the fairly routine recognition of implied rights of withdrawal based on treaty subject matter. *See* Bradley & Gulati, *supra* note 41, at 204.

191 *See* Anderson, *supra* note 18, at 1262.

192 Sovereign state multilateralism reflects Kant's vision of global governance, viz. a law of nations founded on a federation of free states interacting with each other on the basis of shared assessments of mutual interests. *See* IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795). Koh invokes Kant against the Trump Administration. *See* Koh, *supra* note 178, at 466-67. But unless Kant can be read as endorsing an international hive mind, this invocation is inapt.

193 *See* Jamie Fly, *Trump's Unsurprising Rejection of the Paris Climate Agreement* (June 5, 2017), http://www.gmfus.org/blog/2017/06/05/trumps-unsurprising-rejection-paris-climate-agreement ("As a candidate, Trump was very clear on the campaign trail about his intention to scrap the agreement. The Republican platform in Cleveland last summer was explicit as well"); Koh, *supra* note 19, at 355 ("During the 2016 presidential campaign, President-Elect Donald Trump promised to 'cancel' the Paris Agreement.") (citation omitted).

194 *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES, https://www.nytimes.com/elections/2016/results/president (last updated Aug. 9, 2017, 9:00 AM).

195 *See, e.g.*, Koh, *supra* note 178, at 442 ("The environmental community and the global commitment to clean energy are far bigger than Donald Trump."); *id.* at 465 ("A new president cannot simply have his way.").

withdrawal decision disserves the national interest,[196] it would seem that an election-winning percentage of United States voters disagreed with that assessment. Surely it is their judgment that matters and that deserves respect, is it not?[197]

ii. Word Games, Calendar Chicanery and Other Shenanigans

When not trying to replace the traditional concept of the treaty with something more philosophically radical, globalist scholars and their allies have resorted to a host of gimmicks and tricks designed to make international agreements stickier (i.e. easier for states to enter and harder to leave). Regarding ease of entry, the key tactic has been circumvention of those national authorities—usually the legislature—that tend to be skeptical of international commitment. In recent years circumvention has been attempted in several different ways. One has been to couch the most consequential provisions of an agreement in non-mandatory language (e.g. replacing "shalls" with "shoulds"). This allows characterization of an agreement as a mere political/diplomatic commitment on the part of a state by its executive, not a legally binding, contractual obligation requiring legislative approval.[198] A second way has been to use two articles of the Vienna Convention on the Law of Treaties[199]—Articles 18 and 25—to procure state compliance with treaty provisions at the point of executive signature instead of legislative ratification. Article 18 has been used as a stick,[200] Article 25 as a carrot,[201]

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196 *See, e.g.*, Amirfar & Singh, *supra* note 176, at 443.

197 In this vein, President Macron might wish to reconsider the advisability of invoking the concept of democracy to criticize a democratically-blessed geostrategic decision.

198 *See* Koh, *supra* note 19, at 346. Koh writes:

> If the international commitment being assumed is only political, and neither new, legally binding, nor domestically enforceable, the obligations being created are diplomatic, not contractual, and can lawfully be made by the President alone, operating against a broad background of legislative acceptance . . . .

Id. The wording of the emissions-cap provisions in the Paris Agreement exemplifies this strategic use of language. *See* Bridgeman, *supra* note 179 ("The Paris Agreement, having been carefully negotiated by experienced actors over an extended time period, is certainly an example of such exacting scrutiny in the choice of words."); Koh, *supra* note 19, at 352.

199 Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

200 Article 18 states that a nation that signs a treaty is "obliged to refrain from acts which would defeat the object and purpose" of the treaty "until it shall have made its intention clear not to become a party to the treaty." *Id.* art. 18. Puras invoked Article 18 in arguing that the United States is legally bound to secure to its citizens the rights enumerated in the ICESCR. *See* Puras Letter, *supra* note 1, at 3. For a discussion of some of the scholarship that supports Puras's position, see Bradley, *supra* note 44, at 315-16.

201 Article 25(1) permits nations "to have a treaty apply provisionally even before they have ratified it—for example, based on a provision in the treaty that is triggered by

and each to the same effect: reducing the act of ratification *vel non* to the status of either a quasi-formality at best[202] or a nullity at worst.[203] Yet a third way has been to ignore any "inconvenient" understandings that a national legislature may have regarding the nature of the treaty commitments it does agree to adopt. Alston went down this road when he interpreted the CERD as declaring socio-economic rights instead of simply prohibiting discrimination relative to their optional exercise.[204] Puras went down it as well when he advanced, as against the Trump Administration's Obamacare-repeal plans, a disparate-impact claim based on the CERD[205] that the ratifying Senate had expressly discountenanced.[206] Each of these three ways of circumventing the national legislature is problematic, and it behooves us to pause and consider precisely why.

The calculated use of non-mandatory language has been billed as a way to increase state participation in international agreements. Bridgeman write apropos the Paris Agreement: "[A]llowing parties to set their own emissions targets was intended to encourage broad participation among states and incentivize maximum ambition."[207] But framing the matter this way obfuscates more than it clarifies, for it ignores the crucial issue of whether

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signature, or in a separate agreement." Bradley & Goldsmith, *supra* note 45, at 1238. Article 25(2) provides for the termination of this provisional effect if and when a signatory state decides not to become a party to the treaty. *See id.*

202 *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 94 (2000) (citation omitted). Aust writes:

> It is sometimes argued that a state which has not yet ratified a treaty must, in accordance with Article 18, nevertheless comply with it, or, at least, do nothing inconsistent with its provisions. The argument is clearly wrong, since the act of ratification would then have no purpose because the obligation to perform the treaty would not then be dependent on ratification.

Id.

203 Two examples illustrate this point: (1) Some commentators argued that, by virtue of its earlier signature, the United States had an obligation to avoid testing nuclear weapons under the Comprehensive Nuclear Test Ban Treaty, even though the U.S. Senate had previously rejected the Treaty. *See* Bradley, *supra* note 44, at 315-16. (2) In 2013, President Obama signed the ATT despite substantial opposition to it in the Senate. The ATT provides that "[a]ny State may at the time of signature . . . declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State." ATT, *supra* note 121, at art. 23. Some senators feared that the Obama Administration would avail itself of this provision to implement the ATT before the Senate could render its own (presumably negative) judgment via its advice-and-consent role. *See* Bradley & Goldsmith, *supra* note 45, at 1239-40 n.171.

204 *See supra* note 12.

205 *See* Puras Letter, *supra* note 1, at 2-3.

206 *See* Senate Report, *supra* note 12, at 30 (expressing the understanding that the CERD prohibited only those fiscal and social policies that could be shown to be motivated by discriminatory animus).

207 Bridgeman, *supra* note 179.

greater state participation is secured by respecting the exercise of sovereign state choice or by marginalizing it. The VCLT's forgiving and flexible regime regarding the acceptability of treaty reservations is an example of the former manner of securing broad state participation;[208] the strategic choice of modal verb forms in the Paris Agreement, of the latter. Wrote one reporter: "The U.S. had insisted throughout the negotiating process that the [Paris] deal not include any legally binding language that would have required the White House to submit it to the Senate for approval."[209] Indeed, when Koh described the Paris Agreement as the culmination of a "daring change in [the] diplomatic approach to international treaty commitments" which was made in response to the U.S. Senate's previous rejection of the Kyoto Protocol,[210] he was subtly confirming that Paris's architects sought to avoid the possibility of Senate rejection by avoiding, rather than by satisfying, the Senate.[211]

If we wish for further proof on this point we shall find it in the asymmetry that characterizes the entry and exit attributes of these ostensibly political commitments. Logic dictates that such commitments be easy to revoke or ignore by the sole entity (the executive) that made them. From a sovereigntist's perspective, such exit flexibility would go some way toward compensating for the exclusion of the national legislature on the question of entry. However, if the Paris Agreement is any indication, executive-driven exit may be anything but quick or easy. The withdrawal provisions of that Agreement were carefully crafted to ensure that anti-Paris factions in the United States would have to win two Presidential elections, not just one, in order to take the United States out. As Koh has explained (with evident satisfaction):

> The Paris Agreement only recognizes withdrawal under the terms specified in the Agreement's text, which plainly declares that a party cannot give note of withdrawal to the U.N. Secretary General until "three years from the date on which this Agreement has entered into force." Since the Paris

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208 *See* Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 500-06 (2002).

209 Joshua Keating, *The One Word That Almost Scuttled the Climate Deal*, SLATE (Dec. 14, 2015), https://slate.com/news-and-politics/2015/12/climate-deal-came-down-to-the-difference-between-shall-and-should.html.

210 *See* Koh, *supra* note 19, at 351.

211 Koh's assurance that the Paris Agreement enjoyed a measure of Congressional approval because it was concluded against the backdrop of prior Congressional authorizations to the executive branch to tackle the problems of pollution and climate change is undermined by his acknowledgement that the Paris Agreement was one of the two "most important *and controversial* diplomatic arrangements of the Obama Administration." *Id.* at 349 (emphasis added). *See also* Bradley & Goldsmith, *supra* note 45, at 1252 (noting that the Paris Agreement was concluded "in the face of congressional opposition") *and id.* at n.235.

> Agreement entered into force on November 4, 2016, the earliest date that the U.S. could even give such legal notice would be November 4, 2019. That notification would then take another year to take legal effect, meaning that Trump cannot legally withdraw the U.S. from the Agreement until November 4, 2020, the day after the next U.S. presidential election. Until then, Trump's withdrawal announcement has no more legal meaning than one of his tweets.[212]

The image of American negotiators working with foreign governments to create ways to insulate an agreement from the disapproving judgment of the American electorate is, I submit, a deeply disturbing one. Yet surprisingly, some commentators claim to see in such calendar chicanery a validation of democracy rather than its rather obvious insult. Bridgeman, for example, has written:

> This four-year minimum timeline is crucial in light of the intense domestic debate on the merits of staying in the Agreement: it sets up the November 2020 U.S. election as a referendum of sorts on whether the United States should indeed follow through with Trump's announced withdrawal.[213]

Bridgeman overlooks the fact that, for reasons explained above,[214] the 2016 presidential election already served as a "referendum of sorts" on the wisdom of the Paris Agreement—a referendum seemingly lost by Paris proponents. Suffice it to say that democracy has not traditionally been understood to allow for successive rounds of voting until the desired outcome is achieved. To make matters worse, pro-Paris factions and scholars have come up with a range of claims and tactics designed to make the Agreement as sticky as possible as a matter of U.S. domestic law. These efforts are surveyed in Part II.

Requiring state compliance with treaty provisions in the period prior to legislative ratification rests on an ambitious misreading of Article 18 of the VCLT. As Bradley has explained, based on an analysis of Article 18's drafting history and text, Article 18 does not require states, upon signing, to comply with a treaty's provisions, only to preserve those elements of the exo-agreement status quo that make future compliance upon ratification possible and meaningful.[215] In other words, Article 18 seems to have been intended as

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212 Koh, *supra* note 178, at 436.

213 Bridgeman, *supra* note 179.

214 *See supra* notes 193-197 and accompanying text.

215 *See* Bradley, *supra* note 44, at 327-30.

a garden-variety anti-fraud device meant to deter states from taking bad faith measures that deny counter-parties the benefit(s) of their bargain.[216] This narrow construction of Article 18 is not only correct as a technical matter; it is essential for the preservation of the voice of national legislatures and citizenries regarding the type and scope of international commitments their states assume.[217] The danger to democracies of a broad construction of Article 18 is not lessened by the vague assurance, offered by some, that the interim compliance obligation attaches only to core treaty provisions, not peripheral ones.[218] How "coreness" is to be assessed remains distressingly unclear. And the danger to democracy is positively heightened when the broad construction is paired with the strange notion, advanced by others, that an unratified treaty cannot legally be unsigned.[219] Indeed, this combination of ideas represents a one-two doctrinal punch to the sovereignty gut: The broad construction of Article 18 would get states easily "in" to the substantive obligations imposed by treaties, while the alleged prohibition on unsigning would keep them from ever getting out. States would be facing a veritable perpetual purgatory of compliance.

The globalists' use of VCLT Article 25 presents a somewhat different concern. It cannot be said to rest on a misreading of that Article, as commentators appear to agree that provisional application can in fact **"**bind a nation to all or part of a treaty, not just to an obligation not to defeat its object and purpose.**"**[220] However, depending on the content of the treaty and the political context, its use can certainly reflect an insensitive level of indifference on the part of treaty negotiators to the constitutional tensions foreseeably created at the domestic level of those signatory states that entrust the ratification-decision to the legislature. Such indifference goes beyond the

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216 As such, Article 18 would appear to be inapplicable to human-rights instruments, such as the ICSECR, which do not typically memorialize the kinds of quid pro quo that are vulnerable to interim-period machination. *Cf. id.* at 332.

217 *See* David H. Moore, *The President's Unconstitutional Treatymaking,* 59 UCLA L. REV. 598, 631-32 (2012) (concluding that "[o]n textual, structural, and historical grounds, the President's assumption of interim obligations runs afoul of the Constitution").

218 *See, e.g.*, Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171, 173 (2003).

219 *See, e.g.*, Koh, *supra* note 178, at 435-36 (citing the Bush II Administration's experience with the Rome Statute for the proposition that "[i]nternational law makes clear that U.S. presidents cannot simply delete prior signatures from treaties"). This argument has little merit. In signing a treaty, a democratic nation expresses, via its executive, an intent to deliberate and reach a decision regarding ratification via formal proceedings usually involving the legislature in some capacity. The act of unsigning is simply the expression of a counter-intent (i.e. no deliberation will occur because there is no possibility that binding consent to the treaty will be granted). Such reversal is expressly contemplated by Article 18 itself when it refers to a point at which a state makes "its intention clear not to become a party to the treaty." At this point, Article 18 tells us, the interim obligation ceases because the interim period itself has collapsed.

220 Bradley & Goldsmith, *supra* note 45, at 1238.

posture of mere neutrality that international law customarily adopts regarding the manner in which states meet their international commitments. And indifference is not necessarily the worst of it. The use of Article 25 can also represent a rather cynical ploy to give key pro-globalist executive branch officials the legal hook they need to implement agreements having controversial domestic ramifications against the wishes of their legislatures. The ATT, prior to its 2019 unsigning by President Trump, arguably exemplified this ploy. As noted above, the ATT contains a provisional application provision that aroused the suspicions of some U.S. Senators as to the unilateral intentions of the Obama Administration.[221] Opposition to the ATT in Congress was widespread and rooted in concern over the ATT's impact on Second Amendment gun rights[222]—a concern that neither the ATT's drafters nor the pro-gun-control Obama Administration seemed to share.[223] While it is true that provisional application is sometimes limited "to obligations not inconsistent with each country's domestic law,"[224] this limitation does little to preserve a legislature's ratification voice in cases where the obligation either is new in nature (and thus not reflected in extant domestic law) or burdens, but does not outright violate, domestic rights or privileges (the Second Amendment scenario). The only failsafe way to limit mischief in these two cases is to amend Article 25 to clarify that provisional application is available as a matter of international law only if it is consistent with a signatory state's domestic constitutional *processes*, not substantive law.

We come, finally, to Alston's and Puras's decisions to publicly interpret the CERD in ways that ran counter to the clear understanding of the ratifying Senate. While that Senate might be chided for not including its understandings in its package of RUDs to the CERD, certainly jurisdictional comity does not normally depend on the fulfilment of such formalities. This is especially true given, in Alston's case, the U.S. Senate's determined refusal to ratify the ICESCR and, in Puras's case, the highly controversial nature of the reading he was advancing. Even the most ardent promoters of the CERD, such as

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221 *See supra* note 203.

222 *See* Larry Bell, *The U.N. Arms Trade Treaty: Are Our 2nd Amendment Rights Part Of The Deal?* FORBES (July 10, 2012), https://www.forbes.com/sites/larrybell/2012/07/10/the-u-n-arms-trade-treaty-are-our-2nd-amendment-rights-part-of-the-deal/#21d7f3b86c20 (detailing congressional opposition).

223 *See* ATT, *supra* note 121, preamble (acknowledging the legitimacy of ownership and use of conventional weapons for recreational, cultural, historical, and sporting activities, but omitting reference to self-defensive activities); Diana D'Abruzzo, *'It's Got to Stop': 17 Times Obama Has Pushed for Stronger Gun Control*, POLITICO (Aug. 26, 2015), https://www.politico.com/gallery/2015/08/its-got-to-stop-15-times-obama-has-pushed-for-stronger-gun-control-002064?slide=0.

224 Bradley & Goldsmith, *supra* note 45, at 1239.

Meron, put forward the disparate impact argument only tentatively, in recognition of the enormity of its implications.[225]

But I would make a larger point here, which is that, more than anything else, Alston's and Puras's moves reflect a tendency on the part of globalists to try to capture the castle cheaply via definitional and interpretive fiat. I have previously noted the manipulation of categories and labels done for the purpose of immunizing certain favored customary norms against persistent objection.[226] We have seen French President Macron suggest a novel use of the word democracy in a bid to immortalize treaty commitments.[227] And Puras's redefinition of "discrimination" to include non-invidious disparate impact seems nothing if not small potatoes compared to the globalists' wholesale redefinition of "sovereignty" twenty years ago[228] in a bid to legitimize a new international duty of humanitarian intervention—the "Responsibility to Protect"—that was destined to thoroughly wreck one state (Libya)[229] and threaten the health and well-being of another (Syria).[230] The bottom line is that globalists appreciate the power and malleability of words and have not hesitated to harness both to advance the Sources Project at the international level.

III. PART II: QUOD EST INFERIUS EST SICUT QUOD EST SUPERIUS: THE SOURCES PROJECT AT THE DOMESTIC LEVEL

If the aim of the Sources Project at the international level has been the creation of universally binding international obligations despite the opposition of dissenting states, its aim at the domestic level has been to secure states' compliance with such obligations despite the opposition of national political branches concerned to preserve the prerogatives of sovereignty. Perhaps unsurprisingly, the same two tactics that have been deployed at the international level are evident at the domestic level: (1) Using CIL as a tool

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225 *See* Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283, 289-90 (1985).

226 *See supra* note 127.

227 *See supra* note 180 and accompanying text.

228 Sovereignty was redefined from sovereignty-as-control (i.e. the right of a state government to exercise exclusive control over state territory and people) to sovereignty-as-responsibility (i.e. a state government forfeits exclusive control over state territory and people if it fails to protect them from, or subjects them to, mass atrocities). *See* Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect: Report of the Int'l Comm'n on Intervention and State Sovereignty* (Dec. 2001), http://responsibilitytoprotect.org/ICISS%20Report.pdf. The world was assured that this redefinition implied "no transfer or dilution of state sovereignty," only a "necessary re-characterization." *Id.* at 13 ¶ 2.4.

229 *See* Amy Baker Benjamin, *To Wreck a State: The New International Crime*, 19 NEW CRIM. L. REV. 208 (2016).

230 *See* Amy Baker Benjamin, *Syria: The Unbearable Lightness of Intervention*, 35 WIS. J. INT'L L. 515 (2018).

of internalization when the use of treaties is blocked or blunted; and (2) enhancing treaties themselves as a tool of internalization by changing the secondary rules that regulate how they acquire domestic legal effect. *Quod est inferius est sicut quod est superius.*[231] I shall discuss each tactic in turn, using the United States as the case study.

A. CIL to the Rescue of Unratified and Unimplemented Treaties

As the presidency of Jimmy Carter—a "governmental norm sponsor[]" according to Koh[232]—was nearing its end in the late 1970s, it was becoming clear that the U.S. Senate either would not ratify the large and growing body of international human rights treaties or would ratify them subject to RUDs that rendered them unenforceable as domestic law. Globalist legal scholars were predictably appalled and began casting about for a way to get such treaties "in" despite this limitation. Hence the genesis in or around 1980 of what Bradley and Goldsmith later chose to call the Modern Position: the claim that the treaty-mimicking corpus of CIL, or parts thereof, qualified as post-*Erie*[233] federal common law which was (1) binding on the fifty states by virtue of the Supremacy Clause; (2) binding on the President by virtue of the Take Care Clause; (3) potentially binding on the U.S Congress, as respects any prior inconsistent federal legislation, by virtue of the "last in time" rule; and (4) potentially binding on the U.S. Congress, as respects any subsequent inconsistent federal legislation, by virtue of the allegedly constitutional status of CIL norms.[234] Critics of the Modern Position charged—and some proponents freely conceded—that it was devised to enable "federal courts to accomplish through the back door of CIL what the political branches have prohibited through the front door of treaties."[235] In other words, what we had in the Modern Position was an attempt to reprise at the domestic level Prosper Weil's nightmare—a campaign to cleverly outflank that which could not be frontally assaulted.

The Modern Position was problematic for a number of reasons well documented in the literature. It represented a clear affront to the democratic processes of the federal government. It reflected a crude cherry-picking of the attributes of the "new" federal common law that *Erie* had paved the way for, eagerly claiming for CIL the status of supreme federal law while disregarding *Erie's* requirement that any such law be authorized in some fashion by the

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231 "That which is below is like that which is above."

232 Koh, *supra* note 105, at 1410.

233 Erie R.R. Railroad v. Tompkins, 304 U.S. 64 (1938).

234 *See* Bradley & Goldsmith, *supra* note 32, at 322-23 & n.20 (discussing the various versions of the Modern Position).

235 *Id.* at 331; *see also id.* at 330-31 & n.62.

U.S. Constitution or federal legislation.[236] It was illogical: Why should CIL norms be self-executing in the U.S. judicial system when treaty norms, which enjoy far greater democratic legitimacy owing to the Senate's advice and consent role, are not?[237] It was, finally, frightening in its implications. When one combined the liberal rules of modern CIL-formation[238] with the most ambitious versions of the Modern Position,[239] the possibility opened up that, as a matter of domestic rules of recognition, politically-unaccountable NSAs could play a role in nullifying the statutory work-product of the U.S. Congress.[240]

Fortunately, a great deal of wind was taken out of the sails of the Modern Position by the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain*.[241] Whatever else *Sosa* may stand for—and there is disagreement[242]—it made reasonably clear that CIL norms that do not enjoy the support of the U.S. Congress are unlikely to be deemed self-executing in legal actions before the federal courts. In what may have been the most consequential moment of its opinion, the *Sosa* Court indicated a reluctance to entertain, as possible sources of self-executing CIL, international instruments that Congress either considers to be aspirational in nature (viz. the UDHR) or has left unimplemented (viz. the International Covenant on Civil and Political Rights).[243] Anyone who understands the overarching rationale of the Modern Position will understand the significance of the Court's reluctance on this point.

Following *Sosa* there appear to be only two ways in which globalists can make use of CIL to engineer U.S. compliance with treaty norms that have been rejected or left unimplemented by the Senate (or by Congress as a whole). One way is to convince a sympathetic President to recognize and accept such norms as CIL. Presidents have done this with respect to several

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236 *See id.* at 324 ("To be consistent with the requirements of *Erie* . . . [the] new federal common law must be authorized in some fashion by the U.S. Constitution or a federal statute") (citation omitted).

237 Indeed, if a democratic state opts for being half-monist and half-dualist, logic would seem to demand monism for treaties and dualism for CIL.

238 *See supra* Part I.A.ii.

239 *See, e.g.*, JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 5-6, 95, 338-43 (2d ed. 2003) (arguing that some CIL rules have the status of U.S. constitutional law and therefore trump even subsequent inconsistent federal legislation).

240 The more restrained proponents of the Modern Position trotted out the well-worn "trust us, we won't go that far" pledge to assuage concerns on this point. *See* Bradley & Goldsmith, *supra* note 32, at 330. The assurance left critics like Bradley and Goldsmith unpersuaded, and for good reason: Historically, trust has not figured as an acceptable basis for delegating power to government officials. *See id.*; Benjamin, *supra* note 50, at 12-15 (discussing the "distrust principle" at the heart of the American constitutional order).

241 Sosa, 512 U.S. at 734-35.

242 *See* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 871-73 (2007).

243 Sosa, 512 U.S. at 734-35.

conventions,[244] and time will tell whether greater use of this tactic is made and condoned in the future. It is an interesting and open question whether such presidential recognition would constitute political branch endorsement sufficient to satisfy *Erie's* test for federal common law and thereby permit a CIL norm's enforcement via private lawsuits brought in federal court. I suspect it would not, as presidential directive is plainly neither Constitution nor federal statute.[245] A second way to still use CIL is to persuade the Supreme Court to take CIL norms into account when interpreting provisions of the U.S. Constitution. This tactic has also been used with some success,[246] no doubt due to the presence on the Court of what Koh has called a "transnationalist faction" of justices who are prepared to serve as a "critical link between the international and the domestic legal spheres" and who "use their interpretive powers to promote the development of a global legal system."[247] But getting customary norms "in" via the Constitution ultimately depends on the availability of colorably serviceable constitutional text—a stubborn fact likely to limit the utility of this tactic to the globalist agenda going forward.

B. International Agreements Without Congress: A Primer

In addition to attempting to use CIL as a collateral device for getting treaty norms "in," globalist scholars have tried to rework the secondary internalization rules relating directly to treaties themselves. Henkin, for example, was for many years at the forefront of a movement to win the judiciary over to the view that non-self-executing treaty declarations offend the spirit of the Constitution and might be unconstitutional. He stated his case in a 1995 article for the *American Journal of International Law*:

> Article VI of the Constitution provides expressly for lawmaking by treaty: treaties are declared to be the supreme law of the land. The Framers intended that a treaty should become law *ipso facto*, when the treaty is made; it should not require legislative implementation to convert it into United

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244 *See* Eric Talbot Jensen, *Presidential Pronouncements of Customary International Law as an Alternative to the Senate's Advice and Consent*, 2015 B.Y.U. L. REV. 1525, 1528 (2015).

245 It would also seem to be an open question whether Presidents have the power to direct executive agencies to follow the provisions of their unilaterally recognized CIL and to prescribe domestic legal ramifications for failure to do so.

246 In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court took arguments against the juvenile death penalty that long had been made under CIL and accepted them in its interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments.

247 Koh, *supra* note 171, at 748-49.

> States law. In effect, lawmaking by treaty was to be an alternative to legislation by Congress.[248]

Henkin believed that if ever there was proof of American hypocrisy respecting international law (i.e. international law is for them, not us), the non-self-executing declarations favored by the Senate were it.[249] And one can certainly understand his frustration; rights without legal remedies are usually not worth very much. On the other hand, Henkin was insensitive to the implications of his argument. While it is true that the Framers did not "contemplate[] that some treaties might not be law of the land,"[250] neither could they have contemplated the possibility of a world in which international law would seek to intrude so deeply into the political culture and jurisdiction of nation-states via the modern human rights movement. The self-execution of treaties in the era of classical international law posed little threat to the power and prerogatives of the U.S. House of Representatives (which is shut out of the constitutionally prescribed treaty ratification process) because that law confined itself largely to interstate matters. However, in our current era of intrastate-focused international law, self-execution poses a substantial threat, for obvious reasons. Henkin's argument also ran afoul of basic doctrinal logic. If as a matter of domestic law the Senate can reject a treaty altogether, then surely it ought to be able to approve it subject to limiting conditions like non-self-execution. Surely the greater power includes the lesser. If it did not, the federal courts would not proceed with the caution they do in inferring private causes of action from domestic statutes prescribing domestic rules of conduct. The *Sosa* Court affirmed as much, albeit in the context of considering the self-execution of CIL instead of treaties.[251] The bottom line is that Henkin's complaint, however understandable as a political statement, missed the mark widely as a legal one.[252]

Any doubt on this score was removed by the Supreme Court's decision in *Medellin v. Texas*,[253] which was to Henkin's argument what *Sosa* had been to the Modern Position: a large bucket of cold water, liberally poured. The *Medellin* Court not only did not think that the Constitution requires most treaties to be deemed self-executing;[254] it also appeared to endorse a presumption against self-execution which can be overcome only if there is clear evidence in treaty text or structure that the treaty was intended to be self-

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248 Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346 (1995).

249 *See id.* at 348.

250 *Id.* at 346.

251 *See* Sosa, 542 U.S. at 727-28.

252 For a more detailed response to Henkin on this issue, see Bradley, *supra* note 208, at 544-48.

253 552 U.S. 491 (2008).

254 *See id.* at 504-06.

executing by the Senate that ratified it.[255] In opting for this originalist approach—which was the opposite of Henkin's vision—the Court rejected as "novel" [256] and "arrestingly indeterminate" [257] the more internationally minded test for self-execution proposed by Justice Breyer, which would have substituted judicial assessment of the benefits of self-execution in any given case for the ratifying Senate's own historical judgment.[258] The Court also rejected, as constitutionally irrelevant and ineffective, the "unprecedented action"[259] of the George W. Bush Administration in seeking to implement unilaterally, via executive order, the non-self-executing treaty commitment at issue in the case (which Congress had chosen to leave unimplemented).[260] This ruling not only preserved Congress's exclusive gate-keeping role apropos non-self-executing treaties; it also implicitly cast doubt on the claim, discussed above,[261] that the President can constitutionally cause the United States to comply with the provisions of unratified treaties under color of Articles 18 or 25 of the VCLT.

One might think that, following *Medellin*, globalist legal scholars would have felt some hesitation in arguing for expanded presidential power (vis-à-vis Congress) over the nation's international lawmaking. Yet nothing could be further from the truth. During the eight years that followed *Medellin*—years that coincided with the two-term Obama Presidency—globalists bid several novel theories designed to justify the President in entering the United States into international agreements without much, if any, congressional

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255 "[W]hile treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." *Id.* at 505 (citing Igartua De La Rosa v. United States, 417 F. 3d 145, 150 (1st Cir. 2005)) (internal quotations omitted); *see also* Medellin, 552 U.S. at 514.

I say the Court *appeared* to endorse a rebuttable presumption against self-execution because the facts it relied on for its ruling did not fit such a test. The Court concluded that Article 94 of the U.N. Charter was not self-executing based on evidence of non-self-executive intent on the part of the Senate rather than on a lack of evidence of self-executive intent. *See id.* at 509 ("The U.N. Charter's provision of an express diplomatic—that is, nonjudicial—remedy is itself evidence that ICJ judgments were not meant to be enforceable in domestic courts").

256 *Id.* at 515.

257 *Id.*

258 *See id.* at 555-62 (Breyer, J., dissenting). The Court's majority was unmoved by Justice Breyer's seeming appeal for trust in assuring the nation that the new power he was proposing would be exercised in a responsible manner. *See id.* at 516 ("Nor is it any answer to say that the federal courts will diligently police international agreements and enforce the decisions of international tribunals only when they *should be* enforced") (emphasis in original).

259 *Id.* at 532 (adopting the Bush II Administration's own characterization) (internal quotations omitted).

260 *See id.* at 523-32.

261 *See supra* notes 199-203, 215-224 and accompanying text.

involvement. There was, to begin with, the "new" theory that came to be known in the literature as "Executive Agreements+".[262] Executive Agreements+ holds that the President can conclude a legally binding international agreement on virtually any subject, regardless of whether it is committed mostly to the care of Congress under Article I of the Constitution, provided the agreement advances or is consistent with policy goals adopted by Congress in purely domestic legislation.[263] The Obama Administration deployed Executive Agreements+ in justifying its unilateral ratification—under cover of the darkness created by the 2013 government shutdown—of the Minamata Convention on Mercury, a comprehensive international agreement concerning the production, use, and disposal of the chemical.[264] Non-globalist scholars were left shaking their heads at the brazenness of this presidential power grab, with Bradley and Goldsmith opining that it was "difficult to overstate the breadth of this purported authority . . . ."[265]

When *ex ante* congressional authorization was felt to be needed by the Obama Administration, it was reverse-engineered in a disingenuous fashion that might be called "Fake Authorization." Administration lawyers, signed treaty text already in hand, would scour the U.S. Code looking for any statute that might plausibly be read to allow for the conclusion of the international agreement in question.[266] Led by Koh as then-State Department Legal Adviser, the Obama Administration attempted Fake Authorization with respect to the Anti-Counterfeiting Trade Agreement (ACTA)[267]—again provoking expressions of surprise and consternation on the part of members of the legal academy, some of whom reached out to Congress and warned it not to let itself be used in this manner.[268] The scholars wrote:

> The present issue reaches far beyond the topical matters covered by ACTA, into the fundamental Constitutional issue of separation of powers. If Congress allows the Executive to claim that ACTA was authorized by language that clearly does

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262 Bradley & Goldsmith, *supra* note 45, at 1267 ("The very theory of Executive Agreements+ is new . . .").

263 *See id.* at 1266; Daniel Bodansky & Peter Shapiro, *Executive Agreements+*, 49 VAND. J. TRANSNAT'L L. 885, 915 (2016).

264 *See* Bradley & Goldsmith, *supra* note 45, at 1216, 1267.

265 *Id.* at 1266.

266 Although one can only speculate, this scouring likely took place in the context of the State Department's non-public "Circular 175 procedure." *See id.* at 1209 n.16. The use of the word "circular" to describe this process would seem most apt.

267 *See id.* at 1217.

268 *See* Letter from Legal Academics to Members of the U.S. Senate Committee on Finance (May 16, 2012), https://perma.cc/ZE8F-UXRK.

> not authorize the agreement, *it will be ceding unprecedented power to the Executive*.[269]

In truth, it does not take much thought to discern that if members of Congress would be surprised to learn from State Department lawyers that Congress had authorized the conclusion of an international agreement, then Congress did not do so.

Then there was the Obama Administration's "significant constitutional innovation"[270] of marrying a President's international political-commitment authority with pre-existing statutory delegations that give those commitments the possibility of legal teeth under domestic law.[271] The Paris Agreement epitomized this combination. President Obama's internationally nonbinding political pledge regarding the United States' emissions reductions was implemented via existing regulatory authorities that had been delegated by Congress years before for different, albeit related purposes.[272] Bradley and Goldsmith label this move a "consequential political commitment,"[273] but I prefer to call it "Henkin's Revenge," for it represents a sly form of payback by the globalists for the Senate's long-time habit of turning the nation's international legal obligations into domestic political commitments via the use of the non-self-execution declaration. And while Bradley and Goldsmith perceive no real danger in Henkin's Revenge as a constitutional matter,[274] I am not nearly as sanguine.

The Paris Agreement is best categorized as an executive agreement made pursuant to treaty, the treaty being the United Nations Framework Convention on Climate, to which the Senate gave its advice and consent in 1992.[275] The Senate Foreign Relations Committee "expressed the expectation that future agreements that would require legally binding emissions reductions . . . would require the Senate's advice and consent."[276] But there are two levels on which

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269 *Id.* (emphasis added).

270 Bradley & Goldsmith, *supra* note 45, at 1219.

271 *Id.* at 1252.

272 *See id.* at 1250, 1252, 1269.

273 *Id.* at 1269.

274 The authors write:

> Although this new use of the political-commitment authority raises important policy issues, it is difficult to see why it is unlawful. Both the President's power over political commitments and the President's power to exercise power delegated from Congress in the domestic realm are well established. Without significantly more argumentation, it is not clear why two presidential authorities that separately are not legally controversial are unconstitutional when combined.

Id. at 1270.

275 *See* United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]; Bradley & Goldsmith, *supra* note 45, at 1268-69.

276 Bradley & Goldsmith, *supra* note 45, at 1268.

an international agreement can be legally binding—the international and the domestic—and I see no reason to confine the Senate's expectations regarding future agreements under the UNFCCC to the former level. After all, the legally binding nature of agreements on the international plane can mean quite little due to the international system's overall lack of effective enforcement mechanisms. What really matters is the legal nature of any domestic impact of such agreements. In this key sense the Paris Agreement, including President Obama's emissions pledge, has borne deep legal consequences for the United States. The administrative regulations enacted by the Obama Administration to implement the pledge—such as the Clean Power Plan[277]—legally bind firms and persons in the United States. They also legally bind Congress in the sense that Congress will have to take affirmative legislative steps in order to get rid of them. It will have to either rescind the underlying statutory delegations or amend them to clarify that they may not be used as a basis to implement unilateral presidential political pledges. Either action will be burdened by the usual inertia and collective-action barriers, as well as by potential presidential veto.[278] Finally, pro-Paris groups, led in the academy by Koh, have vowed to do their utmost to ensure that the Obama-era regulations legally bind any future President who might seek to disturb them. It is beyond ironic that in the very same 2017 article in which he emphasized the purely political nature of the emissions pledge,[279] and cited it as justification for President Obama's unilateral ratification of the Paris Agreement,[280] Koh warned the Trump Administration of the likelihood of litigation on multiple fronts should it attempt to rescind or slow walk the Paris regulatory effort.[281] Koh has also claimed that President Trump lacks the constitutional authority to withdraw the United States from the Paris Agreement without Congress's approval.[282] This is an astonishing suggestion, also backed by a litigation

277 *See id.* at 1252 n.234.

278 Interestingly, legislative inertia and collective-action barriers were cited in the pre-*Sosa* literature as reasons for rejecting the Modern Position. *See, e.g.*, Stephan, *supra* note 27, at 247.

279 *See* Koh, *supra* note 19, at 364-65, 367.

280 *See id.* at 350-51.

281 *See id.* at 358 ("Should a Trump EPA back away from supporting the Clean Power Plan, litigation would almost certainly ensue."); *id.* at 359 ("[A]lternative, nonfederal stakeholders will almost surely generate an alternative plan of litigation and emissions reduction designed to keep U.S. emissions within striking distance of the promised U.S. Nationally Determined Contribution"); *see also* Koh, *supra* note 178, at 437 ("[B]ureaucratic stickiness and external litigation have slowed the pace of domestic dismantling of our Paris commitments."); *id.* at 438 ("An overt effort by the Trump Administration to discard the [Clean Power Plan] would undoubtedly trigger new fights about notice-and-comment rulemaking before the D.C. Circuit. . . . Should the Trump Administration attempt other changes, domestic litigation seems inevitable.").

282 Koh writes:

> If, in November 2019, the Administration should unilaterally give notice of its intent to withdraw from Paris, new litigation would almost certainly

threat, that rests on the unsound logic that a President may not unilaterally undo what his predecessor unilaterally did.[283]

In sum, the Paris Agreement represents a situation in which one President has unilaterally pledged the nation to serious international undertakings in areas outside core Article II responsibilities and—owing to the pledge's domestic legal teeth—neither Congress nor a future President can easily free the nation from that commitment. Is this merely "aggressive innovation" (Koh's term[284]) and/or "pragmatism" (Justice Beyer's term[285])? Or are we looking instead at the unconstitutional assertion of a quasi-monarchical prerogative? I would argue the latter and urge that we not let semantics get in the way of clear thinking on this point. To say that an international commitment on the part of a President is legally binding is not to say that it is irreversible; it is only to say that it is reversible solely through legal means. Depending on the political context, those means may be difficult to muster. It is highly unlikely that the Senate that ratified the UNFCCC thought it was writing a blank check for the amount of effort it, future Congresses, and future Presidents would need to expend in order to have their contemporary political judgments honored within our system of government. Henkin's Revenge therefore poses a considerable constitutional problem.

And sadly, the Paris Agreement may be but the tip of the iceberg in this regard. However problematic and controversial its emissions cap pledge was and remains, that pledge has at least been well known to both Congress and the public from its inception. Many presidential political commitments of a regulatory nature are apparently not so published and accordingly fly under the criticism-and-accountability radar. Bradley and Goldsmith write:

> Executive branch officials in the last few decades have increasingly used political commitments to effectuate broader and deeper regulatory cooperation between U.S. government agencies and their foreign counterparts on a wide range of regulatory topics. . . . There are scores of . . . examples. Taken

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ensue, arguing that the President lacks constitutional power to withdraw from the Paris Agreement without congressional participation.

Koh, *supra* note 178, at 439; *see also* Koh, *supra* note 19, at 358 ("Nor, as a matter of domestic law, is it entirely clear that the President has constitutional power to withdraw from either the Paris Agreement or the UN-FCCC without congressional participation.").

283 Perhaps because it is so astonishing, Koh's claim seems to have gone unnoticed by other scholars. *See, e.g.*, Bradley & Goldsmith, *supra* note 45, at 1225 (noting that while there was "significant controversy about the policy wisdom of [President Trump's withdrawal] decision . . . no one questioned the President's legal authority to terminate"). The only supportive precedent Koh cites is the inapposite *Goldwater v. Carter*, 444 U.S. 996 (1979), which concerned President Carter's attempt to unilaterally terminate a treaty that had been ratified by the Senate. *See* Koh, *supra* note 19, at 358.

284 *See* Koh, *supra* note 178, at 442.

285 *See* STEPHEN G. BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2011).

> together, political commitments have an enormous impact on the everyday activities of U.S. firms and persons. *But not only are they not subject to any of the requirements of the Administrative Procedure Act (APA), they are not even published systematically or reported to Congress*.[286]

It may surprise few to learn that the Obama Administration actively encouraged this practice of semi-secret international rulemaking,[287] which perhaps might best be called "Secret Henkin's Revenge."

All told, the Obama Administration's legal innovations went some way toward blunting the sovereignty-protective effect of the *Sosa* and *Medellin* rulings. The Administration was willing to (1) assume Congress's assent to its international agreements (Executive Agreements+); (2) fake Congress's assent (Fake Authorization); (3) saddle Congress with regulations implementing agreements Congress was told it did not need to assent to (Henkin's Revenge); and (4) saddle the country with regulations Congress and the public know next-to-nothing about (Secret Henkin's Revenge). Koh would have us believe that we face a stark choice: either allow the President to keep his new toys or face the prospect that he will use the hard power of the U.S. military to achieve the nation's goals.[288] Yet surely this is a false choice (and one, I might add, that borders inappropriately on emotional blackmail). Sovereigntists are not opposed to the conclusion of international agreements. Nor, needless to say, are we in favor of militarism, war or mayhem. We simply oppose the exclusion of Congress from the process of international agreement-making. Bradley and Goldsmith appear to hope that greater transparency regarding the President's unilateral activities will place Congress in a position where it can at least fight for its own inclusion.[289] Perhaps–time will tell. One thing, however, is certain: From a sovereigntist's perspective, the Brave New Legal World bequeathed to us by the Obama Administration makes Henkin's impassioned insistence on the self-execution of most treaties look downright quaint and conservative.

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286 Bradley & Goldsmith, *supra* note 45, at 1218-19 (emphasis added).

287 *See id.* at 1219 n.62.

288 Koh writes:

> Even in a Trump presidency, it is a mistake to conclude that the goal of constitutional interpretation should be to raise the costs of presidential action in foreign affairs, without regard to issue area. After all, if our constitutional readings make it harder for the President to make international deals than to go to war, that legal rigidity will inevitably shift presidential incentives to rely upon—and overextend—lethal tools of American hard power instead of deploying our diplomatic, smart power resources.

Koh, *supra* note 19, at 364-65.

289 *See* Bradley & Goldsmith, *supra* note 45, at 1287-94.

C. Desperate Times Calling for Desperate Measures? Footnote Ninety-Two and the Descent of Harold Koh

I cannot end this tour of the domestic level of the Sources Project without calling attention to some startling suggestions and calls-to-action made by one of the Project's most enthusiastic and influential participants, Harold Koh. As noted above, the 2016 election of Donald Trump to the Presidency evoked a measure of consternation in globalist scholarly circles.[290] Unlike other scholars and commentators, however, Koh did not confine his criticism of President Trump's nationalistic program to arguments of a purely legal nature. Instead, he sought to depreciate the importance of the entire class of domestic actor that President Trump represented, viz. democratically-elected officialdom. In his early 2017 article published in *The Yale Law Journal Forum*, Koh wrote the following:

> Most fundamentally, these case studies [the Paris Agreement and the Iran Nuclear Agreement] remind us that today, America's observance of law—both international and constitutional—is preserved not just by the federal political branches and those officials who lead them at any particular time, but by an ongoing transnational legal process whose diverse stakeholders are not controlled by elected officials.[291]

Koh then proceeded to identify these stakeholders in a footnote that I refer to below as "Footnote Ninety-Two":

> These [stakeholders] include: (1) the courts; (2) states and localities; (3) nongovernmental organizations; (4) formal and informal media; (5) allies and international organizations; and (6) a robust federal bureaucracy that has seen many political leaders come and go. . . . These bureaucrats have myriad ways of saying "Yes, Minister," i.e., signaling political obedience, even while doing their best to continue along the previous bureaucratic path.[292]

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290 *See supra* notes 176-197 and accompanying text.

291 Koh, *supra* note 19, at 366; *see also id.* at 361 ("The key point, as one commentator put it, is that 'there is no reason to believe that people will want good health, better technologies, or clean air less *just because of a change in administration* . . . .'") (emphasis added) (citation omitted).

292 *Id.* at 366 n.92.

Where to begin? There is certainly nothing wrong with Koh's first nominated stakeholder—the judiciary—unless one has in mind litigation of dubious merit that is designed to harass, delay, or obstruct the elected government. Koh has indicated that he does embrace this type of litigation vis-à-vis the Trump Administration.[293] Likewise, while there is nothing per se untoward about seeking to enlist states and localities in a campaign to "hold America's [national] leaders accountable for their [international] commitments,"[294] Koh is arguably the last scholar one would expect to do so. His international law mentor, Henkin, evinced a rather profound hostility toward federalism and states' rights;[295] and Koh himself, in his pre-*Sosa* days of advocating for the Modern Position, vehemently opposed the intrusion of state law into areas of international concern.[296]

The four remaining nominated stakeholders are considerably more problematic than the first two. Kenneth Anderson and David Rieff have persuasively explained why NGOs and "civil society"—the globalists' stock cure for the democracy deficit at the heart of the international order—are unlikely to represent any interests but their own (and, I might add, those of their donors).[297] That Koh hopes to enlist the media against the Trump Administration raises obvious concerns about journalistic integrity and ethics. That he hopes to enlist foreign countries and international organizations suggests a lack of concern to protect U.S. political debate and processes from foreign influence and interference, however ostensibly benign. Finally, his call to career bureaucrats to stymie the Trump Administration through quiet

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293 For example, even though Koh, for good reason, does not appear to think highly of the chances of success of litigation based on *Goldwater v. Carter* (*see supra* note 283), he advocates for it anyway: "Yet even if a litigation challenge ultimately proved unsuccessful, the litigation could still last more than a year, thereby pushing the national decision of whether to complete withdrawal [from the Paris agreement] past Trump's presidency." Koh, *supra* note 178, at 440.

294 Koh, *supra* note 19, at 366.

295 *See, e.g.*, Henkin, *supra* note 248, at 344-46.

296 *See* Harold Hongju Koh, *Is International Law Really State Law?* 111 HARV. L. REV. 1824 (1998). An impression of forum-shopping is equally evident in Koh's eagerness to bring Congress into the Paris-Agreement picture now that a nationalist occupies the Oval Office. *See supra* notes 282-283 and accompanying text.

297 *See* Kenneth Anderson & David Rieff, *"Global Civil Society": A Sceptical View*, AM. U. WASH. COLL. OF L. (Wash. Coll. of L. Research Paper No. 2008-69, 2005), https://ssrn.com/abstract=899771; *see also* Rubenfeld, *supra* note 50, at 34 (describing international NGOs as "unaccountable, self-appointed, unrepresentative organizations" that do not speak "for world public opinion").

acts of disobedience[298]—including, it would seem, intelligence leaks[299]—may represent a first in nearly one hundred years of scholarship on the American administrative state. Historically, the U.S. bureaucracy has been either criticized for being an undemocratic element in our political system (the majority view) or praised for being a democratic element (the minority view).[300] Never to my knowledge has it been praised for being an undemocratic element. It would seem that, in Koh, the "Deep State" has found its first public apologist.[301]

With the exception of the states and localities, Koh's nominated stakeholders are either wholly politically unaccountable or deeply politically insulated. And yet it is Koh's hope that, when combined, their counter-Trump efforts and advocacy will succeed in draining the Trump Administration of so much energy and political capital that it will be unable to deliver on President Trump's 2016 campaign promises respecting the renegotiation or termination of certain international agreements.[302] How Koh can think this is an appropriate political tactic in a democratic republic is a bit of a mystery, although he has left us some clues. He has made note of President Trump's "weak coalition, minority electoral support, and limited political capital,"[303] indicating, perhaps, a view that the Trump Presidency lacks legitimacy because then-candidate Trump did not win the popular vote in the 2016 presidential election. Yet surely Koh would recognize the unfairness of such a position (if in fact he subscribes to it). Presidential candidates campaign in the way best calculated to win them a majority of votes in the Electoral College, as that is how victory is determined. To impugn a Presidency because

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298 *See* Koh, *supra* note 178, at 421 ("U.S. bureaucrats committed to international rules can continue to pursue a strategy of engage-translate-leverage to maintain default compliance with existing norms, *unless explicitly directed to do otherwise*") (emphasis added) (citation omitted).

299 Koh writes approvingly of the fact that "the intelligence community and other parts of the bureaucracy apparently engaged in unprecedented leaking, providing more grist for the [anti-Muslim-travel-ban] lawsuits." *Id.* at 426 (citation omitted).

300 *See* Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 772 n.163 (2001) (listing scholars who represent each view).

301 In a subsequent 2017 article that contains a near-carbon copy of Footnote Ninety-Two, Koh appears to commend the bureaucrats for what he assumes to be their anti-Trump bias: "When a country elects a leader that nearly every employee of the State Department, the Environmental Protection Agency and the Departments of Justice and the Interior has voted against, those bureaucrats have myriad ways of saying 'Yes, Minister.'" Koh, *supra* note 178, at 465 n.211. It is difficult to know which is worse: the bare fact of Koh's assumption or the possibility of its truth. Either way, his hope that the bureaucrats will work to sabotage the work of a leader "a country elects" makes his past praise of democracy-promotion policies that are "dedicated to building democracy from the bottom up" ring horribly hollow. *See* Harold Hongju Koh, *The Future of Lou Henkin's Human Rights Movement*, 38 COLUM. HUM. RTS. L. REV. 487, 491 (2007).

302 *See* Koh, *supra* note 178, at 421.

303 Koh, *supra* note 19, at 361.

it does not rest on a victory in the popular vote is to judge it by a standard that the President *qua* candidate never sought to satisfy.

Another possible explanation of Koh's mindset, which I glean from his comments on the Trump Administration's so-called "Muslim travel ban,"[304] is that he sees in President Trump Hitleresque tendencies toward the maltreatment or denigration of minorities. This, I would suggest, is a tough narrative to sell in light of three things: (1) the Supreme Court's decisions upholding the travel ban and a second controversial Trump Administration immigration-policy directive;[305] (2) the Trump Administration's disinterest to date in using (as opposed to threatening to use) kinetic warfare as a tool to advance national interests; and (3) the reality of Trump Administration policies that are specifically designed to alleviate the plight of formerly-oppressed minority groups.[306]

A third possible explanation—one that is at once uncomfortable and necessary to ponder—is that Koh, like a number of other scholars and commentators in recent years, has lost his regard for the idea of popular control of government because he has lost faith in the capacity of his fellow citizens to make sound political, moral, and scientific judgments.[307] If this third explanation is the correct one, then I would suggest that Koh's Footnote Ninety-Two represents nothing so much as a twisted international variation on the theme of Justice Stone's Footnote Four to the majority opinion in *U.S. v. Carolene Products Co.*[308] As is well known, Footnote Four suggests that electoral democracy in the United States might legitimately be limited for the sake of preserving the individual rights and freedoms guaranteed expressly or impliedly by the U.S. Constitution.[309] Koh's apparent variation suggests that

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304 Koh, *supra* note 178, at 422-30.

305 *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018) (upholding travel ban); Nielsen v. Preap, 139 S. Ct. 954 (2019) (upholding vigorous enforcement of statute requiring deportation of legal immigrants with criminal records).

306 *See, e.g.*, Josh Lederman, *Trump Administration Launches Global Effort to End Criminalization of Homosexuality*, NBC NEWS (Feb. 20, 2019), https://www.nbcnews.com/politics/national-security-trump-administration-launches-global-effort-end-criminalization-on-homosexulaity-n97308; Tucker Higgins, *President Trump Announces His Support for Criminal Justice Reform Legislation, Saying It's 'the Right Thing to Do'*, CNBC (Nov. 18, 2018), https://www.cnbc.com/2018/11/14/trump-criminal-justice-reform-legislation-theri
ght-thing-to-do.html.

307 For some revealing examples, see James Traub, *It's Time for the Elites to Rise Up Against the Ignorant Masses*," FOREIGN POL'Y (June 28, 2016), https://foreignpolicy.com/2016/06/28/its-time-for-the-elites-to-rise-up-against-ignorant-masses-trump-2016-brexit/; Jason Brennan, *Brexit, Democracy, and Epistocracy*, PRINCETON U. PRESS BLOG (June 24, 2016), https://blog.press.princeton.edu/2016/06/24/ethicist-jason-brennan-brexit-democracy-and-epistocracy/.

308 304 U.S. 144 (1938).

309 *See id.* at 152 n.4. The Court indicated that it would apply a standard of review stricter than the rational-basis test to legislation that violated a specific provision of the

electoral democracy might legitimately be limited—and, if necessary, slyly subverted—for the sake of resolving certain matters of international concern on the basis of terms laid down by global "epistemic communities."[310] Faithless bureaucratic agents enlisting in the service of a supranational, technocratic episteme poses the ultimate counter-majoritarian dilemma. If ever we were looking for confirmation that we are not in Kansas anymore, Koh's Footnote Ninety-Two is probably it.

IV. PART III: HOW DO THEY JUSTIFY IT?

The effort to understand how Koh justifies his advocacy of extreme methods to frustrate a newly-elected Presidency prompts similar, if larger, questions regarding the justifications offered by globalist legal scholars for the Sources Project as a whole. At the outset of this study we encountered Charney's nominated justification, viz. certain urgent matters of global concern have put state consent as the source of international legal obligation out of humanity's price range.[311] It now seems appropriate, as a final matter, to turn a critical eye on this justification as well as on others put forward over the years. My aim is not so much to present a comprehensive critique as to offer a few trenchant remarks capable of prompting, perhaps, a reconsideration of long-held assumptions and positions.

A. "We Can't Afford the Consent Principle"

Let us begin with Charney's justification. It began life as a powerful narrative: Extreme times beget extreme measures. Aside from one or two slips-of-the-tongue,[312] Charney presented the new coercive international power as a carefully delimited one that would be exercised in only a small number of extreme cases.[313] Charney's list was famously restricted to big-ticket items like transnational environmental threats, international terrorism, war crimes, and grievous intra-state atrocities (e.g. apartheid or genocide).[314] We have seen, however, how the new, coercive CIL that developed in the wake of Charney's proposal is capable of attaching to virtually any treaty or resolution irrespective of the gravity, urgency or transnational nature of the

Constitution, compromised the functioning of democratic processes, or targeted with prejudicial action discrete and insular minorities.

310 *See* Koh, *supra* note 19, at 364-65 (noting that international law and institutions are currently developed "less through formal devices, and more through repeated dialogues within epistemic communities of international lawyers working for diverse governments and nongovernmental institutions.").

311 *See supra* notes 14-17 and accompanying text.

312 *See supra* note 86.

313 Charney, *supra* note 13, at 530.

314 *Id.*

activity addressed.[315] No apparent thresholds need be met. Moreover, the recent attempts to re-cast treaties as permanent commitments that are off-limits to domestic politics have not differentiated between treaties that address the most urgent global concerns and those that do not.[316] If such attempts continue into the future, this omission may prove as negatively consequential for sovereignty as the CIL development just noted. The bottom line is that however sincere Charney may have been in assuring the world that the new international power would be used conservatively, his intent has not been honored by his academic colleagues or by the international lawyers who man important positions in Koh's "epistemic communities." Somewhere along the line, the expression "urgent global threat" lost the words "urgent" and "threat," to become just "global." This is a problem—if not for Charney, then certainly for sovereigntists.

Regrettably, this is not the only way in which the "we can't afford state consent" rationale has been deployed disingenuously. I noted in the introduction my belief, subscribed to by others, that international power structures are undemocratic because they lack the accountability mechanisms that ensure popular control of government.[317] If this belief is correct, the argument that we can no longer afford state sovereignty and consent entails the argument that we can no longer afford democracy. Yet this grim consequence is seldom if ever admitted to by globalist legal scholars, either because they contest it and claim instead to have reconciled democracy with global governance,[318] or more commonly because they ignore it and hope for the best.[319] Their lack of candor matters because if the global public understood that globalization would cost them something as precious as democratic governance, they might assess more critically than they have heretofore those big-ticket items on Charney's list, as well as the other rationales that have been advanced to justify globalization. Students of political philosophy well understand that authoritarian rule is often sold on the basis of an assumption of a deeply flawed and dangerous "state of nature." But posit a congenial state of nature, or one marked by inconveniences that are fairly easily fixed or contained, and the need for an autocrat—technocratic and NGO-flavored or otherwise—disappears. We find ourselves tossing out our Hobbes and reaching for our Locke. The point is that people have little incentive to question the globalists' depictions of the pre-globalized world—the "state of nature," if you will—if they are unaware that the solution being offered is of an authoritarian kind. Give them that awareness, and they are

315 *See supra* Part I.A.ii.

316 *See supra* Part I.B.i.

317 *See supra* notes 49-50 and accompanying text.

318 *See, e.g.*, SLAUGHTER, *supra* note 172.

319 From what he has written, it would appear that Stephan encountered this Panglossian attitude on the part of his colleagues during the late 1990s. *See supra* notes 20-21 and accompanying text.

then more likely to employ the scrutiny needed to make informed choices productive of efficient outcomes.[320]

Examples in this regard are not hard to come by. Barbara Stark, among others, has urged congressional ratification of the ICESCR on the grounds that it "assures a safety net for those most vulnerable to the vagaries of global capitalism."[321] Her use of the word "vagaries" is interesting, as it suggests that economic crises and dislocations are as inevitable and unpreventable as natural disasters. And since natural disasters do not respect national boundaries, an international solution—in the form of a human rights instrument—would seem to be necessary. However, what if global capitalism's vagaries are not the equivalent of a tornado or volcanic eruption but instead are the product of a specific school of scholarly thought, viz. neo-liberal economics?[322] And what if a different economic approach—a more protective or "Hamiltonian" one, say[323]—could put an end to those vagaries, or at least significantly blunt them?[324] There would then be considerably less need for international socio-economic intervention in the form of the ICESCR, as well as for the kind of comprehensive global financial management provided by the Basel-based Bank of International Settlements.[325] Similar logic can be applied to the issue of cross-border mass migration. This, too, is often portrayed as a quasi-natural phenomenon that can be treated by international means but not effectively prevented. Yet what if this portrayal is inaccurate? If, for example, the ongoing mass migration out of the Middle East and northern Africa is the result of a misguided Western policy of humanitarian bombing and regime-change, as I have argued elsewhere,[326] the solution, it would seem, is straightforward: End that policy. Only then will we be in a position to know whether the Global Migration

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320 By "efficient" I mean outcomes that achieve the greatest gain in collective management of genuine transborder problems for the least amount of loss of democratic sovereignty.

321 Stark, *supra* note 12, at 126.

322 Neo-liberal economics tends to prioritize unfettered market relations, endorse the dominance of capital over labor, and remain agnostic when it comes to assessing the merits of financialized, as opposed to productive, forms of capitalism. *See* DAVID M. KOTZ, THE RISE AND FALL OF NEOLIBERAL CAPITALISM (2017).

323 For background on the economic policies of Alexander Hamilton and his intellectual disciple Henry Clay, see Andrew Spannaus, *The Roots of Trump's 'Economic Nationalism',* CONSORTIUM NEWS (Apr. 13, 2017), https://consortiumnews.com/2017/04/13/rootsof-trumps-economic-nationalism/.

324 This would appear to be the rationale behind President Trump's tariff policy. *See* Tyler Durden, *Trump Is Working to Change the Way Economists View Tariffs*, ZEROHEDGE (May 10, 2019), https://www.zerohedge.com/news/2019-05-10/trump-working-changeway-economists-view-tariffs.

325 For background on the seemingly hierarchical relationship between the Bank of International Settlements and U.S. Federal Reserve, see Benjamin, *supra* note 50, at 35-41.

326 *See* Benjamin, *supra* notes 229-230.

Compact and the CIL likely to develop out of it[327] are truly necessary and worth the loss of democratic sovereignty they entail.

The final problem with the "we can't afford state consent" rationale is the technocratic hubris that sometimes accompanies it. It goes without saying that the call for coerced compliance with internationally crafted solutions would lack normative force unless it presumed solutions of high merit. State dissent and self-exclusion from flawed international approaches would hardly be cause for concern. Yet this logic can tempt the global "epistemic communities" to overstate the virtues of their agreed agendas. The Paris Agreement arguably serves as a case in point here. While President Trump believes Paris to represent merely *a* solution to the problem of climate change—and an extremely baleful one at that for the United States[328]—Paris proponents, eager to quash any suggestion of renegotiation, denounced the President's withdrawal decision as though he had walked away from *the* solution.[329] Their reaction was understandable given that their aim was universal adherence. Yet given the subject matter—not genocide or aggression, which admit of only one correct response,[330] but a highly complex regulatory challenge that is not only amenable to different approaches of an honest kind but also vulnerable to corrupt capture—one would think they might have reconsidered that aim. Instead, they doubled down and insisted that their handiwork was immune to any reasonable criticism.

B. "The Consent Principle Never Really Existed . . . Much."

If Charney had said, in effect, "we can't afford state consent," other globalist scholars, writing in his wake and perhaps not wanting to leave anything to chance, have advanced a second argument that boils down to this: 'The consent principle never really existed—at least not to the extent so often claimed—and we therefore should not be bothered by the fact that consent is increasingly dishonored as the key organizing principle of international

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327 *See supra* notes 131-136 and accompanying text.

328 In explaining his withdrawal decision, the President expressed the view that an unacknowledged secondary agenda of wealth-transfer from West to East lay behind the Paris remediation scheme. *See* Statement by President Trump on the Paris Climate Accord (White House Office of the Press Secretary, June 1, 2017), https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/.

329 *See, e.g.*, Kalina Oroschacoff, *Jean-Claude Juncker: No Renegotiation of Paris Climate Deal*, POLITICO (June 14, 2017), https://www.politico.eu/article/jean-claude-juncker-no-renegotiation-of-paris-climate-deal/ (documenting Juncker's dismissal, as "a distraction," of the Trump Administration's offer to renegotiate the terms of the Paris Agreement).

330 Along the lines of "Stop Now!"

law.'[331] For such scholars, the voluntarist conception of international law—under which international legal rules bind states only if they have expressly or impliedly agreed to them—is more or less a fiction, and an annoying fiction at that. Green, whom I have characterized as a mild globalist,[332] writes for many when he states:

> [T]he voluntarist theory of international law is itself riddled with theoretical holes. . . . [T]he present author rejects the voluntarist understanding of international law, at least in its absolute form. It is observable social fact that binding international law is not always derived from state will. The "tortured legal process" of rooting the binding force of international law in the consent of states is both well known and commonly glossed over. . . . Ultimately, voluntarism is "plagued by contradictions" in relation to international law in general and customary international law in particular.[333]

Green delivers this judgment with conviction, yet he also makes points and concessions that undermine it. He recognizes, for example, that the ICJ, since the 1927 decision of its predecessor court in the *Lotus Case*, has consistently endorsed voluntarism[334] and that, no doubt as a consequence, voluntarism "remains the orthodoxy in modern doctrine."[335] He also acknowledges that states—which he describes as "the primary actors in international law"[336]—are resolutely voluntarist in their approach to the rules that would bind them. He writes:

> States rarely accept the binding force of norms that they have not consented to . . . . If customary international law is something that can be imposed on states in the face of their expressed dissent, then it would likely be perceived by them as an illegitimate attack on sovereign autonomy.[337]

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331 As noted above, Charney himself briefly flirted with this argument before conceding that state consent was a reality that needed to be overcome. *See supra* notes 54-56, 63-67 and accompanying text.

332 *See supra* notes 164-168 and accompanying text.

333 GREEN, *supra* note 42, at 246, 250 (citations omitted).

334 *See id.* at 240.

335 *Id.* at 241.

336 *Id.* at 260.

337 *Id.* (citation omitted); *see also id.* at 254 ("Rejecting voluntarism as a 'perfect' account of international law's binding force does not mean that the will of individual states should no longer be seen as a crucial element of international law-making.") (citation omitted). It will be recalled that Charney, too, conceded that states were voluntarist in their outlook. *See supra* note 81 and accompanying text.

One can be forgiven for wondering how the voluntarist conception can be flawed if the primary actors of the international community, as well as the foremost international adjudicative body, subscribe to it. Here we enter the realm of speculation, but I suspect the answer lies somewhere in the folds of a persistent belief on the part of globalist scholars and their IGO/NGO allies that they simply know better. This is not to say that such scholars and allies have not advanced specific arguments in support of their anti-voluntarist position. They most certainly have. Yet those arguments, taken as a whole, are so lacking in logic and substance as to suggest that the position is more article-of-faith than anything else. A quick canvass will suffice to demonstrate my point.

One argument advanced is that states are not fully voluntarist all of the time. Instead, they "grudgingly accept—in practice if not explicitly—that international law is non-voluntarist at times" [338] and "respond to the 'compliance pull' of international law even when it is against their direct interests to do so." [339] But do they really? I would suggest this argument is far too jejune by half, for it ignores the very real possibility that states distinguish between their near- and long-term self-interests and occasionally willingly sacrifice the former to the latter. Indeed, there is nothing strange or rare about a state agreeing to an international rule it dislikes, and would otherwise refuse its consent to, in the hope that such agreement will secure for it other states' cooperation on different matters going forward. And when such a state strategically trades its "quid" for other states' "quos," it is no more correct to say that it has been coerced than to say that a legislator is coerced when she engages in logrolling in the halls of Congress.

A second argument purporting to show that voluntarism is a fiction focuses on, and makes much of, two narrow categories of primary rules that govern the conduct of states: *jus cogens* norms and "the general principles of law recognized by civilized nations." [340] With regard to the former, it is often observed that states may not opt out of norms of *jus cogens* via persistent objection (pre-crystallization) or treaty-making (post-crystallization). This is true. Yet I would argue that this lack of opt-out rights signifies but a minute element of coercion given that (a) these norms are extremely few in number; and (b) near-universal acceptance of a norm (i.e. near-universal state consent)

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338 GREEN, *supra* note 42, at 260 (citation omitted).

339 *Id.* at 258 (citation omitted).

340 For "general principles," see ICJ Statute art. 38(1)(c). These principles are usually taken to include basic norms of procedural fairness (e.g., the principle of *res judicata*) and of substantive equity (e.g., the doctrine of "unclean hands"). Of them Green writes:

> It is almost impossible to situate the application of such principles as law, binding on states, in a voluntarist account of the system; . . . [T]he idea that such principles have been derived from all—or even most—domestic systems would be an obvious fiction.

GREEN, *supra* note 42, at 247 (citations omitted).

is required before a norm can even acquire the status of *jus cogens*. As Green concedes, if *jus cogens* is a form of natural law, then it is natural law firmly grounded in voluntarism.[341] As for the vaunted "general principles," these are applied coercively only in the context of international adjudication, which itself is a rare and often consensual phenomenon. Even in that context they are applied only sparingly.[342] I leave it to the reader to decide whether a coercive and substantively thick world order can be justified—even partially—on the basis of such seldom and minor applications of law. For my own part I think it reasonably clear that involuntary state submission to, say, the principle of *res judicata* entails an infinitesimal insult to sovereignty compared to involuntary state submission to first order rule regimes like the Global Migration Compact or the ATT.

The third argument against the reality of voluntarism relates to the assertedly coercive nature of traditional CIL. To the extent the argument is simply that tacit consent, through knowing and voluntary inaction, is not the same thing as explicit consent, through affirmative words or conduct, we are in the land of the obvious and the unremarkable: Tacit and express consent are self-evidently different sociological phenomena.[343] That said, it is also true that both types of consent are capable of protecting a state from coercion. Even the most benighted teenager understands the difference between being told she must accompany her family to dinner regardless of her wishes and being told she must accompany her family to dinner unless she objects in timely fashion to going. "You will do X unless you speak up" is a wonderfully meaningful ticket to freedom when compared to "You will do X, period." And even the most benighted teenager understands that she cannot hope to garner much sympathy if she dissents but does not speak up. What holds for nuclear families holds also for the family of nations: Silent dissenters have only themselves to blame.

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341 *See* GREEN, *supra* note 42, at 213-14 ("Peremptory norms may not require universal acceptance, but they do require near-universal acceptance. . . . *Jus cogens* norms are, or at least should be, natural law rules under careful positivist guard") (emphasis in original) (citations omitted). It is helpful to recall that the source of twentieth-century naturalism—the Nuremberg judgments—were the product of an exceedingly positivistic adjudication. Allied prosecutors relied on German treaty commitments, not natural law, to indict on crimes against peace and war crimes. *See* MICHAEL R. MARRUS, THE NUREMBERG WAR CRIMES TRIAL 1945-46, 229-30 (1997). The indictment's sole natural law count—crimes against humanity—drew much publicity but ultimately proved a juridical dead-end in that litigation. *See id.* at 250.

342 *See* GREEN, *supra* note 42, at 247 (noting "the rare occasions when the ICJ has applied general principles").

343 Green suggests this argument when he writes: "The notion of state *silence* as constituting consent for the formation of custom is difficult to reconcile with conceptions of genuine consent. This is not least because 'consent' and 'absence of dissent' are, quite simply, different things." *Id.* at 248 (emphasis in original) (citations omitted).

This undoubtedly is why globalist scholars have tended to quickly pivot from minimizing the value (to dissenters) of tacit consent to denying its very possibility.[344] Over the years they have drawn our attention repeatedly to the plight of the unaware state, the not-yet-formed state, and the state that realizes its disagreement with a norm only after the point of norm-crystallization—all in an effort to demonstrate an allegedly pervasive inability on the part of states to object when they would otherwise wish to.[345] But this tired litany of cases is not nearly as probative as globalists would have us believe. Consider that such states' inability to object translates into negative legal consequences for their sovereignty only owing to the extremely unforgiving rules of persistent objection that globalist scholars themselves have insisted on.[346] What Charney stated apropos the norms of *jus cogens* applies to these rules as well: They are not handed down by God but rather are the product of very human argumentation and behavior.[347] Take away the onerous restrictions on unilateral exemption from CIL, as canvassed and criticized above,[348] and the voluntarists' "problem" of uninformed and involuntary state silence melts away. Conversely, lobby for those restrictions to remain in place whilst citing them as evidence of an objectively non-voluntarist world order, and the only prize you deserve to win is the one given out for advanced intellectual bootstrapping.

A somewhat different argument involving the persistent-objector exemption holds not that the exemption disserves voluntarism but that its actual original purpose was to diminish voluntarism's space. This apparently was the view of mid-twentieth-century British scholars Humphrey Waldock and Michael Akehurst, who saw the exemption as a way to make it easier for binding CIL rules to become established.[349] The logic of their position was nicely restated in 2000 by a committee of the International Law Association when it noted that, in cases where support for a new CIL norm is widespread, the exemption ensures that "the convoy of law's progressive development can move forward without having to wait for the slowest vessel."[350] But casting the persistent-objector exemption as the facilitator of a coercive international

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344 *See supra* note 64 and accompanying text.

345 *See, e.g.*, *id.*

346 *See supra* Part I.A.iii. Green himself argues sternly against excusing these three types of states from the persistent-objector rule's timeliness requirement. *See* GREEN, *supra* note 42, at 162-79. For my comment on his general refusal to countenance subsequent objection for any reason, see *supra* note 160.

347 *See* Charney, *supra* note 13, at 542 ("Today, few suggest that *jus cogens* norms emanate from some deity. Rather, they are the product of human actions, including argumentation and behavior.").

348 *See supra* Part I.A.iii.

349 *See* Bradley & Gulati, *supra* note 41, at 236-38.

350 INT'L LAW ASSOC., STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY LAW, FINAL REPORT OF THE COMMITTEE ON THE FORMATION OF CUSTOMARY INTERNATIONAL LAW, CONFERENCE REPORT (London 2000), at 28.

order has always been a tough sell. Charney, for one, did not buy it. "[I]t is difficult to see," he wrote in 1985, "how the acceptance of this rule does not reflect an acceptance of the consent theory of international law."[351] He was right, albeit for reasons that have not always been cleanly stated in the literature. Here then, briefly, is why:

The explosion of new states that attended decolonization following World War II posed a problem for the old rules of CIL-formation. Uniformity of state practice—something the cozy club of imperial European powers had come both to expect and regard as a quasi-requirement of custom—was not likely to characterize the newly-emerging, highly diverse community of states.[352] But recognizing that unanimity was no longer likely to occur was the easy part; deciding how dissenters would be dealt with going forward, the hard part. Two options presented themselves, albeit somewhat inchoately. The first, which as we know ultimately gained traction in the 1980s with scholars like Charney,[353] was to coerce dissenters by outvoting them with prejudice. The second, favored by Western powers concerned about being outvoted by the more numerous states of the emerging Third World/Global South, was to give dissenters a means of escape.[354] But through their earlier introduction of the Mandatory View during the years 1890-1920,[355] those same Western powers had put an end to the broad exit rights that had characterized pre-twentieth century CIL.[356] Escape would therefore have to come in the form of a *pre*-crystallization right of exit. Hence the genesis of the modern persistent-objector exemption. I submit that nothing other than concern to safeguard the consent principle can explain why the pre-World War II tendency toward unanimous custom gave way, not to majority rule (as it might have), but to the narrow escape hatch of persistent objection.

C. "The Consent Principle Is Undemocratic and/or an Affront to State Autonomy."

The third main justification of the Sources Project that courses through the literature is nothing if not ambitious. It takes the fight right to the heart of the consent principle by arguing that voluntarism is undemocratic and/or an affront to state autonomy. It is undemocratic, allegedly, because it allows a tiny minority of states—indeed, perhaps even a single state—to frustrate the

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351 Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 16 (1985). It will come as no surprise to readers to learn that once Charney (correctly) identified the persistent-objector exemption as his enemy, he set about to discredit it. *See* Charney, *supra* note 13, at 538-42.

352 *See* Bradley & Gulati, *supra* note 41, at 232-33.

353 *See supra* Introduction & Part I.A.i.

354 *See* GREEN, *supra* note 42, at 261.

355 *See supra* note 61.

356 *See* Bradley & Gulati, *supra* note 41, at 215-26.

agenda of a majority of states.[357] It is an affront to state autonomy, again allegedly, because autonomy demands that a state have the "positive" ability to impose constraints on other states' behavior via collective international action.[358] Fortunately, we need not tarry long with either argument.

The "democracy" argument is superficially appealing but rests on a spurious analogy between the domestic and international political orders. Recall the basic truism as to why majority rule is tolerable in the first place: "We are willing to live under laws we oppose, provided that we have a fair opportunity to repeal or amend them."[359] In other words, the minority—be it of states or of individuals—accepts the tyranny-of-the-majority today because it hopes to become the majority tomorrow. Absent that possibility, majority rule is as dictatorial a form of rule as hereditary monarchy. The question, then, is whether dissenting states, and their citizenries, have a fair opportunity to change international rules they oppose. The answer is plainly no, at least not to an extent we would consider remotely acceptable on the domestic level. For the possibility of change depends on the existence of a culture of democratic politics (i.e. an environment in which multitudinous acts of political communication, for the purpose of remonstrance and persuasion, can and do take place). If a conservative Missourian chafes under "leftish" laws passed by a Democrat-controlled Congress, she can avail herself of a common language and common political parties nationwide to win her fellow citizens over to her views, achieve a change in the representational makeup of Congress in the next election, and thereby secure a change in the laws she dislikes. If, on the other hand, the citizenries of Poland, Hungary and the Czech Republic overwhelming oppose a "leftish" open-borders agenda animating a (hypothetical) majority-imposed global migration compact, they have no realistic way of seeking out and winning over other national citizenries even within the European Union, let alone worldwide. The various communities of the world do not speak the same languages, nor necessarily have similar political parties.[360] Yes, their national government representatives can speak with other national government representatives in

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357 Joel Trachtman writes: "The requirement of consent or unanimity-based decision-making cannot be defended by reference to democracy. . . . This can easily be seen where a single small state has the capacity to block decisions that are desired by the overwhelming majority of states." Joel P. Trachtman, *Reports of the Death of Treaty Are Premature, But Customary International Law May Have Outlived Its Usefulness*, 108 AJIL UNBOUND 36, 39 (2014).

358 *See id.* ("Assuming for a moment that a state has equal interests in avoiding constraints on its behavior and procuring constraints on other states' behavior, then any voting rule should be equally attractive compared to any other voting rule.").

359 Andrew C. McCarthy, *Obama's Judges Continue Thwarting Trump,* NAT'L REV. (Nov. 10, 2018), https://www.nationalreview.com/2018/11/obama-appointed-lawyers-thwart-trump-policies-immigration-energy/.

360 Nor, I might add, do they have a shared past, which goes some way toward softening the blow of losing any given round of electoral politics.

the halls of IGOs. But unless those other national governments are elected via democratic processes, and unless the Polish, Hungarian and Czech governments, as well as their citizenries, can access and participate in those processes, effecting changes of position and votes in the IGOs is unlikely. And without that real possibility of change, majority rule is like an elegant hand fitted with brass knuckles. If the consent principle stands in the way of such a hand coming down, that is a good thing, not a bad thing, is it not?

The "autonomy" argument may or may not be defensible, depending on the breadth with which it is pitched. If taken to mean that a state is not fully free unless it can constrain any and all types of behavior on the part of other states, it rests on a conception of freedom that is alien to a good portion of the Western political tradition and conducive to empire building, not state sovereignty. If, on the other hand, the argument is taken to mean that a state is not fully free unless it can protect itself from the harmful behavior of others, it is undoubtedly correct; for both individuals and states, being left in peace is the essence of negative liberty. That is why we have police forces at the domestic level and collective security at the international. However, beyond justifying laws and institutions that protect states from the harmful activity of aggressive war, it is unclear how much globalization this version of the autonomy argument can support. I have argued, for example, that it cannot sustain that portion of the modern human rights movement which targets intrastate malfeasance.[361] I have also suggested why, apropos negative-externality-producing behavior, it cannot justify international solutions that are either unnecessary or substantively flawed.[362] At the end of the day, if the world had only that quantum of international law that the autonomy argument could support, it would have considerably less international law than it has now. And that, I submit, would be a very good thing indeed.

V. CONCLUSION

There was nothing inevitable about the Sources Project. We know this because we can rather easily imagine a world governed by secondary rules different from the ones it has promoted. Consider a world in which the following rules and principles obtain:

- *If a state declines to ratify a treaty (or reserves to a part thereof), it remains legally exempt from any subsequently arising identical CIL until such time as it clearly indicates an intent to be bound by it (via words or deeds).* This rule reflects the ICJ's approach in *North Sea* and effectively puts an end to Sheepdogging.
- *An expression of normative opinio juris contained in a resolution does not mature into binding CIL simply because states begin to*

361 *See supra* note 151 and accompanying text.

362 *See supra* notes 317-330 and accompanying text.

act in conformity with it. For aspirational norms to transition into legal norms, evidence of genuine descriptive opinio juris must be found to exist. This rule effectively puts an end to Fake Custom.

- *NSAs are at most "finders" of CIL. If they find it irresponsibly (i.e. from a posture of advocacy), they are to be criticized, not elevated to the status of CIL "makers." The opinio juris of NSAs can never give rise to new CIL of its own force, and states lose no rights by failing to respond to it.* These rules effectively put an end to Funhouse CIL.
- *A single, formally-stated objection to an evolving CIL norm is enough to establish a state's exemption from that norm. Once established, the exemption continues until such time as a state clearly abandons it (via words or deeds). The burden of proof is on those alleging abandonment. Subsequent objection- and-exit is available, with immediate effect, from any CIL norm that does not implicate significant reliance interests (e.g. human rights norms). It is available from norms implicating significant reliance interests pending the running of an adequate notice period.* These rules align CIL-withdrawal rights with treaty-withdrawal rights, meaningfully preserve the element of state consent in CIL-formation, and safeguard state sovereignty over intra-state matters.
- *The international order exists to serve the needs of individual states, not vice versa. This means that treaty commitments are not presumed to be permanent and that international actors have a duty to respect and be solicitous of domestic constitutional processes.* This principle effectively puts an end to the gimmicks and tricks discussed in Part I.B.ii.
- *In the United States, the federal judiciary enforces (as federal common law) only those CIL norms that are authorized by the Constitution or endorsed by Congress. Consequently, CIL norms that derive from treaties that Congress has refused to ratify or implement are judicially unenforceable. There is a general presumption against the self-execution of treaties, and this presumption is heightened in the case of Senate-only ratified treaties that concern intra-state matters.* These rules reflect and expand upon the spirit of the holdings in *Sosa* and *Medellin.*
- *Ex ante congressional authorization of international agreements negotiated by the President must be specific and genuine, not extrapolated, implied or manufactured. If the President seeks to implement an international political commitment via legally binding domestic regulations, he must first obtain formal approval of that commitment from Congress. These rules*

effectively put an end to Executive Agreements+, Fake Authorization, Henkin's Revenge, and Secret Henkin's Revenge.

If these proposed rules and principles strike us as outdated and even a tad outlandish, it is not because they lack internal consistency or logic. It is because we have been conditioned to believe that the phenomenon they protect—state sovereignty—disserves humanity. But if that conditioning is false, if sovereignty *serves* humanity by ensuring that political decisions are taken at a level close enough to the People that the People might reasonably hope to influence them, then these rules and principles take on an entirely different hue. They become indispensable and, I would suggest, the only moral way forward. While Koh has invoked the film *Casablanca* in promising his fellow globalists that "we'll always have Paris,"[363] my nomination for best picture in the category of international law is and can only be . . . *Back to the Future*.

363 Koh, *supra* note 178, at 442.