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A (Very Thin) Market for Sovereign Control

W. Mark C. Weidemaier
University of North Carolina School of Law, weidemaier@unc.edu

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A (VERY THIN) MARKET FOR SOVEREIGN CONTROL

W. MARK C. WEIDEMAIER†

These days, most states are franchulates . . . much too small to have anything like a jail, or even a judicial system.

—Neal Stephenson, *Snow Crash*[1]

INTRODUCTION

The dystopian 1992 novel *Snow Crash* envisions a world in which nation-states have so dissolved that they lack territorial integrity in the modern sense. States are essentially franchisors, licensing sovereignty to small pockets of territory around the globe. Echoes of this fictional dystopia reverberate (surely unintentionally!) through *A Market for Sovereign Control*, Joseph Blocher and Mitu Gulati's ambitious proposal that international law should facilitate compensated transfers of territorial sovereignty.[2] Blocher and Gulati do not have such a dystopian vision. To the contrary, they envision a global market in which wealthy, well-functioning states seek out regions poorly served by government, hoping to "provide citizens of . . . dissatisfied regions with an expectation of future flourishing . . ."[3] The paradigmatic transaction would likely involve a disputed border region such as Kashmir, but the proposal contemplates the acquisition of any region, anywhere, as long as the region's people approve. If the parent state

† Associate Professor and Ralph M. Stockton, Jr. Distinguished Scholar, University of North Carolina School of Law. Thanks to John Coyle for helpful discussion of prior drafts.

1. NEAL STEPHENSON, SNOW CRASH 128 (reprt. 2003) (1992).

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

3. *Id.* at 826.

has denied representation or equal treatment to people in the region, it cannot prevent the acquisition (but it may receive compensation).[4] Thus Canada might buy, say, Washington, D.C., whether or not the United States wants to sell, if the treatment of D.C. residents by the United States constitutes a denial of representation.[5]

A Market for Sovereign Control has important intellectual and practical ambitions, although it seems to me that these are somewhat in conflict. The intellectual ambition is to describe how international law might facilitate a welfare-enhancing market in which states compete to buy territorial sovereignty over regions. Blocher and Gulati stress that such a market might create incentives for good governance, adding that competition for "underperforming" regions "could improve democratic responsiveness and increase governments' incentives to treat their citizens well."[6] This prospect serves as normative justification for a proposal that many will view with skepticism.

The pragmatic ambition is to harness the rules and institutions of international law to encourage the peaceful resolution of territorial disputes and to provide meaningful exit options to citizens disserved by government. To that end, *A Market for Sovereign Control* envisions both "friendly" and "hostile" transfers of sovereignty.[7] In a "friendly" deal, a parent state voluntarily cedes control over a region in exchange for compensation negotiated ex ante. In a "hostile" deal, an acquiring state assumes sovereignty over the parent's objection and pays compensation in an amount set ex post by auction or by a tribunal such as the International Court of Justice (ICJ). Hostile deals are allowed only when the parent state has "denied representation or equal treatment" to people in the region.[8] There are important practical

4. *Id.* at 815.

5. This is my example, not Blocher and Gulati's, although it is consistent with their proposal. The transaction would require approval by D.C. residents, a finding (plausible) that the United States has denied representation, and Canada's payment of a price determined by auction or set by the International Court of Justice ("ICJ").

6. Blocher & Gulati, *supra* note 2, at 800.

7. John F. Coyle, *Friendly and Hostile Deals in the Market for Sovereign Control: A Response to Professors Blocher and Gulati*, 66 DUKE L.J. ONLINE 37, 37 (2017). The friendly and hostile categories correspond to Blocher and Gulati's "property rule" and "liability rule" categories. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (categorizing entitlements as protected by property, liability, or inalienability rules).

8. Blocher & Gulati, *supra* note 2, at 819. The authors interpret international law to confer a right of remedial secession in cases of severe oppression or genocide. *Id.* at 806. In such cases,

barriers,[9] but *A Market for Sovereign Control* is primarily a thought experiment. It wants to persuade readers that international law *should* enable such transactions.

The conflict between these ambitions arises, in my view, from the fact that *A Market for Sovereign Control* devotes much of its intellectual energy to extolling the virtues of a market that almost certainly will not exist, and to a type of transaction that almost no one appears to want. As noted, Blocher and Gulati envision a market populated by willing and ideally competing buyers.[10] They invite readers to imagine the governance benefits such a market might produce. For example, oppressive parent states would face a credible threat of losing valuable territory to "hostile" acquirers, and this might encourage better governance.[11] Yet in all likelihood, there will be few buyers and almost never any competition. Among other reasons for this,[12] modern states appear largely disinterested in the kind of transaction central to *A Market for Sovereign Control*. This is a "bundled" transaction in which the acquirer state obtains all of the rights, and assumes all of the obligations, of territorial sovereignty. But states already can contract for many of the benefits of sovereignty without assuming the obligation to govern, and the evidence strongly implies a preference for such unbundled transactions. The upshot is that, for most regions, there will simply be no buyers.

On the other hand, it is somewhat puzzling that *A Market for Sovereign Control* links its practical ambitions to the claim that international law can facilitate competition over "underperforming" regions. Indeed, even Blocher and Gulati seem ambivalent about the linkage. By the end of the article, they appear to concede that there will be few if any buyers in their market.[13] Yet they insist that their

they assert that the oppressed region may secede without the parent state's consent and without paying compensation.

9. *See, e.g.*, Coyle, *supra* note 7, at 45–46.

10. *See, e.g.*, Blocher & Gulati, *supra* note 2, at 807 ("But for a market to work, it is important for outside nations to consider whether other nations are underperforming in the management of their own regions.").

11. *Id.* at 816. Although it might instead create more problematic incentives. For instance, an oppressive regime might forcibly disperse an oppressed population so as to prevent the formation of a voting bloc large enough to force regional secession.

12. For instance, transactions in sovereignty involve substantial political costs for officials in both the parent and the acquirer state, which will often prove prohibitive. *See, e.g.*, Coyle, *supra* note 7, at 41.

13. After conceding that sovereignty transactions will be extremely rare, they add: "Our hope is that a market for sovereignty can—even if rarely employed; even if used just once—offer a

proposal can enable at least some welfare-maximizing transfers of sovereignty that would not otherwise occur.[14] This is an important and worthwhile ambition.[15] The difficulty is that, once willing buyers are removed from the picture, a different set of questions comes to the fore, which *A Market for Sovereign Control* spends relatively little time answering.

In the final section of this Response, I briefly discuss two of those questions. First, in the modern era, states almost never resolve territorial disputes through compensated transfers of sovereignty. The barriers are not legal, for international law does not forbid such transfers,[16] and in fact there are many historical examples.[17] So why would changes to international law make a difference? The question is especially apt for the category of "friendly" deals, for Blocher and Gulati propose to add an additional legal barrier by conditioning any deal on regional consent.[18] Perhaps international law can reduce *non-legal* barriers? In a provocative but seemingly off-hand comment, Blocher and Gulati suggest that their proposed reforms might accomplish this by legitimizing compensated transfers of sovereignty.[19] I am skeptical of the claim, but it is an important one that merits further inquiry.[20]

Second, *A Market for Sovereign Control* describes how people in a dissatisfied region might want to buy independence. Despite my skepticism that there will be third-party buyers, there is clearly popular support for independence in many regions. Blocher and Gulati propose to expand the right to remedial secession now (arguably) recognized

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workable solution to actual problems, or at least illustrate a way forward." Blocher & Gulati, *supra* note 2, at 843.

14. *Id.* at 837–40.

15. There are obvious benefits to a legal regime that expands the range of options for peacefully resolving territorial disputes. Of course, there will be costs as well, including the possibility that powerful states will coerce weaker ones to transfer valuable territory at rock-bottom prices. *Id.* at 830–33 (discussing the "colonialism objection" to their proposal). On the whole, I am agnostic about whether these costs exceed the benefits of allowing compensated transfers of sovereignty.

16. 2 OPPENHEIM'S INTERNATIONAL LAW 682 (Robert Jennings & Arthur Watts eds., 9th ed. 1996).

17. *See e.g.*, Blocher & Gulati, *supra* note 2, at 808 n.43 (describing the Louisiana Purchase).

18. Blocher & Gulati, *supra* note 2, at 806–07.

19. Discussing their proposal to require the people of a region to consent to any transfer, Blocher and Gulati suggest that adding this requirement "could (perhaps paradoxically) encourage more transfers by legitimizing them." *Id.* at 807.

20. In theory, if international law could serve this role, there would indeed be buyers in the market for sovereignty.

by international law in cases of severe oppression[21] by giving people in a region that has been denied representation or equal treatment the right to buy independence. For most regions, however, the right will be meaningless without access to substantial external financing, which will likely need to be provided on concessional terms.[22] Where will this financing come from? Blocher and Gulati point to some possible sources, but largely defer discussion of this crucial issue.

I. TRANSACTIONS IN SOVEREIGNTY IN A VERY THIN MARKET

A Market for Sovereign Control acknowledges that voluntary transfers of sovereignty were relatively common in the past, and remain compatible with international law, but no longer take place.[23] This presents a puzzle that I wish occupied a more central place in Blocher and Gulati's discussion. It is hard to square the absence of voluntary transfers under existing law with claims that revisions to international law can produce "cross-border competition among governments,"[24] prompt nations to "search for underperforming regions in other nations,"[25] and facilitate a "market-driven competition" in which nations vie to provide non-residents with "an expectation of future flourishing."[26] Blocher and Gulati recognize this difficulty. They concede that there are barriers to negotiated transfers of sovereignty and, eventually, that their mechanism may be "rarely employed."[27] I think they are right to make the concession, and I only wish they took more seriously its implications for their conception of a "market" in sovereignty.

Political actors have many reasons to favor the acquisition of new territory. These include, among others, the desire to establish ports or

21. On the right to secession generally, see ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 334–39 (2004); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 177–78 (1991).

22. The authors have considered similar questions in other work—for example, arguing that refugees should have tradable claims against their countries of origin that they can use to finance emigration. *See* Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 COLUM. HUM. RTS. L. REV. 53, 59 (2016).

23. Blocher & Gulati, *supra* note 2, at 809–10. To respect the principle of self-determination, the authors would condition such transfers on the consent of the people in the affected region. *Id.* at 811.

24. *Id.* at 800.

25. *Id.* at 814.

26. *Id.* at 835, 826.

27. *Id.* at 837.

military bases, to exploit natural resources, to increase the tax base, to eliminate regulatory and other barriers associated with sovereign borders, and even to relieve people with shared cultural or ethnic ties of oppressive conditions imposed by a foreign state.[28] Political actors also have many reasons *not to want to govern* new territory. These range from xenophobia to an understandable reluctance to assume responsibility for the welfare and security of millions of new citizens.[29]

Given these conflicting goals, it should be no surprise that states prefer to avoid bundled transactions in which the acquirer obtains the full benefits and obligations of sovereignty. It is quite routine, however, for states to contract—*à la carte*, as it were—for discrete rights, typically, though not necessarily, linked to territorial sovereignty. For example, states routinely contract for territorial rights by leasing land for embassies and military bases. They routinely contract for the rights to build infrastructure and to exploit natural resources outside their borders.[30] Indeed, states can at least partially achieve almost any objective without assuming full sovereignty over territory. For example, a state can partially relieve oppressive conditions imposed on people in a foreign state simply by adopting looser immigration policies (at least if the oppressive government allows or cannot prevent emigration).[31] None of these options is a perfect substitute for sovereignty, but each involves dramatically lower costs for the acquirer. Unbundled transactions are less costly for "sellers," too. Political actors in the host state can pursue financial and diplomatic objectives without incurring the costs associated with an outright transfer of sovereignty.

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28. *Id.* at 801–02.

29. *Id.* at 837.

30. As just one of hundreds of examples, consider China's contracts with Burma (Myanmar) and other nations to build dams and other infrastructure projects associated with the production of hydroelectric power. *See, e.g.*, Andrew Higgins, *Chinese-Funded Hydropower Project Sparks Anger in Burma*, WASH. POST (Nov. 7, 2011), https://www.washingtonpost.com/world/asia_pacific/chinese-funded-hydropower-project-sparks-anger-in-burma/2011/10/17/gIQAGYFfxM_story.html?utm_term=.c7423e545524 [https://perma.cc/ERJ3-9BT4]. This is not necessarily to say that these contracts are always welfare-maximizing. *See, e.g.*, Diana Hulova, *Myanmar's Debt: What's Behind the Speedy Efforts to Restructure It?*, EUR. NETWORK ON DEBT & DEV. (Feb. 14, 2013), http://www.eurodad.org/Entries/view/1544601/2013/02/14/Myanmar-s-debt-What-s-behind-the-speedy-efforts-to-restructure-it [https://perma.cc/V7X2-QDEH] (questioning the legitimacy of Chinese loans to Myanmar to fund infrastructure projects led by Chinese companies).

31. Achieving this goal through immigration policy, rather than the assumption of sovereignty, also allows the state to select among potential entrants.

This is all fairly obvious, and certainly not news to Blocher and Gulati. They know that states commonly transact for discrete territorial and economic rights and indeed believe this widespread practice lends credence to their proposal: "[S]overeignty is already 'for sale' in various forms,"[32] so what's so radical about proposing rules to facilitate an outright transfer? It seems to me, however, that the ubiquity of unbundled transactions in sovereignty illustrates a key flaw in their account: there is almost no demand for bundled transactions.[33] One reason is that, especially in the post-World War II world, a relatively robust legal infrastructure supports unbundled foreign investments. This includes treaties supporting international trade as well as multilateral treaties such as the New York Convention[34] and the Washington Convention,[35] which help assure the enforcement of arbitration agreements and awards. Likewise, the proliferation of bilateral investment treaties has given capital-exporting states assurance that their citizens' foreign investments will be protected.[36] In consequence, wealthy states can pursue economic and political objectives abroad—both directly and through proxies—without assuming full territorial sovereignty. Before World War II, the legal infrastructure supporting unbundled investments was much weaker, and this may partially explain why outright transfers of sovereignty were more common.[37]

All of this implies that full transfers of sovereignty will be exceptionally rare, and confined to cases in which it is impossible, or prohibitively costly, to negotiate an unbundled transaction. This primarily means cases in which two (or, rarely, three) states dispute

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32. Blocher & Gulati, *supra* note 2, at 801.

33. Blocher and Gulati come close to acknowledging this. *Id.* at 837 (noting "nations have less need to acquire territory than in the past"). But, I do not believe they fully appreciate its implications for their view of the "market."

34. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, 7 I.L.M. 1047 (1968).

35. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

36. This is not to say the empirical effects of these developments are clear. *See, e.g.*, Jason Webb Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Investment?*, 42 LAW & SOC'Y REV. 805, 807 (2008) (finding no clear link between strong investor protections in BITs and foreign investment).

37. I am by no means suggesting that these legal developments fully account for the lack of outright sales. Other factors likely played a much more significant role, including the creation of relatively robust democratic institutions that made it difficult to dispose of territory without accounting for the interests of the affected population. *See* Paul B. Stephan, *Blocher, Gulati, and Coase: Making or Buying Sovereignty?*, 66 DUKE L.J. ONLINE 51, 55 (2017).

ownership of land itself, or the treatment of the people on it. The fact that states do not presently settle such disputes in this manner (despite this being permitted by international law) implies that these situations will be exceptionally rare.[38] More fundamentally, to the extent that such settlements resemble transactions in a "market," the conditions are those of a bilateral monopoly,[39] not a competition in which multiple buyers "search for underperforming regions."[40] Perhaps a few regions will attract the interest of *a* buyer (in exceptional cases, two).[41] For these regions, the possibility of a transfer of sovereignty ("friendly" or otherwise) may or may not improve governance.[42] For most other regions, there will be no buyers at all.

II. ENCOURAGING TRADES; FINANCING INDEPENDENCE

The thought experiment central to *A Market for Sovereign Control* is important and worthwhile, as are the pragmatic ambitions that motivate it. Blocher and Gulati convincingly argue that transfers of sovereignty can enhance welfare and that international law should bestow greater exit rights on people who suffer from oppression or poor governance. In many respects, my critique is primarily about framing. The focus on competition and market-driven governance arguably distracts from more important questions about whether international law and institutions can mitigate other barriers—many of them non-legal—to welfare-enhancing border changes. In both friendly and hostile deals, the barriers include not only a lack of demand but extraordinarily high transaction costs.[43] In the case of a region asserting the right to buy its independence, barriers include the

38. *See, e.g.*, Coyle, *supra* note 7, at 49. Of course, in the "hostile" deal category, the seller is removed from the equation. But this does not change the buyer's assessment of whether it wishes to bear the full costs of governance.

39. A bilateral monopoly is a market featuring only a single buyer and seller. *See* Donald Rutherford, ROUTLEDGE DICTIONARY OF ECONOMICS 49 (3d ed. 2013).

40. Blocher & Gulati, *supra* note 2, at 814.

41. The most plausible candidates for a transfer of sovereignty identified in *A Market for Sovereign Control* prove the point~~e.~~g., Crimea (Ukraine and Russia), Hans Island (Denmark and Canada), and the Falkland Islands (Argentina and the United Kingdom).

42. For instance, one might wonder whether Russia's acquisition of sovereignty over Crimea will, over the long term, improve governance for the region.

43. *See* Coyle, *supra* note 7, at 40–43 (discussing political costs associated with voluntary transfers of control);), Stephan, *supra* note 37, at 55 (discussing transaction costs associated with granting a blocking right to people in the affected region and the difficulty of designing mechanisms to determine whether and at what price regions can buy independence).

lack of clear remedies if a parent state refuses to respect the right[44] and difficulties in obtaining the necessary financing. I suspect that Blocher and Gulati have a great deal to say on these subjects. On several occasions, they drop tantalizing hints, two of which are especially worthy of further elaboration.

First, might changes to international law reduce the political costs associated with ceding or acquiring new territory? It is not hard to see why political actors might be reluctant to cede or acquire territory. Those in the parent nation risk looking weak or ineffectual. Those in the acquiring state risk looking colonialist (to people in the acquired region), triggering nativist sentiments (among current citizens), or otherwise provoking political opposition. Somewhat paradoxically, however, Blocher and Gulati suggest that their proposed requirement of regional consent might "encourage more transfers by legitimizing them."[45]

At first glance, the claim is surprising. International law derives legitimacy from consent. A rule attains the status of international law because states consent to it via treaty or because the rule describes a widespread practice that states perceive as obligatory.[46] Because states will not consent to rules they view as illegitimate, it is more natural to say that international law follows from, rather than creates, perceptions of legitimacy. Blocher and Gulati propose the opposite pathway. The underlying notion is that articulation of a new rule of international law—here, a rule confirming that sovereignty may be transferred for a price but adding a requirement of regional consent—would make states more, rather than less, willing to transfer sovereignty. For instance, regional consent might allow political actors in the parent state to appear democratically accountable rather than ineffectual, and political actors in the acquiring state to appear benevolent rather than rapacious. This is plausible, though I remain skeptical. After all, modern states already can solicit regional consent before implementing a transfer of sovereignty, yet they do not do so. Still, the question is an important one. For instance, perhaps the political costs of this sort explain why there appear to be no buyers in the market for sovereign control. If international law can change the political calculus, this might change.

44. *See* Coyle, *supra* note 7, at 46–47.

45. *See* Blocher & Gulati, *supra* note 2, at 807.

46. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060.

A second set of questions relates to the mechanism for financing regional bids for independence. As Blocher and Gulati note, some relatively wealthy regions might prefer autonomy and have the financial resources to buy it; Catalonia comes to mind.[47] For such regions, Blocher and Gulati's proposal offers a pathway to independence—although only if the parent state consents or has denied representation or equal treatment to people in the region. I suspect, however, that most poorly governed regions would require massive amounts of external financing. A parent state's failure to invest in citizen welfare and productivity would diminish regional economic prospects at least in the short term, so I doubt many oppressed regions could access sufficient capital at market rates. If that is so, then the right to secede would be meaningless unless the international community arranged for financing on concessional terms. The fact that secessionist movements will often involve some degree of violence or military conflict—and thus leave a seceding region with diminished economic prospects—will only increase the need for financial support.

Blocher and Gulati rightly point out that other states and international institutions have incentives to prevent violent secession and already devote tens of billions of dollars to development aid. Rather than "pay for military intervention or nation rebuilding," why not provide financial backing to a region's bid for independence?[48] I am tempted to reply that, in the absence of a credible mechanism for enforcing the region's right to secede, the international community will have to underwrite the region's independence bid *and* provide concessional loans for nation-rebuilding. That is because many parent states will oppose secession, with force if necessary, so that "border-changing treaties" are likely to be preceded by a period of conflict.[49] More generally, it is not clear to me that wealthy states have the political will to provide the substantial financial assistance necessary to make a poorly governed region's threat to secede credible. To return to a theme central to my critique of *A Market for Sovereign Control*: without willing buyers or massive amounts of financial assistance, poorly governed regions cannot credibly threaten to prompt a transfer of sovereignty. In turn, oppressive regions will have no reason to govern better.

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47. *See* Blocher & Gulati, *supra* note 2, at 839.
48. *Id.* at 815.
49. *Id.*

CONCLUSION

As I have noted, my criticisms of *A Market for Sovereign Control* are largely about framing. Even if Blocher and Gulati's thought experiment were feasible to implement, I am skeptical that it would materially improve incentives for good governance. But perhaps we should take their proposal not as they have framed it, but as an attempt to articulate one (of many) possible ways to facilitate exit by citizens who are poorly served by government. The authors have given this question a great deal of thought, and *A Market for Sovereign Control* represents, in some respects, their most ambitious proposal to date. Although I am not entirely persuaded by their thought experiment, I cannot deny that international law and institutions often fail precisely where they are needed most. Around the world, borders both physical and legal block people from finding safety or a path to a better life. Blocher and Gulati may not be able to remove the physical barriers, but they are right to question the legal ones.