



GW Law Faculty Publications & Other Works

Faculty Scholarship

2006

Reserving

Edward T. Swaine

George Washington University Law School, eswaine@law.gwu.edu

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications



Part of the [Law Commons](#)

Recommended Citation

Yale Journal of International Law, Vol. 31, No. 2, 2006

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

Article

Reserving

Edward T. Swaine[†]

I.	INTRODUCTION.....	307
II.	THE LAW OF RESERVATIONS	312
A.	<i>The Backdrop to the Vienna Convention</i>	312
B.	<i>The Vienna Convention and its Ambiguities</i>	314
1.	<i>The Initial Standing of Reservations</i>	314
2.	<i>The Form and Timing of Objections</i>	317
3.	<i>The Effect of Objections</i>	319
III.	A POSITIVE ACCOUNT OF RESERVATIONS	323
A.	<i>The Puzzle of Ambiguity: Two Conjectures</i>	324
1.	<i>Mistake</i>	324
2.	<i>Irrelevance—or Collusion</i>	326
B.	<i>The Interests in Breadth—and Depth</i>	328
C.	<i>The Interest in Information</i>	333
1.	<i>Information about Deviance</i>	335
2.	<i>Information about Reputation</i>	338
3.	<i>Synthesis</i>	340
D.	<i>The Interest in Reserving</i>	341
IV.	REVISITING THE VIENNA CONVENTION	345
A.	<i>The Initial Standing of Reservations</i>	345
B.	<i>The Form and Timing of Objections</i>	353
C.	<i>The Effect of Objections</i>	357
V.	CONCLUSION.....	364

I. INTRODUCTION

Reservations are, perennially and by acclamation, one of the most complex and controversial parts of treaty law.¹ The idea is simple—states may ask that treaty terms be tailored to their individual preferences, turning a *prix fixe* menu à la carte²—and critical to establishing and applying international

[†] Associate Professor, The Wharton School and the University of Pennsylvania Law School. I have benefited from helpful suggestions made on earlier drafts by workshop participants at the Wharton School and at Boalt Hall, Georgetown, Northwestern, University of Pennsylvania, Temple, and Vanderbilt law schools.

1. After quoting submissions that reservations were “of unusual—in fact baffling—complexity” and of “considerably obscurity in the realm of juristic speculation,” Anthony Aust indicates that such views “are even truer today.” ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 100 (2000); see also J.M. Ruda, *Reservations to Treaties*, 146 *RECUEIL DES COURS* 97, 101 (1975) (noting controversial character).

2. More formally, the Vienna Convention on the Law of Treaties defines a reservation as “a unilateral statement, however phrased or named . . . whereby [a State] purports to exclude or to modify

obligations. But the same issues have bedeviled the law for over fifty years, notwithstanding repeated attempts to resolve them. Shortly after the United Nations was founded, the General Assembly sought and obtained advice on reservations from the International Court of Justice³ and the International Law Commission,⁴ then adopted a resolution characterized as “one of the fundamental documents in the history of the law of treaties.”⁵ Fifteen years of further debate produced an important section of the Vienna Convention on the Law of Treaties that governs, by default, how reservations are handled.⁶ Basically, states are not supposed to propose reservations that are incompatible with a treaty’s “object and purpose.” But if a state proposes a reservation, and another state does not object within a year, the reservation is said to modify the treaty as between them.

This leaves many, if not most, important issues unresolved. Suppose Canada ratifies a multilateral treaty prohibiting seal hunts, but with a reservation that would exempt its native peoples. If that reservation conflicts with the treaty’s object and purpose—say, because the whole point was to constrain traditional harvesting of that kind—is the reservation automatically ineffective, or ineffective only as against states that object on a timely basis? Assuming no state objects, how should a tribunal or a treaty monitoring body react if Canada’s reservation comes up later—should it permit Canada to benefit from the reservation, conclude that the reservation renders Canada a non-party to the treaty, or apply the treaty without regard to the reservation? Shouldn’t Canada, in any event, have some idea about all this before it ratifies?

International organizations are trying, at least at the margins, to clear this all up. Over the last decade, a Special Rapporteur for the International Law Commission has produced near-annual reports of extraordinary length and

the legal effect of certain provisions of the treaty in their application to that State.” Vienna Convention on the Law of Treaties art. 2(1)(d), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 333 [hereinafter Vienna Convention]. Two subsequent conventions, which have extremely similar terms but are of more limited application, will not be separately discussed here. *See* Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, 1946 U.N.T.S. 3; Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, 25 I.L.M. 543.

3. G.A. Res. 478, ¶ 1, U.N. GAOR, 5th Sess., U.N. Doc. A/1494 (Nov. 16, 1950); *see* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28) [hereinafter *Genocide Convention*].

4. G.A. Res. 478, *supra* note 3, ¶ 2; *see* Int’l Law Comm’n, *Report of the International Law Commission to the General Assembly*, ¶ 12, U.N. Doc. A/1858 (1951), *reprinted in* [1951] 2 Y.B. Int’l L. Comm’n 123, 125, U.N. Doc. A/CN.4/SER.A/1951/Add.1 [hereinafter *1951 ILC Report*]. The ILC had already been considering the matter. *See* SHABTAI ROSENNE, *DEVELOPMENTS IN THE LAW OF TREATIES 1945-1986*, at 424-25 (1989).

5. ROSENNE, *supra* note 4, at 430; *see* G.A. Res. 598 (VI), U.N. GAOR, 6th Sess., U.N. Doc. A/L.37 (Jan. 12, 1952).

6. The Convention is formally limited to treaties concluded after the Convention itself came into force in 1980, with respect to states that are themselves parties to the Convention. Vienna Convention, *supra* note 2, art. 4. But it is often invoked under other circumstances, *see, e.g.*, Human Rights Committee, *General Comment No. 24*, ¶ 6 n.3, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 11, 1994) [hereinafter *General Comment 24*] (invoking the Vienna Convention in connection with the International Covenant on Civil and Political Rights (ICCPR)), and accepted by non-parties, *see* Richard W. Edwards, Jr., *Reservations to Treaties*, 10 MICH. J. INT’L L. 363, 365-67 (1989) (citing examples and claiming that “[s]tates that would challenge the Vienna Convention rules concerning reservations carry the burden to demonstrate that the rules they challenge are today not *de lege lata*”).

detail.⁷ Notwithstanding this effort, the Commission has indicated that it seeks only to clarify (rather than modify) the Vienna Convention,⁸ and the guidelines it has drafted to date are relatively modest in their ambition.⁹ Others have pitched in. The Human Rights Committee, having taken an aggressive stance against reservations to human rights treaties,¹⁰ established a working group on the issue,¹¹ and a sub-commission of the Commission on Human Rights¹² considered itself in a “battle” within the United Nations over reservations.¹³ Regional organizations like the Council of Europe have also shown considerable interest in revising reservations law and practice.¹⁴

7. See, e.g., Special Rapporteur, Int'l Law Comm'n, *Tenth Report on Reservations to Treaties*, U.N. Doc. A/CN.4/558 (June 1, 2005) (prepared by Alain Pellet) [hereinafter Special Rapporteur, *Tenth Report*]; Special Rapporteur, Int'l Law Comm'n, *Tenth Report on Reservations to Treaties, First Addendum*, U.N. Doc. A/CN.4/558/Add.1 (June 14, 2005) (prepared by Alain Pellet) [hereinafter Special Rapporteur, *Tenth Report, First Add.*]; Special Rapporteur, Int'l Law Comm'n, *Tenth Report on Reservations to Treaties, Second Addendum*, U.N. Doc. A/CN.4/558/Add.2 (Jun. 30, 2005) (prepared by Alain Pellet) [hereinafter Special Rapporteur, *Tenth Report, Second Add.*].

In addition, the Commission's proceedings are summarized in annual reports, e.g., Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Fifty-Seventh Session*, U.N. Doc. A/60/10 (Sept. 23, 2005) [hereinafter *2005 ILC Report*], and the Special Rapporteur's work is also appraised in the Sixth Committee of the General Assembly. See, e.g., Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Fifty-Sixth Session: Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During Its Fifty-Ninth Session*, U.N. Doc. A/CN.4/549 (Jan. 31, 2005) [hereinafter *Topical Summary 2005*]. Finally, progress reports are regularly published in the secondary literature. See, e.g., Martti Koskenniemi & Christopher C. Mosley, *The Work of the International Law Commission at Its Fifty-Fifth Session (2003)*, 73 *NORDIC J. INT'L L.* 99 (2004).

8. See, e.g., Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Forty-Seventh Session*, ¶ 491, U.N. Doc. A/50/10 (1995) (reporting a “consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978, and 1986 Vienna Conventions” regarding reservations); cf. Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Forty-Ninth Session*, ¶ 157, U.N. Doc. A/52/10 (1997) [hereinafter *1997 ILC Report*] (setting out Commission's preliminary conclusions). The most significant exceptions are likely to be the provisions regarding interpretive declarations, on which the Convention is silent; in such instances, the plan appears to be to codify international practice. See Special Rapporteur, Int'l Law Comm'n, *Third Report on Reservations to Treaties, Third Addendum*, ¶¶ 228-232, U.N. Doc. A/CN.4/491/Add.3 (June 19, 1998) (prepared by Alain Pellet) [hereinafter Special Rapporteur, *Third Report, Third Add.*].

9. See, e.g., *2005 ILC Report*, *supra* note 7, ¶¶ 437-38 (reprinting draft guidelines adopted to date, with commentary). These draft guidelines remain subject to final adoption, following a second reading.

10. *Accord Kennedy v. Trin. & Tobago*, Communication No. 845/1999, Annex, ¶¶ 6.6-6.7, U.N. Doc. CCPR/C/67/D/845/1999 (Nov. 2, 1999), *reprinted in* 2 Human Rights Comm., *Annual Report of the Human Rights Committee for 2000*, at 258-72, U.N. Doc. A/55/40 (2000) (deciding that reservation deemed inconsistent with the ICCPR and its Protocols would not preclude the admissibility of an individual complaint). See *infra* notes 91-94 and accompanying text. See generally *General Comment 24*, *supra* note 6.

11. Press Release, Office of the U.N. High Comm'r for Human Rights, Human Rights Committee Decides To Set up Working Groups on Reservations and on Streamlining Reporting Procedures Among Treaty Bodies (Oct. 31, 2002), available at <http://www.unhchr.ch/SearchFormtest1.nsf/Web+Search+Simple?OpenForm> (search “working groups on reservations” and follow the hyperlink corresponding to Oct. 31, 2002).

12. The nomenclature is potentially confusing. The Human Rights Commission, a U.N. agency under the Economic and Social Council (ECOSOC), was distinct from the Human Rights Committee—a treaty-based body responsible for the ICCPR, and the author of the aforementioned General Comment No. 24.

13. Press Release, Office of the U.N. High Comm'r for Human Rights, Subcommission Continues Debate on Rights of Children, Freedom of Religion and International Terrorism, U.N. Doc. HR/SC/98/29 (Aug. 24, 1998). The Subcommission subsequently agreed, however, to a (temporary)

Despite conflict within these initiatives and academia about the best solution, there is wide agreement about the character of existing law: namely, that there is a sharp tradeoff between honoring the consent of non-reserving states (who, with respect to another state's reservation, would for those limited purposes take the treaty as originally negotiated) and respecting the conditioned consent of reserving states,¹⁵ and that the Vienna Convention decisively favors the latter,¹⁶ upsetting an intended balance between them.¹⁷ The pervasive ambiguities in the law of reservations are said to play a supporting role. Whatever their cause, it is thought such ambiguities impair the reservation regime's progressive development, and tend to disadvantage non-reserving states; the solution is to resolve the Convention's ambiguities and, to one degree or another, to make reservations harder to pull off.¹⁸

ceasefire. U.N. ESCOR [ECOSOC], Comm'n on Human Rights, Sub-Comm'n on the Promotion and Protection of Human Rights, *Reservations to Human Rights Treaties*, ¶ 72, U.N. Doc. E/CN.4/Sub.2/2004/42 (July 19, 2004) (prepared by Françoise Hampson) [hereinafter *Hampson Report*].

14. See Council of Europe, Comm. of Ministers, *Recommendation No. R(99)13 of the Comm. of Ministers to Member States on Responses to Inadmissible Reservations to International Treaties*, 670th Mtg. of the Ministers' Deputies (May 18, 1999), available at <http://cm.coe.int/ta/rec/1999/99r13.htm> [hereinafter Recommendation No. R(99)13]; Comm. of Legal Advisers on Pub. Int'l Law (CAHDI), *Practical Issues Regarding Reservations to International Treaties*, 19th mtg., CM (2000) 50, App. 4 (2000), available at <https://wcm.coe.int/ViewDoc.jsp?id=348409&Lang=en> [hereinafter CAHDI, Practical Issues].

15. I use the term "non-reserving" rather than "objecting" to include states taking no overt position regarding reservations proposed by others. See Int'l Law Comm'n, *Reports of the International Law Commission to the General Assembly*, at 38, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. Int'l L. Comm'n 169, 207, U.N. Doc. A/CN.4/191 [hereinafter *1966 ILC Report*]. As the text suggests, "reserving" and "non-reserving" are each descriptions relating to a particular reservation or prospect thereof, and are non-exclusive otherwise; that is, a state may be deemed "non-reserving" in relation to another state's proposed reservation, but may simultaneously enter reservations on its own behalf with respect to the same treaty (even the same provision) or, of course, some other treaty.

16. See, e.g., *Hampson Report*, *supra* note 13, ¶ 26 ("The Vienna Convention regime favours the reserving state."); D.W. Greig, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INT'L L. 295, 328 (1994) (criticizing the Vienna Convention's reservation regime as "giv[ing] an unacceptable advantage to the reserving state"); Jan Klabbbers, *Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties*, 69 NORDIC J. INT'L L. 179, 179 (2000) (citing "discontent . . . that whether a state would accept another state's reservation or not, the reserving state would get what it desired, unless the objecting state made known that its objections were so fundamental as to prevent the entry into force of the treaty between the reserving and the objecting party").

17. See, e.g., 52 BRIT. Y.B. INT'L L. 437, 439 (1981) (written comments of the United Kingdom, submitting that "the true counterpart to the right of one party to formulate a reservation is . . . the inherent right of other parties to object . . . to that same reservation" and that "[a]ny other principle . . . would destroy the crucial balance between contracting parties in respect of their mutual rights and obligations, inasmuch as it would allow one party to impose its reservation upon others and thus, in effect, to write its own treaty"); *id.* at 440 (describing treaty articles as fulfilling "the fundamental principle of the greatest possible equality between Parties to a treaty, to regard the possibility of an objection as the inherent and automatic corollary of the formulation of the reservation itself"); Reservations, 14 Whiteman DIGEST § 17, at 140 [hereinafter Reservations] (noting rights of states to attach any reservation, and the "right" of other states "to accept or reject such a reservation").

18. See, e.g., *Spanish Diplomatic and Parliamentary Practice in Public International Law, 1995 and 1996*, 4 SPANISH Y.B. INT'L L. 107, 116 (1996) (remarks of Spanish representative at the Sixth Committee of the General Assembly) ("[T]he task now entrusted to the Commission . . . is precisely to close . . . loopholes and clarify . . . ambiguities" in the reservations scheme); see *infra* text accompanying notes 95-96.

At least if we maintain the focus on state consent,¹⁹ this prevailing understanding is seriously incomplete. It is easy to see how reservations benefit the states making them.²⁰ But the law of treaty reservations—if, and only if, its ambiguities and apparent imperfections are included—also plausibly serves the interests of its supposed victims, the non-reserving states. Treaty reservations not only increase the breadth of treaty participation, as they were certainly intended to do, but also permit agreement on deeper commitments than would otherwise be possible. Reservations further help establish an information-forcing mechanism that communicates significant information about the risks and benefits of contracting with reserving states. The regime’s eccentricities, finally, allow non-reserving states to “reserve” their own judgment regarding the acceptability of reservations, and thus to recapture some of the insurance benefits that reserving states capture in exempting their future conduct.

Elaborating a theory of non-reserving state interests does not, of course, resolve the reservation regime’s ambiguities as matter of treaty construction, nor substitute for a serious normative analysis. The point, instead, is to better understand the functions the existing law serves, on the simple premise that the status quo should be better understood before it is fixed. This positive account of reservations also lends itself to analyzing some of the reform proposals presently before the International Law Commission; more generally, it helps to advance a broader project on the positive analysis of treaty escape mechanisms.²¹

The Article is set out in three parts. Part I provides a short background on the controversies over the Vienna Convention’s reservations provisions, then discusses two appealing conjectures as to why they might disadvantage non-reserving states: first, mistake, and second, a systematic bias by states toward reservations. Part II then identifies how reservations may promote the interests of non-reserving states, placing special emphasis on the information-enhancing and risk-shifting—or “reserving”—functions. Part III describes the extent to which attempts at reform are consistent with those interests.

19. This requires bracketing other objections to reservations, though consent is often essential to them as well. For example, appeals to treaty integrity rely on the treaty as negotiated, and so depend on the consensual interest of non-reserving states. *See, e.g., 1966 ILC Report, supra* note 15, at 36, [1966] 2 Y.B. Int’l L. Comm’n 205 (describing “[t]he principle of the integrity of the convention, which subjects the admissibility of a reservation to the express or tacit assent of all the contracting parties”). Even arguments that certain reservations are objectionable *per se* depend to a degree on state consent. If human rights commitments must be understood in the context of local circumstances, the use of reservations to promote local adaptation—and the allowance made for that at an international level—should be acceptable in principle. MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS* 82-84, 88-93 (1998). Indeed, the human rights that states are willing to recognize in a negotiated convention (and the number of states that agree to promote them) are likely to be affected by the rules governing reservations, which may make positive universalism a reality. *See* Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT’L L. 643, 683-87 (1990) (describing reservations to CEDAW as permitting compromise between universality of human rights norms and their integrity); *see infra* Part II.B (discussing breadth and depth).

20. LIESBETH LIJZAAD, *RESERVATIONS TO UN HUMAN RIGHTS TREATIES* 66 (1994) (describing advantages accruing to reserving states).

21. *See, e.g.,* Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003).

Several important, problematic assumptions are in order. First, I assume for the most part that the relevant actors are rational, self-interested states, though it should be recognized that one of the major functions of reservations is to placate domestic constituencies.²² Second, I address reservations relating to all kinds of multilateral conventions—economic, environmental, military, human rights, and so forth—even though they pose somewhat distinct issues. Third, in suggesting that the existing reservations regime has hidden virtues, I certainly do not mean to suggest that it is optimal or in equilibrium. The argument, instead, is that reservations reforms should pause before undermining potentially attractive elements of the status quo, or consider how potentially important values might be better fulfilled.

II. THE LAW OF RESERVATIONS

A. *The Backdrop to the Vienna Convention*

To understand the present regime, it is useful to consider the road not taken. Prior to the Vienna Convention, the presumption was that all other treaty parties would have to agree to any state's proposed reservations. Particular treaties might specify, however, that reservations were to be accepted (or rejected) by the vote of a qualified majority of states, or that no reservations were ever to be permitted. Under any of these approaches, decision-making on reservations was consent-based, collective, and supposed to determine a reservation's status shortly after it was proposed. Under the innovative and exceptional Pan American doctrine,²³ in contrast, proposed reservations were effective against any state that had accepted them, but if a state objected, no treaty relations would be forged between it and the reserving state. This, too, was purely consensual in character, but no longer collective; assuming a state did not withdraw a proposed reservation, it might create three sets of bilateral relations—one between the reserving state and accepting states (the treaty's original terms, as altered by the reservation), a second between all non-reserving states (the treaty's original terms), and a third for *non*-treaty relations between the reserving state and objecting states.²⁴

The International Court of Justice developed a hybrid approach in its *Genocide Convention* advisory opinion. The occasion was an accounting

22. See *infra* text accompanying notes 119, 126-128, 222 (noting role of domestic institutions in reserving and reacting to other states' reservations); see also *infra* text accompanying notes 180-183 (noting that reservations may reveal information about domestic politics).

23. So called after the former Pan American Union, now the Organization of American States. See *Co-Operation with Inter-American Bodies*, Annex IV, U.N. Doc. A/CN.4/102 (Apr. 12, 1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 236, 250-51, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (Nov. 1956); see also Reservations, *supra* note 17, at 141-44 (describing "Pan-American" rule).

24. See generally INGRID DETTER, *ESSAYS ON THE LAW OF TREATIES* (1967); FRANK HORN, *RESERVATIONS AND INTERPRETIVE DECLARATIONS TO MULTILATERAL TREATIES* (1988); ROSENNE, *supra* note 4, at 356-57, 424-36; IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES*, at ch. 3 (2d ed. 1984); Rudolf L. Bindschedler, *Treaties, Reservations* (1984), in 4 ENCYCLOPEDIA PUB. INT'L L. 965 (2000). Perhaps the best illustrations of the wide variety of pre-Vienna schemes are provided in William W. Bishop, Jr., *Reservations to Treaties*, 103 RECUEIL DES COURS 245 (II-1961).

problem—namely, whether those reckoning when the Genocide Convention came into force should count states that had ratified with objected-to reservations²⁵—but the answer had lasting significance. The Court rejected arguments that international law required that reservations be accepted unanimously, noting the prevalence of reservations, tacit assent to them, and the rarity of objections.²⁶ Instead, everything depended on the treaty in question, and the Court found it plausible that the Genocide Convention’s drafters had intended to permit reservations, perhaps not mentioning the possibility simply to avoid unduly encouraging them.²⁷ Not only was universal participation (promoted, as necessary, by allowing reservations) of utmost importance, but the nature of the treaty meant that reservations imposed few costs on non-reserving states: in human rights treaties, “the contracting States do not have any interests of their own,” but instead have only the common interest of accomplishing “those high purposes which are the *raison d’être* of the convention.”²⁸

To the Court, this common interest also suggested an objective basis for evaluating reservations—whether they were consistent with the treaty’s object and purpose—that “limit[ed] both the freedom of making reservations and that of objecting to them.”²⁹ The Court acknowledged that states might have differing opinions about compatibility,³⁰ and this was the central complaint made in a dissent by four judges. For the dissenters, international law required a default rule of unanimous consent to reservations,³¹ the clarity of which would facilitate negotiating alternative rules better suited to particular conventions.³² The dissenters thought the majority’s approach would be impossible to administer: a treaty’s “object and purpose” would rarely be evident, and the difficulty of reconciling varying state appraisals would give rise to “the utmost confusion.”³³ This laid the groundwork for future criticisms of the Vienna Convention regime.

25. ROSENNE, *supra* note 4, at 424-25.

26. Genocide Convention, *supra* note 3, 1951 I.C.J. at 21-25.

27. *Id.* at 22-23.

28. *Id.* at 23.

29. *Id.* at 24.

30. *Id.* at 26. Two potential exceptions were noted: first, when states sought a more general “jurisdictional” resolution of the matter on the common plane; second, when a state objected, but *without* claiming that a reservation was incompatible, and “an understanding [developed] between that State and the reserving State [to] the effect that the Convention will enter into force between them, except for the clauses affected by the reservation.” *Id.* at 27.

31. *Id.* at 31 (dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read, & Hsu Mo).

32. *Id.* at 37-42 (dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read, & Hsu Mo).

33. *Id.* at 42-46 (dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read, & Hsu Mo).

B. *The Vienna Convention and its Ambiguities*

The *Genocide Convention* majority's approach was accepted, at least provisionally, for other treaties,³⁴ but the International Law Commission remained seized of the matter through the 1960s. It initially favored something closer to the dissenters' view,³⁵ but evolved due to changes in personnel³⁶ and state preferences.³⁷ The rule ultimately reflected in the Vienna Convention, in any case, is that unless a treaty provides otherwise, reservations may be proffered unless they are incompatible with the treaty's object and purpose.³⁸ If a state fails to object to a proposed reservation within twelve months, it is deemed to have accepted it,³⁹ and the reservation is effective in relations between the reserving state and the non-objecting state.⁴⁰ If a state *does* object, it is presumed nonetheless to be accepting the reserving state as a treaty party;⁴¹ in that case, the provisions to which the reservation relates are deemed inapplicable in relations between the two states.⁴²

This sketch, however, passes over some genuine ambiguities, including many that are thought to disadvantage non-reserving states. Indeed, the sum of the uncertainties afflicting them suggests, at least superficially, that the law of reservations is badly in need of fixing.

1. *The Initial Standing of Reservations*

As noted above, Article 19(c) of the Vienna Convention provides that states "may . . . formulate a reservation unless . . . the reservation is incompatible with a treaty's object and purpose."⁴³ It is unclear how, and when, this incompatibility bar kicks in. If Article 19(c) really constrains a state, even as it formulates a reservation, one natural reading is that

34. The General Assembly commended that approach to the Secretary General's practice as "depository," and to states in general. G.A. Res. 598(VI), at 84, U.N. GAOR, 6th Sess., 360th plen. mtg., U.N. Doc. A/L.37 (Jan. 12, 1952).

35. *1951 ILC Report*, *supra* note 4, ¶ 24, [1951] 2 Y.B. Int'l L. Comm'n 128 (concluding that "the criterion of the compatibility of a reservation with the object and purpose of a multilateral convention . . . is not suitable for application to multilateral conventions in general").

36. *See, e.g.*, SINCLAIR, *supra* note 24, at 59 (attributing "fundamental change in the Commission's approach to reservations" to the appointment of a new special rapporteur in 1961).

37. *See* Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 289 (1991) (reporting that "not one [delegation] favored the unanimity rule governing the admission of reservations"). *Compare 1951 ILC Report*, *supra* note 4, ¶ 34, [1951] 2 Y.B. Int'l L. Comm'n 130-31, *with 1966 ILC Report*, *supra* note 15, at 152-53, [1966] 2 Y.B. Int'l L. Comm'n 321-22. States had also participated in the Genocide Convention proceedings, but their participation in the Commission is somewhat more direct. UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 21-22, U.N. Sales No. E.95.V.6 (1996) (stressing that "[g]overnments have an important role at every stage" of the Commission's work).

To be clear, I do not mean to suggest that the Vienna Convention rules on reservations, when drafted, were the unmediated result of state preferences. The Commission's preferences, and other factors, undoubtedly played a significant role. *See, e.g.*, ROSENNE, *supra* note 4, at 427 (surmising that the General Assembly was surprised by the results of its initial inquiry).

38. Vienna Convention, *supra* note 2, art. 19(c).

39. *Id.* art. 20(5).

40. *Id.* art. 21(1)(a) & (b).

41. *Id.* art. 20(4)(b).

42. *Id.* art. 21(3).

43. *See supra* note 38 and accompanying text.

incompatible reservations are void *ab initio*.⁴⁴ But this reading, sometimes termed the “permissibility” approach to reservations, is not inevitable. The drafting history suggests that the repeated references to “formulating” reservations were intended to avoid suggesting that anything more definitive was accomplished by lodging them alone; some ILC members would have gone further, but their commentary suggests that the matter was unresolved, as does debate within the conference.⁴⁵ In any event, the rule can hardly be regarded as self-enforcing.⁴⁶ The Vienna Convention sheds no light on how a treaty’s “object and purpose” is to be reckoned,⁴⁷ nor does practice,⁴⁸ and particular treaties often do not supply any clues.⁴⁹ This makes it harder to credit the suggestion that incompatible reservations are automatically void, unless each reserving state is supposed to intuit the answer in its own cause.

Those championing what is called the “opposability” approach argue that the Vienna Convention instead vests the other, non-reserving states with the final authority on compatibility.⁵⁰ If states accept the reservation, or fail to object within the allotted time, this may reflect their considered judgment that the reservation does not violate the treaty’s object and purpose, but it is in any event decisive. This approach can be faulted for failing to take seriously the limits imposed by Article 19(c) on the formulation of reservations—or, for that matter, to respect incompatibility at all, given that (on the opposability view) all objections, whatever their ground, have equal standing.⁵¹ Treating

44. Or, perhaps, not properly regarded as reservations at all. *See, e.g.*, D.W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BRIT. Y.B. INT’L L. 67 (1976-77). Some additional arguments are elaborated in the next section.

45. For reviews of this history, see, for example, Special Rapporteur, Int’l Law Comm’n, *Fifth Report on Reservations to Treaties, Third Addendum*, ¶¶ 227-28, U.N. Doc. A/CN.4/508/Add.3 (Jun. 23, 2000) (prepared by Alain Pellet).

46. *See, e.g.*, Isabel Buffard & Karl Zemanek, *The ‘Object and Purpose’ of a Treaty: An Enigma?*, 3 AUSTRIAN REV. INT’L & EUR. L. 311 (1998); Jan Klabbers, *Some Problems Regarding the Object and Purpose of Treaties*, 8 FIN. Y.B. INT’L L. 138 (1997).

47. As William Schabas observes, the interpretive approach commended by the Vienna Convention indicates that a treaty’s object and purpose is to be determined in light of its object and purpose. William A. Schabas, *Reservations to Human Rights Treaties: Time for Innovation and Reform*, 1994 CAN. Y.B. INT’L L. 39, 48. The problems with using a treaty’s object and purpose as a threshold test for reservations were evident from the beginning. *See Genocide Convention, supra* note 3, at 44 (dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read, & Hsu Mo) (“What is the ‘object and purpose’ of the Genocide Convention? To repress genocide? Of course; but is it more than that? Does it comprise any or all of the enforcement articles of the Convention? That is the heart of the matter.”).

48. *See* Special Rapporteur, *Tenth Report, First Add., supra* note 7, ¶ 81 (describing case law of the International Court of Justice).

49. Schabas, *supra* note 47, at 47.

50. *See 1966 ILC Report, supra* note 15, at 57, [1966] 2 Y.B. Int’l L. Comm’n 226 (noting that admissibility inescapably depends on the judgment of other state parties); Ruda, *supra* note 1; *see also* Bindschedler, *supra* note 24, at 965 (“If a reservation were to be incompatible with the object and purpose of a treaty, but all the other contracting parties were to accept it notwithstanding, the reservation probably would attain validity; in such circumstances another treaty with different aims would come into being.”).

51. As noted previously, the *Genocide Convention* advisory opinion appeared to suggest that the only basis for an objection was incompatibility. *See infra* notes 109-111 and accompanying text. The Commission adopted this approach in its 1962 proposals, but after several states protested that objections were often made on other grounds, *see 1966 ILC Report, supra* note 15, at 110, 118, 177, [1966] 2 Y.B. Int’l L. Comm’n 279, 287, 346 (comments by Australia, Denmark, and the United States), it dropped that limitation. Most commentators, accordingly, think that objections may be made on any ground, and with identical effect. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF

incompatible reservations as (merely) opposable also fits somewhat awkwardly within the objections scheme: like reservations expressly or implicitly precluded by the treaty's terms (also mentioned in Article 19),⁵² incompatible reservations may in theory be evaluated without any intervention by a non-reserving state, and do not seem appropriately made part of a treaty through sheer inaction.⁵³

Neither permissibility nor opposability is obviously correct,⁵⁴ and practice has not conclusively resolved the matter. States sometimes act as though allegedly incompatible treaty reservations were never good, or indicate that they regard objecting to such reservations as strictly unnecessary.⁵⁵ Treaty monitoring bodies, too, have increasingly asserted the right to re-evaluate the compatibility of treaty reservations.⁵⁶ Neither pattern is consistent with the view that incompatibility becomes a non-issue if states have failed to object.

THE UNITED STATES § 313, cmt. c (1987); AUST, *supra* note 1, at 127; SINCLAIR, *supra* note 24, at 61; Catherine Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, 1993 BRIT. Y.B. INT'L L. 245, 251, 255 & n.52. *But cf.* Schabas, *supra* note 47, at 63-64 (“[A] state could not arbitrarily object to a reservation formulated by a ratifying state, but must base its objection on the breach of the ‘object and purpose’ test or of some other rule.”).

52. See Vienna Convention, *supra* note 2, art. 19(a)-(c).

53. The ILC's Special Rapporteur makes this case quite forcefully. See Special Rapporteur, *Tenth Report, Second Add.*, *supra* note 7, ¶¶ 183-87.

54. For what it is worth, it is even unclear which view more commentary favors. Compare LIJNZAAD, *supra* note 20, at 41-43 (“The majority of writers conclude that, though compatibility is an objective criterion, it will ultimately be the States parties who will decide upon the acceptability of a given reservation.”), with Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 534 n.21 (2002) (representing that “[t]he majority view among legal scholars is that, under the modern system, individual states cannot ‘accept’ state R's incompatible reservation, unless all state parties consent to such a fundamental change”); *cf.* Special Rapporteur, Int'l Law Comm'n, *First Report on the Law and Practice Relating to Reservations to Treaties*, ¶¶ 96-115, U.N. Doc. A/CN.4/470 (May 30, 1995) (*prepared by Alain Pellet*) (describing division of opinion between permissibility and opposability schools, and taking position that the Commission could not resolve the debate at that juncture) [hereinafter Special Rapporteur, *First Report*]; Konstantin Korkelia, *New Challenges to the Regime of Reservations Under the International Covenant on Civil and Political Rights*, 13 EUR. J. INT'L L. 437, 452-54 (2002) (describing debate); Redgwell, *supra* note 51, at 263-69 (same).

There are, of course, other permutations of those approaches. For example, while the Vienna Convention creates a default presumption that reservations will modify treaty relations between the reserving state and non-reserving states, an incompatible reservation might plausibly—irrespective of objection—void that default, without necessarily preventing the reserving state from becoming a party to the treaty.

55. See, e.g., *Observations by the United Kingdom on General Comment 24*, 3 INT'L HUM. RTS. REP. 261, 264 (1996) [hereinafter *U.K. Observations*] (reporting U.K. view that incompatible reservations fall outside the scope of Articles 20 and 21 entirely); Statement by Ambassador Carl Henrik Ehrenkrona, Legal Advisor of the Foreign Ministry of Sweden, on Behalf of the Nordic Countries for the Report, Oct. 30, 2003, <http://www.swedenabroad.com/pages/general.asp?id=13328&expand=11049> (last visited Apr. 29, 2006) (reporting similar view of Nordic states); Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fifty-Fifth Session: Topical Summary of the Discussion held in the Sixth Committee of the General Assembly during its Fifty-Eighth Session*, ¶¶ 178, 188, U.N. Doc. A/CN.4/537 (Jan. 21, 2004) [hereinafter *Topical Summary 2004*].

Sometimes the permissibility view is viewed as a constraint by reserving states too. In one instance, for example, the Office of the Legal Advisor at the U.S. Department of State defended the proposition that a very substantial reservation to a treaty (exempting nuclear warships from the definition of the “nuclear ships” covered by the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships) might be proposed by the United States, subject to objection by other states, “unless it is incompatible with the object and purpose of the treaty.” *The Law of Treaties and Other International Agreements*, 1975 DIGEST § 1, at 263-64 (quoting memorandum).

56. See *infra* notes 87-94 and accompanying text.

At the same time, the fact remains that states do object to reservations on incompatibility grounds, though that is unnecessary under the permissibility approach.⁵⁷ Treaty bodies, while occasionally despairing that states can be entrusted to enforce a compatibility standard,⁵⁸ have made no headway in developing an objective test for the object and purpose of a treaty.⁵⁹ The result is confusion as to whether reservations, once proffered, are any good, and what a non-reserving state has to do about that.

2. *The Form and Timing of Objections*

Once a state has tendered a reservation, Article 20 of the Vienna Convention indicates that non-reserving states may accept the reservation or object to it—no other options are specified. An objection is presumed not to preclude the treaty's entry into force unless the objecting state says so clearly;⁶⁰ all objections, it would appear, must be tendered within twelve months, or a state will be deemed to have accepted the reservation.⁶¹

For reasons already suggested, the problem of incompatible reservations makes this less clear.⁶² If incompatible reservations are void *ab initio*, such that no objection is necessary at all, the mere failure to act within twelve months cannot be construed as tacit acceptance.⁶³ If, on the other hand,

57. This may simply be risk aversion: even if a state believes that it would be within its rights to invoke incompatibility in some future dispute without having first objected, it may not wish unnecessarily to rely on that position. Objecting may also provide collateral benefits, such as encouraging other states to object or encouraging the reserving state to withdraw its reservation. *See infra* notes 273, 286-290 and accompanying text.

58. *General Comment 24*, *supra* note 6, ¶¶ 17, 18.

59. The experience of the Human Rights Committee is illustrative. Its description of the object and purpose of the ICCPR was strikingly capacious. *General Comment 24*, *supra* note 6, ¶ 7. While it suggested that reservations contrary to peremptory norms or customary international law are necessarily incompatible with a treaty's object and purpose, *id.* ¶ 8, one may distinguish between reservations to the underlying norm and reservations as to treaty-based means of *enforcing* that norm, *see Observations by the United States on General Comment 24*, 3 INT'L HUM. RTS. REP. 265, 267 (1996) [hereinafter *U.S. Observations*], and there is in any event no greater consensus as to the norms on which such a test relies. *See Schabas*, *supra* note 47, at 49-54. For discussion of the ILC Special Rapporteur's somewhat different resolution, *see infra* text accompanying notes 237 (noting attempt to provide general definition of object and purpose), 256-260 (describing approach to compatibility of reservations relating to peremptory norms and customary international law).

60. Vienna Convention, *supra* note 2, art. 20(4)(b).

61. *Id.* art. 20(5). The International Convention on the Elimination of all forms of Racial Discrimination is one example of a treaty establishing a different deadline—a mere ninety days, which probably serves to diminish still further the prevalence of objections. International Convention on the Elimination of All Forms of Racial Discrimination (CERD) art. 20(1), *opened for signature* March 7, 1966, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195; *see also* Yogesh Tyagi, *The Conflict of Law and Policy on Reservations to Human Rights Treaties*, 71 BRIT. Y.B. INT'L L. 181, 220-21 (2000) (describing the process by which the CERD Committee “attempted to check [reservations]”).

62. *See* Special Rapporteur, Int'l Law Comm'n, *Eighth Report on Reservations to Treaties*, ¶ 73, U.N. Doc. A/CN.4/535 (May 23, 2003) (*prepared by* Alain Pellet) [hereinafter *Special Rapporteur, Eighth Report*] (concluding that “Article 20, paragraph 5 gives ambiguous indications as to the period in which an objection may be formulated”).

63. *See, e.g., Hampson Report*, *supra* note 13, ¶ 19.

incompatible reservations fall entirely within the general legal scheme, as the opposability school suggests, that argument is not well taken.⁶⁴

The uncertainty surrounding these questions seems to have affected state practice. States usually object (if at all) on a timely basis.⁶⁵ But states not infrequently object more than twelve months after receiving notice of a reservation, when on an opposability approach such acts are legally void.⁶⁶ Such tardiness may be due to a state's miscalculation as to when it received notice of the reservation,⁶⁷ or inattentiveness,⁶⁸ but the problem seems more pervasive than that.⁶⁹ In some instances, states have expressly justified tardy objections on the grounds that incompatible reservations are not governed by the time limits imposed by Article 20.⁷⁰

64. See AUST, *supra* note 1, at 117 (noting argument); 1966 ILC Report, *supra* note 15, at 38, [1966] 2 Y.B. Int'l L. Comm'n 207 (indicating that the former Article 16(c) must "be read in close conjunction with the provisions . . . regarding acceptance of and objection to reservations").

65. Reactions to Pakistan's reservation to the IAEA Convention on the Physical Protection of Nuclear Material, which affected its use, storage, and transportation of nuclear material, certainly illustrate sensitivity. See Int'l Atomic Energy Agency [IAEA], *Information Circular: Convention on the Physical Protection of Nuclear Material: Status List as of 30 September 2002*, IAEA Doc. INFCIRC/274/Rev.1/Add.8 (Nov. 5, 2002). Fifteen of the seventeen states or organizations objecting did so within a year after Pakistan's submission of its instruments of ratification; Euratom, via the European Union, appears to have gone to some trouble in order to be timely. Hughes Belin, *EU, Euratom Object to Pakistan's Reserve on Physical Protection Text*, NUCLEAR FUEL, Oct. 29, 2001, at 12.

66. See HORN, *supra* note 24, at 205-09. Under a permissibility approach, on the other hand, dilatory objections (like timely objections) need never be made at all, at least when the reservation is incompatible with a treaty's object and purpose. See *supra* text accompanying note 44.

67. The twelve-month period commences when the non-reserving state is "notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later." Vienna Convention, *supra* note 2, art. 20(5). For general discussions of timing niceties, see HORN, *supra* note 24, at 205-09; LIJZAAD, *supra* note 20, at 147-48; Lawrence J. LeBlanc, *Reservations to the Convention on the Rights of the Child: A Macroscopic View of State Practice*, 4 INT'L J. CHILD. RTS. 357, 378-79 (1996).

68. For suggestions that reservations are often overlooked, even by competent ministries, see AUST, *supra* note 1, at 115; SINCLAIR, *supra* note 24, at 63; Daniel L. Hylton, Note, *Default Breakdown: The Vienna Convention on the Law of Treaties: Inadequate Framework on Reservations*, 27 VAND. J. TRANSNAT'L L. 419, 439 (1994).

69. See LIJZAAD, *supra* note 20, at 147-48 (addressing Convention on Racial Discrimination); *id.* at 222-24 (ICCPR); *id.* at 382 (Convention Against Torture); LeBlanc, *supra* note 67, at 378-79. Even conspicuous reservations may attract late objections. For example, while a number of states objected to the U.S. reservations to the ICCPR, apparently none did so within twelve months. See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 434-35 (2000); Catherine J. Redgwell, *Reservations to Treaties and Human Rights Committee General Comment No. 24(52)*, 46 INT'L & COMP. L.Q. 390, 394-95 (1997).

70. See 1 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS OF 31 DECEMBER 2003, at 215, U.N. Doc. ST/LEG/SER.E/22, U.N. Sales No. E.04.v.2 (2004) [hereinafter MULTILATERAL TREATIES] (Italian communication regarding Botswana reservation to the ICCPR); *id.* at 243 (Danish communication regarding Niger reservation to CEDAW); *id.* at 262 (Danish communication to Kuwait reservation to CEDAW); *id.* at 265 (Swedish communication regarding Singapore reservation to CEDAW); *id.* at 288 (Italian and Danish communications regarding Qatar reservation to Torture Convention); *id.* at 306 (objection by Denmark to the reservations of Brunei and Saudi Arabia to the Convention on the Rights of the Child); *id.* at 312 (Danish communications regarding reservations by Djibouti, Iran, Pakistan, and Syria to the Convention on the Rights of the Child); *id.* at 313 (Belgian and Danish communications regarding Malaysia reservation to the Convention on the Rights of the Child); *id.* at 314 (Belgian communication regarding Qatar reservation to the Convention on the Rights of the Child). As these examples reflect, this position has been taken exclusively, or nearly so, with regard to human rights conventions, perhaps because reservations to those conventions are often both far-reaching and the subject of less careful (and timely) scrutiny by other

Timing is also affected by lacunae having less to do with incompatibility. For example, states do not always make clear whether their response is an objection,⁷¹ arguably tolling the period for objection—particularly if it may be argued that the underlying reservation is impossible to assess as of the time it was notified.⁷² Finally, the practical consequences of tardiness may be insubstantial. It is notable, for example, that the U.N. Secretary-General accepts for deposit late objections—conceding only some “indicative value” by calling a late objection a “communication” when circulating it.⁷³

These practices reinforce uncertainty as to whether the twelve-month limit “expresses a criterion for the validity of an objection” or “establishes no more than a presumption of acceptance.”⁷⁴ The case seems strongest for exempting objections on incompatibility grounds from any strict deadline, or at least subjecting those that are late to some lesser sanction.⁷⁵ Whatever the merits of these arguments, the overlapping excuses for late objections make it unclear what rule states are forging—or violating—and suggest that the scope of the tacit acceptance rule will remain murky.

3. *The Effect of Objections*

Under Article 21, if a non-reserving state accepts another state’s reservation, it modifies the relevant treaty provisions for them both.⁷⁶ If, on the other hand, a non-reserving state objects—without specifically denying the reserving party’s status as a party—“the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.”⁷⁷

states. But the accompanying statements have not purported to limit the argument to that context, and the logic applies to other types of conventions as well.

71. See Special Rapporteur, Int’l Law Comm’n, *Eighth Report on Reservations to Treaties, First Addendum*, ¶¶ 86-92, U.N. Doc. A/CN.4/535/Add.1 (July 10, 2003) (prepared by Alain Pellet) [hereinafter Special Rapporteur, *Eighth Report, First Add.*] (describing examples of queries and other “quasi-objections”); LIJZAAD, *supra* note 20, at 225 (describing advent of the “pseudo-objection” under the ICCPR).

72. See AUST, *supra* note 1, at 121 (citing equivocal statement by the United Kingdom that it was not “able to take a position on” four reservations made by the Korea to the ICCPR “in the absence of a sufficient indication of their intended effect,” and so would reserve its rights, and concluding that “[t]he effect of this statement is to suspend the time limit there may be for making objections, whatever that might be, until the reserving state has made clear the effect of the reservation”); Redgwell, *supra* note 69, at 397-401.

73. Treaty Section of the Office of Legal Affairs, *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, ¶ 213, U.N. Doc. ST/LEG/7/Rev.1 (1999) [hereinafter *Summary of Practice*]. The Treaty Section distinguishes objections from non-parties; although these are also dubbed “communications,” they are not ordinarily registered or published. *Id.* ¶ 214.

74. HORN, *supra* note 24, at 208-09. Horn’s argument cites state practice, but also adverts to the drafting history, functional considerations, the language of other conventions, and the fact that Article 20(5) states only that “a reservation is considered to have been accepted” when no objection has been made within a year—language that, without more, seems perfectly sufficient to refer to a deemed, but conclusive, acceptance.

75. This solution requires a rather nuanced view of the relationship among Articles 19 through 21, but it is not out of the question. One might say, for example, that Article 21 requires that a reservation be “established” in accordance with Articles 19 and 20, and that incompatible reservations by definition are not. *Cf.* AUST, *supra* note 1, at 117-18.

76. Vienna Convention, *supra* note 2, art. 21(1)(a), (b).

77. *Id.* art. 21(3).

Applying this provision gives rise to mundane questions, such as determining the provisions to which the reservations relate, and predictably runs into problems when it comes to incompatible reservations.⁷⁸ But the principal puzzle concerns the value added by objecting to *any* reservation, since disapplying the relevant treaty provisions seems little better than accepting the reservation's modification of them.⁷⁹ The problem is evident, for example, when states enter reservations to compulsory dispute settlement mechanisms: regardless of whether a non-reserving state objects, the reserving state will benefit from the reservation, since there is no practical difference between accepting the reservation and disapplying the provision entirely.⁸⁰ The result, as one official put it, is that any objection not denying treaty relations altogether may be "only for the record,"⁸¹ leaving states little incentive to object—which means that states also have reason to refrain from formulating reservations in the first place.

Two developments compound the Vienna Convention's uncertainties. First, some states—principally Nordic⁸²—claim innovative effects for their objections, at least when a reservation may be said to be incompatible with a treaty's object and purpose. Some objections assert what has been termed an "intermediate" effect, disapplying not only the reserved-to provisions but also other provisions identified by the objecting state.⁸³ Another, more common,

78. It is hard to accept that an incompatible reservation has a conventional effect on treaty relations between the reserving and accepting state, as if there were nothing distinctive about it. (If, for example, a state party to the Genocide Convention were to include a reservation affording it discretion to commit genocide, it is hard to believe that such a term would modify the treaty's terms *inter se* even if another state remained *mum.*) Similarly, it would appear inappropriate to require objecting states to preclude explicitly entry into force of incompatible reservations. LIJZAAD, *supra* note 20, at 45 (citing authorities espousing this view).

79. As Elena Baylis commented, "[t]his does not seem like a satisfactory, or even rational, result." Elena Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT'L L. 277, 294 (1999); see LIJZAAD, *supra* note 20, at 48; SINCLAIR, *supra* note 24, at 76-77; Ruda, *supra* note 1, at 200. There are other ways of conceptualizing the differences, but they do not lead to any difference in outcome. See, e.g., HORN, *supra* note 24, at 176 (distinguishing between the "regulation" envisioned by a treaty, the "contraregulation" created by acceptance of a reservation, and the "deregulation" created by an objection).

80. HORN, *supra* note 24, at 177.

81. The Law of Treaties and Other International Agreements, 1980 DIGEST § 1, at 397 (quoting letter from Arthur W. Rovine, Assistant Legal Advisor for Treaty Affairs); see also P.H. Imbert, *Reservations and Human Rights Conventions*, 6 HUM. RTS. REV. 28, 29 (1981) (claiming that the tension relating to reservations to human rights treaties is "aggravated by the fact that when one Contracting Party makes a reservations there seems to be nothing that the other parties can do about it"). But see Reservations, *supra* note 17, at 139 (quoting congressional testimony of State Department Legal Advisor Hackworth, in response to query, that "[i]t is safe [in adopting reservations] to go just as far as you feel like going, but if you want to be sure to become a party to the instrument, you would have to move with considerable caution lest the other parties should refuse to accept the reservations").

82. See Klabbers, *supra* note 16; Lars Magnuson, *Elements of Nordic Practice 1997: The Nordic Countries in Coordination*, 67 NORDIC J. INT'L L. 345, 350 (1998). But the phenomenon is not limited to those countries. Hampson Report, *supra* note 13, ¶¶ 16-17 (citing examples); Special Rapporteur, Int'l Law Comm'n, *Ninth Report on Reservations to Treaties*, ¶ 19 n.38, U.N. Doc. A/CN.4/544 (June 24, 2004) [hereinafter Special Rapporteur, *Ninth Report*] (same).

83. Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Fifty-Sixth Session*, ¶ 17, U.N. Doc. A/59/10 (Sept. 16, 2004) [hereinafter 2004 ILC Report]; Special Rapporteur, *Eighth Report, First Add.*, *supra* note 71, ¶ 95; see, e.g., 2 MULTILATERAL TREATIES, *supra* note 70, at 330-35 (statements by Canada, Japan, the Netherlands, Sweden, the United Kingdom, and the United States to the effect that they are not in treaty relations with respect to provisions of the Vienna

type seeks “super maximum” effect by asserting a binding relationship between the states under the *entire* treaty, including any provisions to which the reservations pertain.⁸⁴ The main argument for such innovations, unsurprisingly, is that objections premised on a reservation’s impermissibility are not governed by Article 21 at all, and that it would be intolerable to limit responses to such reservations to the minimal effects of ordinary objections.⁸⁵ Expanding the range of possible effects can make determining a state’s treaty obligations considerably more challenging.⁸⁶

A second development has been intervention by treaty-monitoring bodies. While some bodies have disclaimed any authority to judge reservations under the governing treaties,⁸⁷ others have concluded the

Convention on the Law of Treaties subject to dispute settlement provisions, to which other states had reserved, in respect of those states).

84. 2005 ILC Report, *supra* note 7, ¶¶ 18, 29; 2004 ILC Report, *supra* note 83, ¶ 17; Special Rapporteur, *Ninth Report*, *supra* note 82, ¶ 8; Special Rapporteur, *Eight Report, First Add.*, *supra* note 71, ¶ 96 (citing examples). For example, Sweden’s objection to Qatar’s reservation to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography stated that “[t]he Convention enters into force in its entirety between the two States, without Qatar benefiting from its reservation.” 1 MULTILATERAL TREATIES, *supra* note 70, at 333; *see also id.* at 244-47, 256-58, 259-65 (objections and communications by Denmark, Finland, Sweden, and Great Britain to CEDAW reservations); *id.* at 306, 307, 309-13 (objections and communications by Denmark, Finland, and Sweden to reservations to the Convention on the Rights of the Child); *id.* at 182-83, 186 (objection by Denmark, Finland, and Sweden to ICCPR reservations). This type of objection is not entirely limited to human rights treaties. *See, e.g.*, 1 MULTILATERAL TREATIES, *supra* note 70, at 111 (objection by Finland to reservations to the Vienna Convention on Consular Relations); Päivi Kaukoranta, *Elements of Nordic Practice 1997: Finland*, 67 NORDIC J. INT’L L. 321, 327-28 (1998); *id.* at 433 (objection by Finland to reservations to the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances).

85. *See, e.g.*, *Topical Summary 2004*, *supra* note 55, ¶ 178. The Netherlands also once reasoned that the authority to object to any treaty relations with the reserving state connoted the right to exclude only *part* of a treaty, providing the provisions were severable. R.C.R. Siekmann, *Netherlands State Practice for the Parliamentary Year 1982-1983*, 15 NETH. Y.B. INT’L L. 267, 345-46 (1984) (quoting explanatory memorandum from the Dutch government concerning the ratification of the Vienna Convention). Subsequent defenses have sounded in permissibility terms. *See, e.g.*, Lars Magnuson, *Elements of Nordic Practice 1997: The Nordic Countries in Coordination*, 67 NORDIC J. INT’L L. 345, 350 (1998) (quoting statement by Swedish representative to the Sixth Committee of the U.N. General Assembly); Laurids Mikaelsen, *Elements of Nordic and International Practice in the Year of 1996 (Denmark)*, 66 NORDIC J. INT’L L. 319, 323 (1997). States defending innovative objections have, in any event, confined their use to reservations they assert to be inadmissible. *See supra* note 83 (citing examples).

86. *See, e.g.*, AUST, *supra* note 1, at 112, 119 (citing varied reactions to Guatemalan reservation to the Vienna Convention itself); 2 MULTILATERAL TREATIES, *supra* note 70, at 330-33, 336-37 (objections of, e.g., Denmark, Finland, Belgium, and the United Kingdom) (reflecting fact that some objections were arguably dilatory as well); 1 *id.* at 286-88 (reporting varied claimed effects in the objections to the now-withdrawn Chilean reservation to the Torture Convention regarding superior orders).

87. *See* Memorandum from the Office of Legal Affairs to the Director of the Division of Human Rights Regarding Legal Effects of Statements of Interpretation and Other Declarations Made at the Time of Ratification or Accession (Apr. 5, 1976), *reprinted in Selected Legal Opinions of the Secretariats of the United Nations and Related Intergovernmental Organizations*, 1976 U.N. Jurid. Y.B. 159, 219-21, U.N. Doc. ST/LEG/SER.C/14 (reporting view by the Office of Legal Affairs that a decision by CERD “that a reservation already accepted is incompatible with the object and purposes of the Convention would have no legal effect”); *Report of the Comm. on the Elimination of Racial Discrimination*, at 85, U.N. Doc. A/33/18 (1978); Legal Opinion of the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat Upon an Inquiry by the Committee Concerning the Implementation of Article 28 of the Convention on the Elimination of All Forms of Discrimination Against Women, in *Report of the Committee on the Elimination of Discrimination Against Women*, at

opposite, with little more by way of an explicit entitlement.⁸⁸ The primary driver seems to be the perceived need to correct the Vienna Convention regime. The Human Rights Committee, for example, argued the non-reciprocal character of human rights treaties meant that states were inadequate guardians against reservations, and that it needed to know whether reservations were in effect in order to fulfill its own functions.⁸⁹

The authority of treaty bodies with respect to reservations has been resisted by a number of states,⁹⁰ but for immediate purposes, it suffices to highlight two ways in which it accentuates, rather than resolves, the Vienna Convention's ambiguities. First, the suggestion that states are inadequate calls into question a premise more or less common to the permissibility and opposability approaches—the acceptance that state appraisals, through objections or otherwise, govern the acceptance of reservations—and creates doubt as to whether the Vienna Convention is a complete regulatory system. The second source of confusion concerns the remedy for incompatible reservations. The Human Rights Committee announced that incompatible reservations may be severed, so that the treaty binds the reserving party in its entirety.⁹¹ Whatever this position's merits,⁹² the Committee's lack of specificity as to when a reservation will be deemed severable,⁹³ and its

55-56, U.N. Doc. A/39/45 (1984). In each case, though, the relevant body has nonetheless interrogated states regarding their reservations. Tyagi, *supra* note 61, at 221, 230-31.

88. See, e.g., *Belilos v. Switz.*, 132 Eur. Ct. H.R. (ser. A) (1988), reprinted in 10 Eur. H.R. Rep. 466 (1988); Chris Wold, *Implementation of Reservations Law in International Environmental Treaties: The Case of Cuba and Iceland*, 14 COLO. J. INT'L ENVTL. L. & POL'Y 53, 73-77 (2003) (discussing the International Whaling Commission).

89. *General Comment 24*, *supra* note 6, ¶¶ 17-18.

90. Cf. *Korkelia*, *supra* note 54, at 437-38 (noting controversies). For objections by states, see *infra* note 92 (citing state objections).

91. *General Comment 24*, *supra* note 6, ¶ 18. The Committee is hardly alone in its view. The Secretary-General, *Report of the Ninth Meeting of Persons Chairing the Human Rights Treaty Bodies*, ¶ 18, U.N. Doc. A/53/125 (Annex) (May 14, 1998) (reporting chairpersons' "firm support for the approach reflected in General Comment No. 24"); *Belilos*, 10 Eur. H.R. Rep. at 487 (endorsing severability); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) (1995) (same).

92. For criticisms, see generally *Evans v. Trin. & Tobago*, Communication No. 908/2000, Annex, U.N. Doc. CCPR/C/77/D/908/2000 (Wedgwood, dissenting); *Observations by France on General Comment 24*, 4 INT'L HUM. RTS. REP. 8 (1997) [hereinafter *France Observations*]; *U.K. Observations*, *supra* note 55, at 261; *U.S. Observations*, *supra* note 59, at 265; Roberto Baratta, *Should Invalid Reservations to Human Rights Treaties Be Disregarded?*, 11 EUR. J. INT'L L. 413 (2000); and William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277, 324-325 (1995).

93. The Committee said only that the "normal" result was severance. *General Comment 24*, *supra* note 6, ¶ 18. It has not in fact appeared especially eager to judge the permissibility or severability of state reservations; it took a more deferential approach, for example, in considering the state report submitted by the United States. See, e.g., *Report of the Human Rights Committee, United States of America*, ¶¶ 279, 292, U.N. Doc. A/50/40 (Oct. 3, 1995) (citing reservations the Committee "believes to be incompatible with the object and purpose of the Covenant," and urging that the United States review them with a view to withdrawing them). When it took a more aggressive position in connection with an individual communication concerning Trinidad and Tobago, that state denounced the ICCPR Optional Protocol. See Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1881 (2002) (describing episode). Since then, the Committee's practice with respect to individual communications has been "to confine the effect of reservations narrowly, but not to question their fundamental permissibility," or to honor the invocation of reservations but address claims indirectly through the use of non-reserved provisions. Seventeenth Meeting of Chairpersons of the Human Rights Treaty Bodies, *The Practice of Human Rights Treaty Bodies with Respect to Reservations to*

ambiguity concerning a treaty body's final authority in any such determination,⁹⁴ are striking. Given that states have not generally asserted severability powers for themselves, the Committee's view either sharpens the divide between the risks a state takes when facing intervention by a third party, as opposed to review by its peers, or it supports expanding the claims of some states to lodge innovative objections with equivalent effects.

Many of these issues are appreciated by those interested in reforming the Convention regime. The International Law Commission has thus far rejected claims that the regime needs an overhaul, but it concurs that the system's uncertainties interfere with its effective operation,⁹⁵ and that supplemental guidelines are necessary to resolve ambiguities and restore order.⁹⁶ Before adopting even so modest a course, it would be useful to examine how this may have developed—to undertake, that is, a positive analysis of reservations law seriously, rather than simply regarding it as a mess to be reformed. To do so, we first need a better understanding of state interests in reservations.

III. A POSITIVE ACCOUNT OF RESERVATIONS

For the reasons described, the Vienna Convention appears vague on the most essential questions, and its ambiguities are thought to be particularly nettlesome for those confronted with a reservation—partly because the rules already seem to favor the reserving states, and partly because they benefit from any resulting limbo. While states must take seriously their treaty obligations, the international legal system is ill-situated to enforce obligations against states that have conditioned those obligations, at least when their expressed wishes appear unopposed by other states, organizations, or doctrine.

This poses the puzzle, however, as to why states would favor one facet of their identities. States are not, clearly, locked into reserving or non-reserving roles; a state proposing a reservation is no less likely to be

International Human Rights Treaties, ¶¶ 25, 28, U.N. Doc. HRI/MC/2005/5 (June 13, 2005) [hereinafter *Treaty Bodies' Practice*].

94. The Committee could be read to have asserted binding authority on the predicate determination of compatibility. *General Comment 24*, *supra* note 6, ¶ 11 (asserting non-contravenable “competence to interpret the requirements of any provisions of the Covenant”); *id.* ¶ 18 (“It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant.”). But the United States, among others, categorically rejected the Committee's power to issue “definitive or binding interpretations of the Covenant.” *U.S. Observations*, *supra* note 59, at 266; *see also U.K. Observations*, *supra* note 55, at 263-64, ¶¶ 9-12 (submitting similar criticism); *France Observations*, *supra* note 92, at 8 (same). Defenders of the Committee regarded the U.S. objections as overstated, without clarifying its precise role. P.R. GHANDHI, *THE HUMAN RIGHTS COMMITTEE AND THE RIGHT OF INDIVIDUAL COMMUNICATION* 371 (1998) (suggesting a “misunderstanding,” because “clearly the Committee is not seeking to arrogate a legally binding quality to its views,” but defending its right to issue authoritative interpretations).

95. Special Rapporteur, *First Report*, *supra* note 54, ¶¶ 94-95.

96. *See, e.g., 2004 ILC Report*, *supra* note 83, ¶ 288 (reporting view that “the provisions of the Vienna Conventions concerning objections were vague and needed to be clarified”); *1997 ILC Report*, *supra* note 8, ¶¶ 100-23 (setting out wide-ranging discussion of ambiguities and gaps in the Vienna Convention).

evaluating other states' reservations even to the very same treaty. So why would they so decisively favor one role over the other? Perhaps the benefits of reserving are still underappreciated, but we would also profit from a broader appreciation of what inures to the advantage of non-reserving states—in short, a sense of their interests.

A. *The Puzzle of Ambiguity: Two Conjectures*

The existing literature has done little to unpack the interests of non-reserving states, let alone anything that could account for the existing regime.⁹⁷ Nonetheless, two possible explanations for the existing state of affairs may be surmised, each of which assumes something about the stake of non-reservers.

1. *Mistake*

One conjecture, reflected in a recent article by Ryan Goodman, is that the “interest [of non-reserving states] consists in preserving the bargained-for elements of a multilateral agreement, which incompatible reservations or similar arrangements would defeat.”⁹⁸ On this premise, “the almost universal failure of states to object to reservations”—which one commentator described as “the basic reason for the juristic bewilderment that has confounded this subject”⁹⁹—seems due to their carelessness in practice or, more plausibly, in their having created insufficient incentives to object in the first place. Either way, states tend to forgive reservations that they would not, and should not, were the rules better designed.

This understanding of state interests, and diagnosis, is implicit in much contemporary criticism of the Vienna Convention. Nevertheless, it appears incomplete. Non-reserving states do not exploit some of the opportunities already afforded them under the Convention. For example, they could specify a treaty's object and purpose, the better to deter incompatible reservations and facilitate objection,¹⁰⁰ or object more often to the party status of reserving states.¹⁰¹ Moreover, states might negotiate around the Convention by

97. If anything, existing accounts of the interests of non-reserving states tend to reinforce the notion that the Vienna Convention is biased against them. See Vincy Fon & Francesco Parisi, *The Hidden Bias of the Vienna Convention on the Law of Treaties* (George Mason Univ. Law and Econ. Working Paper No. 03-20); Francesco Parisi & Catherine Ševčenko, *Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention*, 21 BERKELEY J. INT'L L. 1 (2003); see also *infra* text accompanying notes 206-209 (discussing absence of reciprocity). Ryan Goodman's work, on the other hand, has tried to explain how the interests of *reserving* states might be reconciled to recent apparent inroads into their prerogatives. See Goodman, *supra* note 54.

98. Goodman, *supra* note 54, at 533.

99. D.P. O'CONNELL, INTERNATIONAL LAW 235 (2nd ed. 1970); accord LeBlanc, *supra* note 67, at 373-74 (discussing example of the Convention on the Rights of the Child).

100. It may be impossible, however, to identify the object and purpose of a treaty like the LOSC, which features 320 articles and nine annexes, or even broad-ranging human rights treaties like the ICCPR. AUST, *supra* note 1, at 111. The result of protracted negotiations might be the “verbatim repetition of almost every provision.” Bernard Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session (1979)*, 74 AM. J. INT'L L. 1, 35 (1980).

101. See AUST, *supra* note 1, at 115 (citing example).

identifying provisions as to which reservations are permissible (if any),¹⁰² specifying optional clauses that states are free to accept or reject,¹⁰³ or creating other mechanisms that allow states a (constrained) choice as to their levels of obligation.¹⁰⁴ Such workarounds are not explored at the rate one would expect if states were intent on protecting negotiated treaty terms,¹⁰⁵ and their form is often even more disappointing. When states actually vary from the Vienna Convention default,¹⁰⁶ they usually leave themselves free to lodge declarations¹⁰⁷ or other means of differentiating treaty obligations.¹⁰⁸ In short,

102. See, e.g., Diplomatic Conference on Arrest of Ships, Mar. 1-12, 1999, *Report of the U.N. Int'l Mar. Org.*, art. 10, U.N. Doc. A/CONF.1888 (Mar. 19, 1999) (identifying provisions as to which reservations are permitted); Patent Cooperation Treaty art. 64, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231 (identifying provisions as to which reservations are permitted, but barring other reservations). Recent examples of treaties barring any reservations include the World Health Organization Framework Convention on Tobacco Control art. 30, May 21, 2003, WHA Res. 56.1 [hereinafter Tobacco Convention]; Rome Statute of the International Criminal Court art. 120, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Such provisions appear to be particularly prevalent in environmental agreements. See U.N. Off. of Leg. Affairs, Treaty Section, *Final Clauses of Multilateral Treaties*, at 47 n.51, U.N. Doc. No. E.04.V.3 (2003) (citing examples). But see Craig L. Carr & Gary L. Scott, *Multilateral Treaties and the Environment: A Case Study in the Formation of Customary International Law*, 27 DENV. J. INT'L L. & POL'Y 313, 322 n.29 (1999) (indicating that only ten of forty-one global environmental treaties surveyed contained "no reservations" provisions).

103. See Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Fifty-Second Session*, at 241-47, U.N. Doc. A/55/10 (2000) (describing such provisions, but distinguishing them from reservations).

104. *Id.* at 247-52 (describing provisions allowing state choice, but distinguishing them from reservations); *id.* at 255-69 (describing other techniques for restricting the application of treaty terms); Special Rapporteur, Int'l Law Comm'n, *Fifth Report on Reservations to Treaties, First Addendum*, ¶¶ 83-84, U.N. Doc. A/CN.4/508/Add.1 (May 1, 2000) (prepared by Alain Pellet) (enumerating alternatives to reservations).

105. Special Rapporteur, Int'l Law Comm'n, *Second Report on Reservations to Treaties, First Addendum* ¶¶ 123-24, U.N. Doc. A/CN.4/477/Add.1 (June 13, 1996) (prepared by Alain Pellet) [hereinafter Special Rapporteur, *Second Report, First Add.*] (citing rarity of provisions banning reservations); AUST, *supra* note 1, at 124 ("The problems of reservations may be lessened, or even avoided, if provision is made in each new treaty, but this is not new."); Clark, *supra* note 37, at 282 (citing failure to meet "the 'imperative necessity' of formulating regimes on reservations specific to each treaty") (quoting ARNOLD MCNAIR, *THE LAW OF TREATIES* 170 (1961)); see, e.g., Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B INT'L L. 281, 317-19 (1976-77) (describing inconclusive negotiation of reservations clause to ICCPR); Gregory F. Jacob, *Without Reservation*, 5 CHI. J. INT'L L. 287, 290 (2004) (claiming that before negotiating on the Tobacco Convention, "[m]any of the delegates had never heard of a 'no reservations' clause").

This was anticipated during the negotiation of the Vienna Convention. As Sinclair, a treaty law expert from the United Kingdom, observed, "Although the ideal solution to the problem of reservations was to ensure that the treaty itself dealt with the question, practical experience showed that, more often than not, the treaty was silent on the matter, not necessarily because the negotiating States had ignored the question of reservations, but usually because they had been unable to reach an agreed solution. . . . As a result the negotiating States might reluctantly decide to dispense with a reservations article, so as not to disturb the delicate balance of interests they had reached in formulating the treaty." United Nations Conference on the Law of Treaties, First Session, Vienna, Austria, Mar. 26-May 24, 1968, at 114, U.N. Doc. A/Conf.39/11 (1971).

106. Not infrequently, treaty-specific reservations clauses consist of insignificant variations on the Vienna Convention, sometimes simply recapitulating the object and purpose test. See, e.g., *Treaty Bodies' Practice*, *supra* note 93, ¶ 5 (summarizing reservations terms in major human rights treaties).

107. Declarations are statements that in theory do not alter a state's treaty obligations, but which in fact are often pursued to that very effect. See *infra* text accompanying notes 148, 151 (discussing declarations, including examples of the Law of the Sea Convention and the International Criminal Court).

108. Treaties that bar reservations to the principal articles often permit reservations to the technical appendices or annexes—which may be where the real bite is felt. See, e.g., Comprehensive

states do not appear moved to redress any mistakes they made in initially assigning an advantage to reservations.

Most broadly, it would remain puzzling how this system came to pass. The *Genocide Convention* advisory opinion alerted states to the basic contours of the flexible system, yet they adopted something very much like it in the Vienna Convention (and re-adopted near-identical terms in a subsequent convention),¹⁰⁹ and abide by these terms even when they need not.¹¹⁰ Their embrace of what is, supposedly, such a one-sided bargain is at least counter-intuitive, as is the vagueness of the rules they have elected to follow. As one commentator noted, “One would expect the law regarding the States bound by a treaty and the provisions of the treaty to which they are bound to be of such a fundamental importance that the law regarding reservations would be clear and stable. This has not, however, been the case.”¹¹¹

2. *Irrelevance—or Collusion*

If this first conjecture is less than completely convincing, a second commends itself: states really do not care much about reservations, or care only about their own. The former account suggests that reservations are infrequent and incidental to the effectiveness of treaties.¹¹² While the

Nuclear Test Ban Treaty art. XV, Sept. 24, 1996, S. TREATY DOC. NO. 105-28, 35 I.L.M. 1439 (not in force) (barring reservations to the treaty’s articles and annexes, but permitting reservations to the protocol and its annexes if not incompatible with the treaty’s object and purpose); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. XXII, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 317 (barring reservations to the Convention’s articles, but permitting reservations to its annexes not incompatible with its object and purpose). This is a particularly common practice in environmental treaties. *See, e.g.*, Convention on International Trade in Endangered Species of Wild Fauna and Flora art. XXIII, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES]; Andrew J. Hiemert, Note, *How the Elephant Lost His Tusks*, 104 YALE L.J. 1473, 1477 (1995) (describing how reservations and opt-out provisions in CITES permit states to permit “laundering” of endangered species); *infra* note 177 and accompanying text (discussing CITES).

Sometimes particular deals are struck with acceding parties. For example, while the Kyoto Protocol prohibited reservations, Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 26, Dec. 10, 1997, 37 I.L.M. 32, concessions made to Japan, Canada, Australia, and Russia reduced their emissions targets by two-thirds relative to the original 1997 terms. *Compare id.*, with Eric Pianin, *Emissions Treaty Softens Kyoto Targets*, WASH. POST, July 29, 2001, at A23 (citing World Wildlife Fund estimates). *See also infra* text accompanying note 151 (discussing “package deals”).

109. *See supra* note 2 (citing Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations and Vienna Convention on Succession of States in Respect of Treaties).

110. *See supra* note 6.

111. Edwards, *supra* note 6, at 362.

112. *See, e.g.*, AUST, *supra* note 1, at 107 (cautioning that “one should not exaggerate the problem” and that “[e]xcept perhaps for some human rights treaties, reservation are generally not so numerous or so extensive as to jeopardise the effectiveness of a treaty”). One analysis, for example, found that reservations were taken in small number to a minority of treaties (eighty-five percent of the multilateral treaties examined had no reservations, and only four percent had more than three reservations), were less common in more important treaties (and in wholly unimportant treaties, too), and usually had “no marked effect on the operation of the corresponding treaties.” *See* John King Gamble, Jr., *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AM. J. INT’L L. 372, 376-91 (1980). The findings are not without difficulty. Counting reservations is subjective and potentially misleading; self-styled declarations, for example, may also purport to modify treaty relations as would reservations. (Another author, for example, found 900 reservations to a set of treaties that a U.N. working paper had calculated at 700. Tyagi, *supra* note 61, at 188.) Gamble’s survey,

intricacies of reservations probably exceed their practical significance,¹¹³ they have remained a substantial issue for contemporary multilateral treaties¹¹⁴—even in efforts at varying from the Convention, as in the Kyoto Protocol and the International Criminal Court—suggesting that states regard the option as important.¹¹⁵ Few seriously dispute that the default rules governing their real and potential application are worth examining.

A narrower and more plausible claim emphasizes the irrelevance of any *other* state's reservations, not reservations as a whole. Judge Rosalyn Higgins has suggested that in human rights treaties, at least, states may care little about reservations affecting how another state treats its own citizens, citing the lack of objections to reservations that are facially incompatible with a treaty's object and purpose.¹¹⁶ Indeed, she posited that “one might almost say that there is a collusion to allow penetrating and disturbing reservations to go unchallenged.”¹¹⁷ Collusion aside,¹¹⁸ the basic intuition is that states care more about preserving their right to make reservations than they do about their right to object—which would help explain why they maintain a regime with inadequate incentives for objecting. This theory is also consistent with the tendency of domestic institutions to pay less attention to the reservations made by other states than to their own.¹¹⁹

moreover, was based on treaties entering into force just five years after the Vienna Convention was completed, and eight years before it entered into force.

113. HORN, *supra* note 24, at 370.

114. This is clearest for human right treaties. *See, e.g.*, SANDRA L. BUNN-LIVINGSTONE, *JURIS CULTURAL PLURALISM VIS-À-VIS TREATY LAW: STATE PRACTICE AND ATTITUDES* 296 (2000) (estimating that thirty-two percent of the state parties to six human rights conventions had made reservations to them); LIJNZAAD, *supra* note 20. But other treaties are also heavily qualified by reservations. *See, e.g.*, Gary E. Davidson, *Congressional Extraterritorial Investigative Powers: Real or Illusory?*, 8 EMORY INT'L L. REV. 99, 123 (1994) (claiming that “many key states that have acceded to [the Hague Service and Evidence Conventions] have done so subject to critically important reservations that serve to undermine their effectiveness”); Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 197 (1998) (noting that over forty percent of parties to the CISG had made reservations, resulting in “significant variations in the text of the CISG in force in Contracting States”).

115. *See supra* note 108; *infra* text accompanying notes 125-26.

116. Rosalyn Higgins, *The United Nations: Still a Force for Peace*, 52 MOD. L. REV. 1, 11-12 (1989); *see also* LIJNZAAD, *supra* note 20, at 397 (describing appearance of a “hypothetical problem” in human rights treaties, given number of reservations and paucity of objections); Tyagi, *supra* note 61, at 215 (“States generally do not see any legal interest in or need to object to reservations. In fact, most State bureaucracies simply do not consider the matter to be important enough to respond.”).

117. Higgins, *supra* note 116, at 12.

118. One might imagine states refraining from objecting in exchange for a tacit commitment that the reserving states will not object, in turn, to their reservations. States do prefer to avoid unnecessarily causing offense, and may risk retaliation in kind when they object. *See infra* note 215 and accompanying text. It is also true that some of the leading reserving states themselves make few objections. Tyagi, *supra* note 61, at 214 (citing record of Australia, India, Singapore, and the United States). But those states that object most vociferously do not appear to suffer any increase in objections to their own reservations, when they make them. *See* HORN, *supra* note 24, at 197-99 (providing selective data on the states most active in objecting to reservations and those offering the most objected-to reservations, and showing little overlap). Nor are there obvious episodes of tit-for-tat behavior. The United States, for example, drew many objections to its reservations to the ICCPR, but does not appear once to have objected to any other state's reservations; like China and Russia, it appears only rarely to object. *See* Tyagi, *supra* note 61, at 214.

119. For example, the U.S. Senate, which is zealous in protecting the ability of the United States to enter reservations, does not presently receive the reservations made by other state parties. CONGRESSIONAL RESEARCH SERVICE, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE*

Again, however, there are reasons to doubt this explanation's completeness. For one, the infrequency of objections may be due to their insufficient payoff under the Convention, which may or may not have been deliberate. It bears mention, moreover, that states *do* sometimes object, and have created mechanisms that entitle them to do so—to some degree, at least. (Perhaps the present system captures this ambivalence, but that seems like a just-so story.) This conjecture also could not explain adoption of the present system, with its particular eccentricities, as opposed to any other system that would be equally indulgent toward reservations—such as a permissive collegial mechanism—or, for that matter, one in which all reservations were permitted. It becomes a mystery, for example, why states would tolerate the emerging authority of treaty bodies over reservations, particularly their potential authority to declare a state's own reservations severable.¹²⁰ Finally, the conjecture fails to explain why states would have stuck with the same reservations regime for both normative and non-normative treaties. The answer, perhaps, resides in the hidden virtues of reservations for everyone.

B. *The Interests in Breadth—and Depth*

While these initial conjectures undoubtedly explain non-reserving state behavior to a substantial degree, they do not exhaust the alternatives. The most accepted interest in permitting reservations, prominent in the *Genocide Convention* opinion and in the International Law Commission's work, is that they encourage additional states to become parties.¹²¹ Even their critics concede that reservations contribute to developing broader participation.¹²² While the prospective benefit for treaties that are *already* widely subscribed seems marginal,¹²³ the era of new human rights-related treaties may not yet have passed.¹²⁴ Even the Rome Statute for the International Criminal Court,

OF THE UNITED STATES SENATE 19 (2001) (study prepared for the Committee on Foreign Relations of the U.S. Senate) [hereinafter CRS]. *But see* Reservations, *supra* note 17, at 178-79 (indicating that, as of 1970, reservations would be communicated to the Senate for its consideration and approval).

120. *But see supra* text accompanying notes 90, 92 (noting objections by France, the United Kingdom, and the United States to intervention by the Human Rights Commission).

121. *See Genocide Convention, supra* note 3, 1951 I.C.J. at 23; *supra* text accompanying note 28; 1966 ILC Report, *supra* note 15, at 38-39, [1966] Y.B. Int'l L. Comm'n 207-08 (emphasizing significance of reservations to increasing participation, and claiming that "the rule calculated to promote the widest possible acceptance of [multilateral treaties] may be the one most suited to the immediate needs of the international community"); Gamble, *supra* note 112, at 372 ("Most arguments in favor of the liberal use of reservations have as their cornerstone the belief that the liberal admissibility of reservations will encourage wider acceptance of treaties.").

122. *See, e.g.,* U.N. Off. of the High Comm'r for Human Rights, Comm. for the Elimination of Racial Discrimination, *Preliminary Opinion on the Issue of Reservations to Treaties on Human Rights*, ¶ 1, U.N. Doc. CERD/C/62/Misc.20/Rev.3 (Mar. 13, 2003) (describing reservations as "*le mal necessaire*" in order to "have as many States parties as possible," and asserting that "[i]t is obvious that many of the States parties would not have ratified" the CERD "if the possibility of making the respective reservations was denied to them"); LeBlanc, *supra* note 67, at 371 (acknowledging benefit of relatively liberal reservations regimes for the Convention on the Rights of the Child). In fact, officials in human rights regimes have reportedly encouraged states that are on the fence to explore the possibility of employing reservations. *See* Schabas, *supra* note 47, at 41.

123. The Convention on the Rights of the Child, for example, already has 191 signatories.

124. *See, e.g.,* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention]; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on

which actually prohibits reservations,¹²⁵ illustrates their potential virtue, since that prohibition probably contributed to the U.S. decision to stay out of the treaty.¹²⁶ The U.S. sensitivity with regard to reservations is rather extreme,¹²⁷ but it illustrates the broader point that reservations are especially significant for states in which the treaty power is shared.¹²⁸

Treaties sometimes expressly prioritize breadth, and it is easy to hypothesize benefits even when they do not.¹²⁹ An additional state's participation can have positive externalities for other participants, or at least reduce the relative costs imposed by membership.¹³⁰ Broadened participation also increases the chance that treaty norms will come to be regarded as customary international law, further advancing the cause of universality.¹³¹

Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507. Universality clearly remains a significant goal for the human rights project as a whole. See U.N. ESCOR, *Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System*, ¶¶ 14-36, U.N. Doc. E/CN.4/1997/74 (March 27, 1997) (prepared by Philip Alston) [hereinafter *ECOSOC Final Report*].

125. Rome Statute, *supra* note 102, art. 120.

126. *The International Criminal Court: Hearings Before the H. Comm. on International Relations*, 106th Cong. 5 (2000) (statement of John R. Bolton) (arguing that “if there were nothing else objectionable about this treaty, that alone would be a reason to reject it,” and that “[t]he notion that the Senate in its consideration can’t make appropriate reservations is an unacceptable precedent for the United States”); William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701, 711 (2004) (noting objection to prohibition of reservations by U.S. Ambassador to the negotiations and the likely resistance it would have encountered in the U.S. Senate); cf. Jack L. Goldsmith, *The Self-Defeating Criminal Court*, 70 U. CHI. L. REV. 89, 89 (2003) (arguing that “the ICC depends on U.S. political, military, and economic support for its success”).

127. *International Law in a World of Multiple Actors: A Conversation with Louis Henkin and Louis B. Sohn*, 92 AM SOC'Y INT'L L. PROC. 248, 257 (1998) (remarks of Louis Henkin) (“If you seek to destroy the possibility of U.S. adherence to treaties, take away the right to enter reservations. . . . [T]he United States would stop ratifying treaties.”); see also, e.g., *FRY Case Against NATO States Regarding Air Strikes*, 93 AM. J. INT'L L. 638, 639 (1999) (quoting statement of John R. Crook, U.S. State Department Assistant Legal Advisor, that “the possibility of making reservations was crucial to the ability of the United States to become a party to [the Genocide] Convention”).

128. The increase in popular control over treaty-making, such as through legislative participation, may be the principal explanation for the growth in using reservations. Bishop, *supra* note 24, at 263-64. The U.S. Senate, at least, has indicated concern when the United States has agreed to no-reservations clauses. CRS, *supra* note 119, at 15, 274-76.

129. See, e.g., Weston D. Burnett, *Mediterranean Mare Clausum in the Year 2000?: An International Law Analysis of Peacetime Military Navigation in the Mediterranean*, 34 NAVAL L. REV. 75, 145 (1985) (expressing concern that the Law of the Sea Convention's prohibition of reservations “is so restrictive that it may discourage state participation, thereby reducing the likelihood of the [Convention] attracting sufficient state parties”).

130. For example, expanding membership in the Kyoto Protocol reduces the comparative economic disadvantage of existing members. *Leadership Costs: What If The EU Leads on Climate Change, and No One Follows?*, FIN. TIMES, Mar. 1, 2004, at 16 (noting concerns by EU officials that European industry may suffer if other industrialized states do not become parties).

131. See Catherine Logan Piper, Note, *Reservations to Multilateral Treaties: The Goal of Universality*, IOWA L. REV. 295, 296-97 n.20 (1985) (citing Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 434-35 (1983)). If states adhere to a norm only because they subscribe to the treaty, however, it is unlikely that it would be regarded as significant evidence of customary international law, and it is “exceptionally rare” that the treaty would itself be regarded as creating customary international law. COMM. ON FORMATION OF CUSTOMARY (GEN.) INT'L LAW, INT'L LAW ASS'N, FINAL REPORT: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW §§ 24-27 (2000) [hereinafter *ILA FINAL REPORT*]; see also *infra* notes 256-260 and accompanying text.

And state parties will be temperamentally disposed to perceive benefits to others joining, at least if the terms are not wildly dissimilar.¹³²

Nonetheless, breadth seems like an insufficient basis for reservations. It is difficult to determine whether reservations are genuinely necessary to secure participation,¹³³ though states certainly have an interest in saying so.¹³⁴ Not all treaty parties are equals, moreover, and a state's appetite for reservations tends to diminish its desirability as a partner. Reservations may, it must be recalled, impair treaty integrity, uniformity, and consistency among members,¹³⁵ and in the aggregate undermine (rather than enhance) any claim to status as customary international law.¹³⁶

Breadth is also an ungainly explanation for the present reservations regime. States genuinely desiring breadth in a particular treaty could simply drop any compatibility limits or mechanisms for objecting, or water down onerous treaty terms. Alternatively, particularly significant potential parties could be cherry-picked through concessions tailored to their needs, rather than

132. See also James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT'L ORG. 943, 959-960 (1998) (arguing that international political actors, once engaged in an institution, realize the iterative nature of their relationships, "creat[ing] . . . mutual confidence and positive trust spirals").

133. 1966 ILC Report, *supra* note 15, at 38-39, [1966] Y.B. Int'l L. Comm'n 207-08; see also Gamble, *supra* note 112, at 393 ("[I]t is not evident that the liberal use of reservations necessarily encourages participation."). One dated survey found that treaties permitting reservations received "proportionately larger acceptances" than treaties limiting reservations (or which contain mainly one obligation, making reservations unlikely). OSCAR SCHACHTER ET AL., TOWARD WIDER ACCEPTANCE OF UNTREATIES 148 (1971). The survey also speculated, however, that "in some of these cases, the States would have accepted without reservations if reservations were not permitted." *Id.* at 154-55.

134. Recently, the United States insisted that the bar on reservations in the Framework Convention on Tobacco Control was fatal to its participation. See Jacob, *supra* note 105; Marc Kaufman, *U.S. Seeks To Alter Anti-Tobacco Treaty*, WASH. POST, Apr. 30, 2003, at A1. However, when other states held firm it signed nonetheless. *U.S. Lights Up Eyes by Backing Smoking Limits*, CHI. TRIBUNE, May 19, 2003, at 5; *United States Signs Tobacco Control Treaty*, FDCH Regulatory Intelligence Data, May 11, 2004; see generally Sean D. Murphy, *Adoption of the Framework Convention on Tobacco Control*, 97 AM. J. INT'L L. 689 (2003). It should be noted, though, that the Tobacco Convention has yet to be approved by the Senate. The U.S. reversal may also have been tolerable because less is at stake for framework treaties, which accommodate greater variation and often require additional protocols. Allyn L. Taylor, *An International Regulatory Strategy for Global Tobacco Control*, 21 YALE J. INT'L L. 257, 294 (1996).

135. Many have noted the conflict between universality and integrity. See, e.g., Gamble, *supra* note 112, at 373 n.4; LeBlanc, *supra* note 67, at 359; Redgwell, *supra* note 51, at 253. Losing uniformity might also be regarded as objectionable, for reasons of inter-state equity and mutuality. See M.H. Mendelson, *Reservations to the Constitutions of International Organizations*, 45 BRIT. Y.B. INT'L L. 137, 146-47 (1971). Universality's cost in terms of treaty integrity is sometimes expressed in terms of individual rights as well. See, e.g., *General Comment 24*, *supra* note 6, ¶¶ 4, 17. Whatever the merits of the criticism, it is curious that the sacrifice of universality at the state level might be defended on the ground of universality at the *individual* level.

136. This is clearest if states actually resort to reservations that have an impact on the observance of the norms in question. See Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 370 (1987). It is debatable whether the mere potential for reservations should count equally. Compare *North Sea Continental Shelf (F.R.G. v. Den. & Neth.)*, 1969 I.C.J. 3, ¶¶ 63-65 (Feb. 20) (citing failure to include delimitation of continental shelf areas between adjacent states among non-reservable provisions as evidence that it was "not regarded as declaratory of existing or emergent rules of law"), and Oxman, *supra* note 100, at 35 (citing potential for reservations to the Law of the Sea Convention to undermine arguments that it established international law binding on non-signatories), with ILA FINAL REPORT, *supra* note 131, § 22 (providing that "[t]he fact that a treaty permits reservations to all or certain of its provisions does not of itself create a presumption that those provisions are not declaratory of existing customary law").

adopting an overbroad approach allowing all states to take reservations.¹³⁷ Finally, breadth cannot redress the purported imbalance suffered by non-reserving states. Both reserving and non-reserving states benefit from increasing participation, presumably, yet reserving states are certainly the primary beneficiaries of their own reservations.

A sounder argument, rather, is that reservations increase the *depth* of treaty participation. Appeals to breadth suppose a static view of the underlying treaties, in which additional parties are added without affecting the treaty text; on this view, reduced commitments by those parties look like a tax on treaty integrity.¹³⁸ But this takes treaty contents as a given, when they may well be influenced by the opportunities for self-exemption.¹³⁹ If making reservations were significantly harder, states might subscribe at a lower rate, but they might also try to obviate the need for reservations by making the treaty's terms less demanding.¹⁴⁰ Treaty integrity, then, is less than an independent variable.

It may be perfectly reasonable, moreover, for states to tolerate reservations as the price for deeper treaty obligations. States may, of course, exaggerate the salience of reservations to their willingness to accept more stringent terms;¹⁴¹ moreover, states willing to accept an additional treaty obligation *without* reservation may, given the opportunity, reserve anyway.¹⁴²

137. Bishop, *supra* note 24. As, for example, in the series of Member State-specific protocols and agreements appended to the Treaty on European Union on matters ranging from the acquisition of property in Denmark to numerous provisions respecting central banking and the final transition to economic and monetary union. See Treaty on European Union art. 177, Feb. 7, 1992, 1992 O.J. (C 224), reprinted in 31 I.L.M. 247, 293-94. Such arrangements are presumably more easily made in plurilateral treaties.

138. To the extent the bargaining environment is implicated, it is only to note that states sometimes take reservations in order to achieve through the back door ends that they unsuccessfully pursued during negotiations. See, e.g., Jan Klabbers, *On Human Rights Treaties, Contractual Conceptions and Reservations*, in RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME 149, 181-82 (Ineta Ziemele ed., 2004) (citing authorities); see also Tyagi, *supra* note 61, at 255.

139. This sort of tradeoff is widely noted both in the international relations literature, see, e.g., George W. Downs, David M. Roche & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996), and in the legal literature, see, e.g., John K. Setear, *Ozone, Iteration, and International Law*, 40 VA. J. INT'L L. 193 (1999).

140. The ability to affect the stringency of treaty terms will depend, of course, on the nature of the voting rules employed during the negotiating process: were the treaty terms finalized by unanimous vote or by consensus, the power of would-be reserving states would be considerable, but their authority under a majority voting rule may be considerably less impressive. That said, the ability to enter reservations may influence the choice of voting rule. In negotiating the Child Rights Convention, the United States agreed to adoption by consensus, including a provision that prohibited the juvenile death penalty, so long as states retained the right to enter reservations to such provisions. *Report on the Working Group on a Draft Convention on the Rights of the Child*, ¶ 544, U.N. Doc. E/CN.4/1989/48 (1989).

141. They may also, as in the instance of the United States and the Child Rights Convention, fail to ratify the treaty at all after securing the right to formulate reservations. See *supra* note 140.

142. This may be particularly prevalent in divided-power democracies, such as the United States, in which the institutions charged with negotiation and signature are not identical with those involved in ratification. See *supra* text accompanying notes 126-128. Sometimes, however, a state may be divided against itself, and the Vienna Convention default overcome. See Jacob, *supra* note 105, at 298 (“[A] surprisingly large number of delegates argued in favor of the [no-reservations provision of the Tobacco Convention] on the grounds that if reservations were allowed, their own government would be likely to take some. . . . I watched the representatives of governments that apparently would have liked

Nonetheless, a default rule favoring reservations is defensible. Negotiated-for terms are likely to be relatively sticky, and may constrain states that would not otherwise conform their conduct to treaty standards.¹⁴³ Limiting reservations, moreover, increases the incentive for states to participate in multilateral negotiating (rather than relying on the opportunity to deviate later), which may risk thwarting consensus on any topic under discussion.¹⁴⁴ Indulging states with a particularly pronounced interest in reserving may, conversely, play an important role in enabling other states to participate in or lead negotiations, since states that intend simply to opt out of provisions may willingly surrender the pen to others.

None of this is to say, of course, that reservations invariably improve depth. Some treaties involve trades in which states accept a disfavored obligation in return for others making a concession on a different front; reservations might fatally undermine such deals, which is why treaties like the 1982 U.N. Convention on the Law of the Sea (UNCLOS)—the classic example of such a “package deal”—prohibit them.¹⁴⁵ But the lesson for other treaties is mixed at best. The UNCLOS “no reservations” clause was contested and contingent,¹⁴⁶ its fifteen-year negotiating procedure is cautionary,¹⁴⁷ and it only avoided the need for reservations by tolerating declarations,¹⁴⁸ allowing

to take reservations to the Convention deliberately acting to deprive their governments of the opportunity to do so.”).

143. Risk-averse states may be reluctant to commit themselves to additional obligations during treaty negotiations, but go along if they are provided with a reservation escape hatch—and, thereafter, fail to take advantage of that option because they have reassessed their concerns, because they had overestimated resistance to the obligation, or because circumstances have changed.

144. JAMES K. SEBENIUS, *NEGOTIATING THE LAW OF THE SEA* 207-14 (1984) (evaluating virtues and vices of adding parties to negotiations).

145. *See, e.g.*, REPORTS OF THE UNITED STATES DELEGATION TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 83 (Myron Nordquist & Choon-ho Park eds., 1983) [hereinafter U.S. REPORTS TO THIRD CONFERENCE] (“Since the Convention is an overall ‘package deal’ reflecting different priorities of different states, to permit reservations would inevitably permit one State to eliminate the ‘quid’ of another State’s ‘quo.’ Thus there was general agreement in the Conference that in principle reservations could not be permitted.”) (discussing the Ninth Session (Resumed)). Technically, the UNCLOS permits reservations where “expressly permitted by other articles” to the Convention, but there are no such expressions. United Nations Convention on the Law of the Sea art. 309, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3.

146. *See* Ted L. McDorman, *Reservations and the Law of the Sea Treaty*, 13 J. MARITIME L. & COMM. 481, 490-97 (1982) (describing negotiations). For example, it is notable that the prohibition on reservations was adopted with the understanding that the most controversial individual clauses might permit reservations, *see supra* note 145, and this seems to have satisfied some potential opponents. U.S. REPORTS TO THIRD CONFERENCE, *supra* note 145, at 450 (discussing the Ninth Session (Resumed)).

147. *See* SEBENIUS, *supra* note 144, at 182-207 (evaluating strengths and weaknesses of adding issues to multilateral negotiations).

148. The effect is disputed. *Compare* AUST, *supra* note 1, at 105 (noting that Article 310 of the UNCLOS permits declarations or statements that “do not purport to exclude or modify the legal effect of the provisions,” and that many states have taken advantage by lodging declarations or statements that have been objected to as reservations), *and* Sam K.N. Blay et al., *Problems with the Implementation of the Third United Nations Law of the Sea Convention: The Question of Reservations and Declarations*, 11 AUSTL. Y.B. INT’L L. 67, 68 (1984-87) (examining “disturbing” tendency of declarations to modify legal obligations under UNCLOS), *and* Burnett, *supra* note 129, at 145 (noting that declarations permit states to “circumvent” prohibition on reservations), *with* John King Gamble, Jr., *The 1982 U.N. Convention on the Law of the Sea: A Midstream Assessment of the Effectiveness of Article 309*, 24 SAN DIEGO L. REV. 627 (1987) (suggesting that the initial set of declarations did not significantly degrade the integrity of the treaty).

variance in state implementation,¹⁴⁹ and adopting vaguer obligations.¹⁵⁰ These accommodations are by no means unique, and reinforce the limits of package-making as a substitute for reservations.¹⁵¹ Nonetheless, package deals illustrate that the interest in depth is most compelling when states must be cajoled into accepting more stringent obligations than some would prefer, but less compelling when the deeper obligations are genuinely interdependent.

C. *The Interest in Information*

While breadth, and to a lesser degree depth, are easily recognized as values advanced by treaty reservations, the informational value of reservations has been entirely unexplored. This is surprising, given information's influence on international norms and practices.¹⁵² One of the central values of negotiating, concluding, and administering international agreements lies in producing information about other states. As Ken Abbott observed, where states have incentives both to cooperate and to act independently,

[I]nformation regarding the structure of the interaction, the incentives perceived by other states, and the compliance of others with their obligations will be crucial to international cooperation. . . . States will be reluctant to enter into agreements without clearly defined mechanisms for the ongoing production of reasonably timely and reliable information on these matters. Such mechanisms . . . may determine the success of an agreement in practice.¹⁵³

Many agreements, moreover, are oriented toward information production not only because of the information's relative value, but also

149. McDorman, *supra* note 146, at 496 (noting that the need for reservations regarding UNCLOS dispute settlement is avoided by the variety of treaty options and the possibility of opting out of compulsory dispute settlement for a period).

150. *Id.* at 490 (stating that the package deal approach has necessitated "employing ambiguous language to achieve agreement where agreement would not otherwise be reached.").

151. Other notable instances of no-reservations clauses justified in terms of package deals include the International Criminal Court and the WTO. *See, e.g.*, CLAUDE BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* 38 (2001); Sharon A. Williams, *The Rome Statute on the International Criminal Court—Universal Jurisdiction or State Consent—To Make or Break the Package Deal*, 75 INT'L L. STUD. 539 (2000). In the case of the WTO, reservations may not be made to the WTO Agreement itself, but they may be made to the annexed agreements. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations ¶ 4, Apr. 15, 1994, 108 Stat. 4809, 1867 U.N.T.S. 14 (Marrakesh agreement establishing the World Trade Organization). The ICC has no such mechanism. But states postponed any decision about crimes of aggression or the elements of crimes, *see* Rome Statute, *supra* note 102, arts. 5, 9, and permitted significant declarations, *see* Schabas, *supra* note 126, at 711 (citing examples).

152. *See, e.g.*, Randall H. Cook, *Dynamic Content: The Strategic Contingency of International Law*, 14 DUKE J. COMP. & INT'L L. 89, 104 (2004) ("Information-enhancing rules and organizations . . . provide the principal substantive content of international law."); Xinyuan Dai, *Information Systems in Treaty Regimes*, WORLD POL., July 2002, at 405, 405 (asserting that "information provision by international institutions lies at the foundation of neoliberal institutionalism. . .").

153. Kenneth W. Abbott, "Trust But Verify": *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1, 4 (1993). For other discussions of the significance of information in international agreements, *see* James D. Fearon, *Rationalist Explanations for War*, 49 INT'L ORG. 379 (1995); Lisa L. Martin & Beth A. Simmons, *Theories and Empirical Studies of International Institutions*, 52 INT'L ORG. 729, 740-42 (1998). *See also* HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION 202-23 (1997) (contrasting prominence of information in economic analysis and international relations theory with relative neglect in understanding the domestic politics of international affairs).

because more demanding objectives are unattainable. Human rights treaties probably illustrate both explanations. While such treaties do not provide much by way of traditional sanctions, some do establish elaborate mechanisms for reporting and, to a lesser degree, review of state policies.¹⁵⁴ The information thereby revealed may help to influence the behavior of parties and non-parties in their unilateral, bilateral, and multilateral relations with the state concerned.¹⁵⁵

The difficulty is that information may yet be difficult and expensive to obtain. With human rights treaties, for example, states routinely violate their reporting obligations, and the quality of their reporting is uneven at best.¹⁵⁶ Reforms are frequently proposed, but the basic difficulties—the disincentive for states to disclose embarrassing information about themselves,¹⁵⁷ or to turn one another in and risk retaliation in kind¹⁵⁸—remain.¹⁵⁹ As a result, one of the more modest objectives of the human rights treaty system is badly compromised.¹⁶⁰

Information is also painfully difficult to generate in other, non-normative treaties—such as arms control agreements—perhaps because more is at stake. Information about a state’s present constraints and preferences, and its expectations for the future, may be more closely held, and less available to

154. See, e.g., International Covenant on Civil and Political Rights, at 23, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; Torture Convention, *supra* note 124, art. 19.

155. The degree to which these obligations do in fact affect behavior—due, potentially, to some of the deficiencies in disclosure noted immediately below—is contested. Compare, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) [hereinafter Hathaway, *Do Human Rights Treaties Make a Difference?*], and Oona A. Hathaway, *Testing Conventional Wisdom*, 14 EUR. J. INT’L L. 185 (2003), with Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171 (2003).

156. See, e.g., ECOSOC Final Report, *supra* note 124, ¶¶ 37-59; ANNE F. BAYEFESKY, THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS 7-25 (2001), available at <http://www.bayefsky.com/report/finalreport.pdf>; ANNE F. BAYEFESKY, HOW TO COMPLAIN TO THE UN HUMAN RIGHTS TREATY SYSTEM 155 (2002); Anne F. Bayefsky, *Making the Human Rights Treaties Work*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 229, 234, 286 (Louis Henkin & John Lawrence Hargrove eds., 1994) [hereinafter Bayefsky, *Making the Human Rights Treaties Work*]; Dai, *supra* note 152, at 427.

157. LOUIS HENKIN, THE AGE OF RIGHTS 22 (1990) (“[M]any [state reports to the Human Rights Committee] are skimpy and almost all of them are self-serving and concealing rather than revealing inadequacies in compliance.”); J. SHAND WATSON, THEORY AND REALITY IN THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 155-56 (1999) (describing inadequacy of entrusting reporting to potential norm violators, including the fact that these states will tend to base reports on “internal law which they may not be implementing”); Bayefsky, *Making the Human Rights Treaties Work*, *supra* note 156, at 242 (describing complete inadequacy of some state reports, so much so as to call credibility into question).

158. WATSON, *supra* note 157, at 156 (noting that the check on self-reporting is other governments, which “[i]n order to avoid having to endure the same treatment at some later time . . . have a strong self-interest in defeating the full potential of the system”).

159. To be sure, genuinely non-state actors may have fewer disincentives, but suffer from more restricted access to information. Hathaway, *Do Human Rights Treaties Make a Difference?*, *supra* note 155, at 2009 (noting that even domestic and international organizations that are “genuinely committed to the ends of [human rights] treaties . . . have restricted access to information regarding the real impact of the treaties in individual countries”).

160. See, e.g., *id.* at 2023 (“The main method of enforcement and monitoring under the major universal treaties is a largely voluntary system of self-reporting. The bodies cannot assess any real penalties when countries fail to comply with reporting requirements, and these bodies possess insufficient resources to give complete and critical consideration to the reports that are made.”).

civil society.¹⁶¹ It is easier in theory to obtain information about compliance, but treaty organizations themselves rarely suffice;¹⁶² for the states' parts, uncertainty and incentives to mislead persist,¹⁶³ particularly where the interests of noncompliance victims and their states are not congruent,¹⁶⁴ and treaty mechanisms may be needed to generate additional information.¹⁶⁵ Even where sanctions are substantial, and diminish the significance of information production as an end in itself, this merely increases the incentives to dissemble.

Treaty reservations worsen these problems in some regards, since a state's ability to exempt itself may diminish its incentive to disclose information in negotiations, or to comply with any reserved-to mechanisms. Nonetheless, the potential countervailing benefits, even in informational terms, may be substantial.

1. *Information about Deviance*

First, in formulating a reservation, a state indicates how it cannot meet (or hopes not to meet) the treaty's original terms, in the course divulging private information about its preferences and likely constraints. The information may be incomplete, of course, in explaining the origin or significance of the limits; the state's reservation may or may not be a real prerequisite for its participation in the treaty.¹⁶⁶ Still, such information might have been otherwise unavailable to non-reserving states, or too costly for them to obtain.¹⁶⁷

The logic may be put in familiar law-and-economics terms. Parties establishing a default rule need to choose between providing what most parties likely desire and a "penalty" default that aims at something else—such as forcing parties to reveal information in the process of contracting around the rule.¹⁶⁸ Such information may shed light on the parties' intent, their understanding of the law and its constraints, or their type (for example, the risk that it will behave in a fashion inconsistent with the rule).¹⁶⁹ Parties will be reluctant to volunteer such information, however, because it exposes them

161. Abbott, *supra* note 153, at 14 (explaining that, given the incentives of other states to conceal negative or conflicting information, "[s]tates will often have to make do with incomplete knowledge of preferences, relying on reputation, recent experience and their own understanding of the situation as proxies"); *id.* at 15 (commenting that, with regard to expectations about the future, "such information is at least as problematic on an ongoing basis as it was initially").

162. Dai, *supra* note 152, at 405.

163. *Id.* at 409.

164. *See id.* at 413; *see also, e.g., id.* at 426 (discussing example of human rights regimes); *id.* at 431 (discussing example of environmental regimes).

165. Abbott, *supra* note 153, at 15-16.

166. *See supra* text accompanying notes 133-134 (discussing uncertain need for reservations).

167. *See supra* note 102-108; *infra* text accompanying notes 232-234 (discussing alternative mechanisms).

168. Information-forcing is not the only possible reason for choosing "minoritarian" defaults. *See* Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1591, 1593-1606 (1999) (describing other rationales). *But cf.* Eric A. Posner, *There Are No Penalty Default Rules in Contract Law* (Univ. Chi. John M. Olin Law & Economics Working Paper No. 237, 2005) (challenging the supposed prevalence of such rules).

169. *Cf.* Ayres & Gertner, *supra* note 168, at 1591, 1606 (discussing contracts context).

to exploitation by a more powerful party¹⁷⁰ or forces them to sacrifice a pooling-generated subsidy.¹⁷¹

Just so, reservations may be understood as a non-majoritarian means of achieving partial separation. Absent reservations, states might pool together in apparent allegiance to treaty obligations that were, on average, weaker and more ambiguous; with reservations and deeper obligations, the ratification process distinguishes some states from those pools, revealing salient traits.¹⁷² The adoption of deeper treaty terms—facilitated by reservations and by majority voting,¹⁷³ each of which also broadens the number of parties canvassed—spurs individualized exemption through reservations, revealing those states that prefer not to meet the heightened obligations.

The importance of reservations as an information-disclosing mechanism should not be overstated.¹⁷⁴ Some information may have been known before, at least by those that have reason to care. Even then, however, the reservation may be confirmatory, or make the information more public and tractable, including by disseminating it to non-governmental organizations. Information may also have been disclosed previously precisely *because* the ability to reserve later made doing so harmless.¹⁷⁵ The instrumental value of any information is also difficult to evaluate.¹⁷⁶

That said, recent experience is suggestive. Reservations may provide basic, but otherwise non-verifiable, information regarding compliance with negotiated treaty terms, as in Pakistan's reservation exempting its use of nuclear materials from the IAEA Convention on the Physical Protection of Nuclear Materials, which permitted other states to evaluate its intentions and formulate objections.¹⁷⁷ Reservations have also identified more general

170. Cf. Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992) (considering a private party facing another party with market power, and the opportunity to use revealed information to take more of the gains of trade).

171. Cf. Barry E. Adler, *The Questionable Ascent of Hadley v. Baxendale*, 51 STAN. L. REV. 1547 (1999) (explaining how an informed party may resist contracting around a default rule when doing so might eliminate subsidies achieved by lurking within an undifferentiated pool).

172. See Oren Bar-Gill & Omri Ben-Shahar, *The Uneasy Case for Comparative Negligence*, 51 AM. L. & ECON. REV. 433, 456-57 (2003) (“In a pooling outcome, individuals with different characteristics choose the same behavior. In a separating outcome, individuals choose different behaviors, each according to her unique characteristics.”). See generally DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW*, at chs. 3, 4 (1994).

173. On that relationship, see *Genocide Convention*, *supra* note 3, 1951 I.C.J. at 22 (“The majority principle, while facilitating the conclusion of multilateral conventions, may also make it necessary for certain States to make reservations.”).

174. For additional qualifications, see *infra* text accompanying notes 227-236.

175. Thus China, for example, disclosed to foreign diplomats in advance of signing the ICCPR that it would attach controversial reservations upon ratification, confident that it would nonetheless be able to maintain them. See *U.S. Interests at the June U.S.-China Summit: Hearing Before the S. Comm. on Foreign Relations*, 105th Cong. 36 (1998) (statement of Mike Jendrzeczyk, Washington Director, Human Rights Watch/Asia Division); see also Reservations, *supra* note 17, at 184 (quoting assessment by State Department official that other states would not object to U.S. reservations to the International Convention for the Prevention of Pollution of the Sea by Oil because the reservations had “been discussed informally with all of them”).

176. It may be expected, however, that vital information implicating national security is likely to be disclosed reluctantly—and not revealed solely for purposes of reducing international legal responsibility—and will at the same time be vigorously pursued by other states through different means.

177. See *supra* note 65 and accompanying text. In that instance, Pakistan has not yielded, but on other occasions reservations have effectively galvanized international pressure. For example, five

foreign relations positions, as in competing reservations regarding Kashmir: the Indian declaration limiting the right to self-determination under the ICCPR and the ICESCR, which illuminated a serious disagreement between newly independent states and former colonial powers,¹⁷⁸ and Pakistan's subsequent declaration that the International Convention for the Suppression of Terrorist Bombings did not apply to struggles for self-determination against foreign occupation, which elicited a rare objection by the United States (among many others).¹⁷⁹ Last, but not least, reservations provide information about the constraints imposed by domestic audiences. This is especially clear with human rights treaties—U.S. death penalty reservations and the Sharia reservations of Islamic states come to mind¹⁸⁰—but is by no means limited to them.¹⁸¹ Given the critical function of reservations in securing legislative agreement to treaty terms, and in enabling the delegation of negotiating authority in the first place, it is unsurprising that they would regularly communicate information about local politics.¹⁸²

State practice also suggests that the *absence* of reservations may communicate useful information. For example, Australia's renunciation of federalism reservations (and federal-state clauses) highlighted domestic constitutional developments that clarified the extent of the national government's powers.¹⁸³ Sometimes the signal has instrumental value

African states took reservations when the elephant was listed as a species in Appendix I to the CITES treaty, but withdrew in the face of international pressure and changed economic circumstances. Bill Padgett, Note, *The African Elephant, Africa, and CITES: The Next Step*, 2 IND. J. GLOB. L. STUD. 529, 535 (1995).

178. See 1 MULTILATERAL TREATIES, *supra* note 70, at 158 (declaration by India representing that the rights of self-determination “do not apply to sovereign independent States or to a section of a people or nation—which is the essence of national integrity”); *id.* at 162-63 (objections by France, Germany, and the Netherlands); Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 25-26 (1993) (noting role of India's reservation, and objections thereto, in clarifying disagreement over self-determination); Tyagi, *supra* note 61, at 194-95 (noting influence of India's declaration on international action and academics). The Indian statement, though styled as a declaration, was treated as a reservation by the objecting states, and was labeled as such by France. 1 MULTILATERAL TREATIES, *supra* note 70, at 162-63.

179. 2 MULTILATERAL TREATIES, *supra* note 70, at 126, 128-33 (reprinting Pakistani reservations and objections thereto). The objecting states, again, explicitly treated the Pakistani declaration as a reservation.

180. One study suggests that domestic law reservations of this type constitute the majority of reservations to human rights treaties. See BUNN-LIVINGSTONE, *supra* note 114, at 296.

181. For example, the United States Senate imposed 28 “conditions” on U.S. ratification of the Chemical Weapons Convention, including a provision barring the transfer abroad of any U.S. samples. Resolution of Ratification for the Chemical Weapons Convention, S. Res. 75, 105th Cong. (1997) (enacted). The impact of that restriction, and the risk it will be copied by other states, illustrates that inter-state information exchange may not always be beneficial. Michael Krepon, *Weak Without Treaties*, WASH. POST, Oct. 1, 2002, at A21 (arguing that if other states copy the Senate-imposed conditions, they might “prevent the discovery of ‘smoking guns’ during challenge inspections”); Barbra Slavin, *U.S. More Talk Than Action on Treaties*, USA TODAY, Oct. 27, 1998, at 13A (same). India, which is a party to the Convention, has considered retaining its samples as part of its implementing legislation. *India: Govt. To Amend Trade Union Act*, THE HINDU (Chennai), Mar. 8, 2000, at 11.

182. See Klabbers, *supra* note 138, at 149, 166-67 (citing deliberations within the International Law Commission regarding the importance of reservations to domestic politics); see also *supra* note 19.

183. Brian R. Opeskin & Donald R. Rothwell, *The Impact of Treaties on Australian Federalism*, 27 CASE W. RES. J. INT'L L. 1, 18-20 (1995). While the official policy change focused on federal state clauses, it also addressed reservations. Memorandum from Bob Carr, Premier, to Ministers: Principles and Procedures for Commonwealth-State Consultation on Treaties (Austl.), ¶¶ 8.1-8.2 (No.

precisely because it is unrepresentative. When the United States failed to take a reservation to the juvenile death penalty prohibition in the Fourth Geneva Convention, that was cited by international tribunals and death penalty opponents as evidence of customary international law.¹⁸⁴ None of this information would be available in the absence of reservations; the significance of a dog's failure to bark, to invoke Sherlock Holmes, rests on its ability to do so in the first place.

2. *Information about Reputation*

Reservations also provide a more positive message about a treaty state's attitude toward the remainder of the treaty and toward international obligations in general. Reservation-based treaty deviance is not, significantly, the same thing as treaty *breach*: although reservations indicate that a state may not comport itself according to certain negotiated terms, they also mean that the state is willing to subject its self-exemption to international scrutiny, and reaffirm the state's commitment to those terms to which it has *not* taken a reservation.¹⁸⁵ By the same token, reservations allow the state to avoid any generalized inferences about its trustworthiness that might follow in the event of a reservation-less breach.¹⁸⁶

This interest also sounds in law-and-economics terms—in this case, a signaling model familiar to international relations scholarship. Signals allow parties to indicate their type by doing something that others are unlikely to do—usually by taking costly actions that only those of its type would be willing to bear.¹⁸⁷ If reservations are somewhat costly (because they expose the state to objections and reveal information about deviance), yet signal that the state is of a type that takes international obligations seriously, reserving states may be understood as engaging in a different, more voluntaristic kind of separation—one that incurs initial costs in order to identify them as *less* costly states.

97-01) (1997), available at http://www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/1997/m97-01.htm.

184. See, e.g., *Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 67 (2002), available at <http://www.cidh.oas.org/annualrep/2002eng/USA.12285.htm>. That implication was disputed. See Observations of the United States Government on the Report of the Inter-American Commission Made on October 15, 2001, Re: Case No. 12.185 (Michael Domingues), <http://www.cidh.oas.org/respuestas/usa.12185.htm>; Brief for the United States as Amicus Curiae at 17, *Domingues v. Nevada*, 528 U.S. 963 (1999) (No. 98-8327), 1999 WL 33639524.

185. See, e.g., Statement by Lars Magnuson, Legal Adviser, Statement on Behalf of the Nordic Countries, Oct. 29, 1998, http://www.swedenabroad.com/pages/general____13288.asp (last visited Apr. 29, 2006) (“Reservations carefully lodged can be seen as a sign that the reserving state takes treaties seriously.”). This is, to be sure, a complex signal. See *infra* text accompanying notes 192-195.

186. See, e.g., *International Human Rights Treaties: Hearings Before the S. Comm. on Foreign Relations*, 96th Cong. 31 (1980) (testimony of Davis R. Robinson, former legal advisor) (“The rationale behind the reservations is, rather, that we take our international legal obligations seriously, and therefore will commit ourselves to do by treaty only that which is constitutionally and legally permissible within our domestic law.”).

187. See, e.g., James D. Morrow, *The Strategic Setting of Choices: Signaling, Commitment, and Negotiation in International Politics*, in STRATEGIC CHOICE AND INTERNATIONAL RELATIONS 88 (David A. Lake & Robert Powell eds., 1999). Whether signals must be costly is a point of dispute. See *infra* note 228.

It is difficult to provide examples of state behavior that can only be explained as signaling.¹⁸⁸ Certainly the decision to reserve *ex ante*, thus suffering certain costs in exchange for what is often a future contingency, is itself suggestive. States unconcerned with reputation might, after all, simply breach the treaty if the necessity arose, rather than suffering up-front costs for contingent gain. In the alternative, states might style their departures from a treaty as mere declarations—which is unlikely to undermine their effectiveness in a pinch¹⁸⁹—but for the fact that such moves signal bad-faith interpretation rather than a capacity to respect binding obligations. Finally, some reservations successes suggest the potential for differentiated signaling. For example, Russia has been criticized for noncompliance with the European Convention on Human Rights, but its slow progress in reforming its code of criminal procedure—for which it entered a “temporary” reservation upon acceding—appears to have been treated more indulgently,¹⁹⁰ perhaps because its reservation echoed the kind of lawful, measured adaptation that other states had been allowed.¹⁹¹

To be sure, international lawyers often hold reputation in higher regard than states seem to. States do not always value being trustworthy over more aggressive profiles,¹⁹² and they can undoubtedly breach some treaties without endangering their reputation for all others.¹⁹³ Proposing particularly sweeping or numerous reservations, moreover, may call into question a state’s legal

188. See generally Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625, 640-42 (2001) (reviewing ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000)) (describing difficulty of empirically assessing signaling theories).

189. As noted previously, whether a statement is styled a reservation or a declaration is not conclusive as to whether it functions as a “reservation” for purposes of the Vienna Convention. See *supra* text accompanying notes 107-108, 112. This makes it possible for states to lodge statements they term declarations, which are less likely to attract objections, and later to rely on them as though they were reservations. Tyagi, *supra* note 61, at 181, 212 (noting possibility of abuse, and describing example).

190. See, e.g., EUR. PARL. ASS., *Honouring of Obligations and Commitments by the Russian Federation*, Doc. 9396 (2002), available at <http://assembly.coe.int/Documents/WorkingDocs/doc02/EDOC9396.htm>; EUR. PARL. ASS., *Honouring of Obligations and Commitments by the Russian Federation*, Doc. 8127 (1998), available at <http://assembly.coe.int/Documents/WorkingDocs/doc98/edoc8127.htm>; EUR. PARL. ASS., *Resolution 1277 (2002) on the Honouring of Obligations and Commitments by the Russian Federation*, <http://assembly.coe.int/Documents/AdoptedText/ta02/ERES1277.htm>.

191. Jeffrey Kahn, Note, *Russian Compliance with Articles Five and Six of the European Convention of Human Rights as a Barometer of Legal Reform and Human Rights in Russia*, 35 U. MICH. J. L. REFORM 641, 660 (2002) (commending Russian reservation as “impl[y]ing] awareness in Russian legal and political circles of the dissonance between European and Russian standards in these areas,” and as “an entirely proper method of signaling awareness of such noncompliance with expected obligations under the Convention”).

192. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 102-03 (2005); Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT’L L.J. 487 (1997).

193. See GOLDSMITH & POSNER, *supra* note 192, at 102; George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEG. STUD. 95 (2002) (relying principally on different compliance rates, sometimes even within related subjects-matter). *But see*, e.g., Scott Barrett, *International Cooperation and the International Commons*, 10 DUKE ENVTL. L. & POL’Y F. 131, 139 (1999) (“A damaged reputation resulting from noncompliance can make it difficult for a deviant to enter into future agreements. Even a single deviation carries the risk of precipitating general erosion in law abidance, to the detriment of all states.”).

fidelity to the treaty in question.¹⁹⁴ Acknowledging this, the reservations regime affords reserving states flexibility—using reservations to signal a respect for the remaining obligations, or refraining from reservations in order to demonstrate an unblemished commitment to a particular treaty—that, because it permits more state-specific information to be conveyed, is likely to benefit non-reserving states as well.¹⁹⁵

3. *Synthesis*

These two types of information—about prospects for deviance, and a state’s regard for its reputation—clearly relate to each other. States may be reluctant to reveal any information, and disclosing how they deviate from a treaty that they cared to ratify may be singularly unappealing. Disclosure might, conceivably, merely be the price for the defense that reservations provide against claims of treaty breach. But reservations also bolster a state’s reputation by showing that they take treaty commitments seriously enough to broadcast when they cannot comply, benefiting them by avoiding unwanted inferences from subsequent conduct about their trustworthiness.¹⁹⁶

This account suggests how the information provided by reservations may ultimately serve both reserving and non-reserving states. Reserving states may learn something from how other states react.¹⁹⁷ Indeed, given the inadequate legal incentives for objecting, non-reserving states probably object in large part *because* of this communicative value.¹⁹⁸ Reservations may also ward off potential disputes, for instance by facilitating subsequent agreements. For example, the Geneva Conventions of 1949, anticipating the inability of belligerents to agree on protecting powers to safeguard the interests of prisoners of war and civilians, obliged detaining powers to designate a neutral party to assume those functions.¹⁹⁹ When Communist states entered reservations to those provisions, insisting that the detainees’ states needed to

194. See, e.g., Committee on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women*, ¶ 14, U.N. Doc. A/53/38/Rev.1. (1998) (“Reservations to any human rights treaty . . . indicate clearly the degree of commitment of the reserving State to full compliance with the particular treaty.”); cf. John K. Setear, *Law in the Service of Politics: Moving Neo-Liberal Institutionalism from Metaphor to Theory by Using the International Treaty Process To Define “Iteration,”* 37 VA. J. INT’L L. 641, 714-16 (1997) (describing quandary as to whether to consider reservations as an instance of defection or compliance).

195. See Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 617-18 (2002).

196. Additional answers are suggested by the structure of the Vienna rules. See *infra* text accompanying notes 228-36.

197. See Anja Seibert-Fohr, *The Potentials of the Vienna Convention on the Law of Treaties with Respect to Reservations to Human Rights Treaties*, in RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME, *supra* note 138, at 183, 208 (“Objections to reservations give insight into States parties’ understanding about incompatibility.”).

198. See *supra* notes 187-191 and accompanying text (discussing signaling).

199. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 10, Aug. 12, 1949, 6 U.S.T. 3115, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 10, Aug. 12, 1949, 6 U.S.T. 3219, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 10, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 11, Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287.

consent to any such choice, that alerted detaining powers, neutral states, and humanitarian organizations to the importance of consulting those states²⁰⁰—and influenced the negotiation of Geneva Protocol I, which modestly improved the ease of selecting a neutral body to perform as a protecting power, as well as creating supplementary compliance mechanisms.²⁰¹

This and similar experiences suggest that reservations may constructively identify gaps in existing agreements, allowing parties to revisit them²⁰² or to develop other solutions.²⁰³ Such gaps exist, of course, because agreement on those terms—with those reserving states—is difficult. At the same time, if the criticisms of reservations are well taken, and reservations are entered opportunistically, the fact that reservations were taken does not necessarily signal an impasse. It does, however, vest the non-reserving states with a decision concerning how to react properly.

D. *The Interest in Reserving*

Article 21(b) of the Vienna Convention provides that a reservation properly established with respect to another state not only modifies treaty obligations for the reserving state, but also “modifies those provisions to the same extent for that other party in its relations with the reserving State.”²⁰⁴ This reciprocity nominally serves two functions. First, it deters reservations, if a reserving state’s interest in its reservation is outweighed by the harm (to it) of extending the reservation to others. Second, if reservations are nonetheless formulated, reciprocity means that they potentially benefit non-reserving states too; if another state’s reservation conveys benefits through reciprocity that outweigh its costs, a non-reserving state may actually welcome it.²⁰⁵

200. Claude Pilloud, *Reservations to the Geneva Conventions of 1949*, 180 INT’L REV. RED CROSS 107, 118-19 (1976).

201. George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT’L L. 42, 55-57 (2000).

202. Ronald B. Mitchell, *Sources of Transparency: Information Systems in International Regimes*, 42 INT’L STUD. Q. 109, 109, 113 (1998); see, e.g., Reservations, *supra* note 17, at 157 (citing reservations to Economic Agreement of Bogotá as reason to think “it may be wise to continue negotiations . . . in an attempt to secure the withdrawal of the reservations and the conclusion of a more satisfactory and precise understanding”); Davidson, *supra* note 114, at 123 (explaining that reservations by other signatories to the Hague Service and Evidence Conventions “may offer the U.S. Congress, at the very least, a starting place to begin negotiating expanded extraterritorial power”).

203. Thus, for example, Switzerland’s reservation to the Convention on the Elimination of Racial Discrimination, which permits it to differentiate among foreign laborers based on their country of origin, was criticized as incompatible with the object and purpose of the treaty. See Committee on the Elimination of Discrimination Against Women [CEDAW], July 2-20, 1993, *Ways and Means of Expediting the Work of the Committee*, ¶¶ 47-48, U.N. Doc. CEDAW/C/2001/II/4. That brought it to the attention of the European Commission against Racism and Intolerance, which renewed the criticism, European Commission against Racism and Intolerance, *ECRI’s Country-by-Country Approach: Report on Switzerland*, ¶ 19, CRI (98) 27, available at http://www.coe.int/T/E/human_rights/Ecri/5-Archives/1-ECRI%27s_work/1-Country_by_country/CBC1-Switzerland.pdf, and Switzerland modified its policy—albeit imperfectly. European Commission Against Racism and Intolerance, *Third Report on Switzerland*, ¶¶ 94-104, CRI (2004), available at http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/2-Country-by-country_approach/Switzerland/third%20report%20Switzerland%20-%20cri04-5.pdf; see also, *id.* at 34-35 (reporting response by Switzerland).

204. Vienna Convention, *supra* note 2, art. 21(b).

205. Thus, for example, British officials evaluating a Libyan reservation to the 1961 Vienna Convention on Diplomatic Relations permitting the opening of diplomatic bags observed that, while

There is reason to think that neither condition is satisfied with any frequency, and that reciprocity is rarely very attractive. In a recent article, Francesco Parisi and Catherine Ševčenko evaluate reciprocity as a possible solution to what they perceive as a contradiction: while the reservations regime favors the reserving states, reservations do not seem to be as common as this “natural advantage” suggests.²⁰⁶ Reciprocity, they conclude, provides a solution only when the states involved are in symmetrical positions, something that seems particularly unlikely in human rights treaties.²⁰⁷ (If anything, they understate reciprocity’s limits, since reciprocity benefits non-reserving states only against the reserving state—meaning that they remain vulnerable to any other party’s invocation of their treaty obligations—while the reserving state benefits from the reservation at least in relation to all non-objecting states.²⁰⁸) The result, in their analysis, is that the Vienna Convention ensures excessive and sub-optimal reservations, and the solution lies either in barring reservations or in persuading states to take a keener interest in other states’ compliance.²⁰⁹

But perhaps reciprocity simply needs to be understood in broader terms. Reservations benefit other states when they themselves reserve by, for example, having set a precedent or increased the prospect that their reservations will be overlooked.²¹⁰ Reservations may also confer a different kind of discretion on the non-reserving. As Richard Bilder observed, reservations reduce a reserving state’s risk by conferring latitude to deviate from a treaty’s terms in the future, at the cost of uncertain treaty relations with non-reserving states.²¹¹ It bears emphasis, however, that non-reserving states—like reserving states—do not abhor uncertainty; what they wish to

Libya had never exploited the reservation, the United Kingdom was nonetheless entitled to benefit from it. 60 BRIT. Y.B. INT’L L. 510, 511-13 (1984).

206. Parisi & Ševčenko, *supra* note 97, at 1, 25. Understandably, they do not explain how many reservations would be predicted (and, thus, how “relatively low” reservations are at present). *Id.* at 17-20. Their sense that reservations are less common than they might be is consistent, however, with other assessments. *See supra* note 112.

207. *Id.* at 9-24; *see also* Special Rapporteur, *Second Report, First Add.*, *supra* note 105, ¶ 152. To choose extreme examples, it is unlikely that a secular state would benefit from Sharia-related reservations, or that others would benefit from Belgium’s (former) CEDAW reservation exempting Belgian law that required the sovereign and successors to the crown to be male.

208. *See 1966 ILC Report*, *supra* note 19, at 38 (“[T]he equality between a reserving and non-reserving State, which is the aim of [the objections principles], may in practice be incomplete. For a non-reserving state, by reason of its obligations toward other non-reserving States, may feel bound to comply with the whole of the treaty, including the provisions from which the reserving State has exempted itself by its reservation.”). As noted previously, the reserving state’s position with respect to objecting states is virtually identical. *See supra* text accompanying notes 76-79.

209. *See* Parisi & Ševčenko, *supra* note 97, at 24 (discussing human rights).

210. Latecomers indeed appear to make more reservations, but it is not clear whether this is due to the precedent set for them or some other factor—such as the same hesitancy that delayed their accession, or the opportunity to see how the treaty operates, including at the hand of treaty bodies. Eric Tistounet, *The Problem of Overlapping Among Different Treaty Bodies*, in *THE FUTURE OF HUMAN RIGHTS TREATY MONITORING* 397 (Philip Alston & James Crawford eds., 2000). Even similarly-termed reservations, which might suggest imitation, may be better attributed to a similarity of circumstance. *Cf.* EVA BREMS, *HUMAN RIGHTS: UNIVERSALITY AND DIVERSITY* 267-84 (2001) (identifying similarities—and differences—in Islamic human rights reservations).

211. RICHARD B. BILDER, *MANAGING THE RISKS OF INTERNATIONAL AGREEMENT* 71-73 (1981).

avoid, rather, is uncertainty dictated by someone else.²¹² Under the Vienna Convention, reservations allow a reserving state discretion as to whether it complies with a treaty, but they also allow non-reserving states the same rights *inter se*, as well as the ability to “reserve” their own judgment regarding the propriety of the reservation.²¹³

The interest in this broader kind of reciprocity requires understanding the complicated perspective states have on objecting. For reasons already discussed, the Vienna Convention creates surprisingly limited opportunities for non-reserving states to actually change the reserving state’s policy. But states may only weakly favor such changes, all things considered. Assuming states care to encourage treaty compliance in the first place,²¹⁴ they may regard another state’s reservations as peripheral to its compliance with the remainder of the treaty. States may also fear repercussions if they confront that state, including retaliatory complaints about their own reservations or breaches, treaty denunciation by the reserving state (thus slipping any obligations whatsoever),²¹⁵ or simply a chill in relations.²¹⁶

This suggests that non-reserving states might sometimes prefer not to object, even if they would also have preferred that the other state not formulate reservations in the first place. In addition, a state may actually *embrace* another state’s decision to formulate reservations. Perhaps the non-

212. See Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT’L ORG. 495, 518-23 (1991).

213. Interestingly, a delegate addressing the Vienna Convention put the insurance benefits of reservations in terms nominally applicable to non-reserving states as well. United Nations Conference on the Law of Treaties, First Session, Vienna, Austria, Mar. 26-May 24, *Official Records, 23d Meeting*, ¶ 6, U.N. Doc. A/Conf.39/11 (1971) (Sarin Chhak of Cambodia, noting that “[r]eservations could also have the advantage of enabling a treaty to be adapted to changing circumstances” and that “[a] reservation was based on the desire of reserving State [sic] to adapt the treaty to its own needs, but it could also be based on developments resulting from changing circumstances in general”).

214. Compare, e.g., Hathaway, *Do Human Rights Treaties Make a Difference?*, *supra* note 155, at 2007 (arguing that human rights treaties reward “positions rather than effects,” and may serve “to relieve pressure for real change in performance in countries that ratify the treaty”), with Goodman & Jinks, *supra* note 155, at 178-82 (disputing implication that ratification reduces international pressure). For normative treaties, the issue turns on conflicting intuitions as to whether states care about conditions abroad. Compare WATSON, *supra* note 157, at 65 (“[I]n the typical pure human rights case, there is inevitably insufficient interest on the part of other states for them to sanction effectively when confronted with a violation”), and LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS* 253 (1989) (making similar argument), with MENNO T. KAMMINGA, *INTER-STATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS* 136 (1992) (arguing that states join human rights treaties to put pressure on others to become parties, or in reaction to such pressure), and *id.* at 56, 61 (citing increasing willingness of states to intercede on behalf of foreign victims of human rights violations), and *id.* at 136-37 (citing examples of states willing to object to the reservations formulated by other states).

215. See CAHDI, *Practical Issues*, *supra* note 14 (noting “instances where States have denounced a treaty to which they had not made reservations with a view to re-acceding to the treaty with reservations”). The leading example concerns Trinidad and Tobago. See *supra* note 93.

216. See, e.g., Parisi & Ševčenko, *supra* note 97, at 21 (“[S]tates may hesitate to object to a reservation for fear of causing unnecessary tension in existing bilateral relationships.”); Tyagi, *supra* note 61, at 215 (suggesting that states “know that an intolerant approach towards reservations may give rise to legal and political complications”). It may seem incongruous that states face little practical consequence from objections, yet resent them; nevertheless, objections have raised hackles in the past. See, e.g., John Quinn, *The General Assembly into the 1990s*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 71 (Philip Alston ed., 1992) (describing sensitivity of Islamic delegations to criticisms of their human rights reservations).

reserving state regards its consequent right to object as a chit for trading with the reserving state, though that right should confer little real bargaining power. More often, it may perceive that the reserving state will engage in exactly the same conduct regardless—so that objections are irremediable and lose face, or simply box the would-be reserver into a treaty breach (and pose the still more delicate prospect of complaining about that). That states dislike such legalized confrontation may be inferred from the rarity of formal inter-state complaints²¹⁷ and the infrequency with which even informal complaints invoke international law.²¹⁸ In the event a treaty breach is provoked, a non-reserving state faces a more difficult task in disarming domestic constituencies, which may pressure it to enforce another state's treaty responsibilities irrespective of the political costs, converting the sovereign's right to object or complain into an unwanted political obligation.²¹⁹

To be clear, the point is *not* that states invariably prefer to tolerate reservations. Non-reserving states may consider it vital to object to a reservation—to take a stand in favor of treaty integrity, to protect their interests *inter se*, or to enhance their reputations for legal rectitude—or they may be completely indifferent. Such preferences will vary by state, by treaty, and over time,²²⁰ just like the reserving state's interest in exploiting reservations—depending on the status of relations with the reserving state,²²¹ the behavior of third states,²²² and domestic dynamics, which may (for

217. This is especially clear for human rights treaties, where mechanisms like Article 41 of the ICCPR (which permits other states to complain to the Human Rights Committee) are rare and poorly subscribed. Even among the states consenting to inter-state complaints—seemingly a self-selected group more tolerant of criticism—not a single one has been lodged, notwithstanding a regular traffic of individual complaints. One concern is likely the possibility of retaliation, since by their nature such mechanisms expose would-be complainants themselves—giving rise to “reciprocal inaction.” WATSON, *supra* note 157, at 159 (citing the ICCPR, Torture Convention, and CERD). Another reason may be adequate informal mechanisms for inter-state discussions. JAMES FLOOD, *THE EFFECTIVENESS OF UN HUMAN RIGHTS INSTITUTIONS* 37 (1998).

218. KAMMINGA, *supra* note 214, at 58 (concluding that “interceding states appear only rarely to make a point of invoking the applicable international standards,” and that “[n]o difference can be perceived in the character of intercessions addressed to states bound by relevant treaty provisions and intercessions addressed to states not formally bound by such obligations,” and speculating that humanitarian appeals are more effective and less irritating than invoking international law).

219. See, e.g., *Cuba Rights Censure Sparks Uproar*, BBC NEWS INT'L VERSION, Apr. 15, 2004, <http://news.bbc.co.uk/2/hi/americas/3628435.stm> (describing U.S.-sponsored resolution of censure adopted by the Human Rights Commission, attendant fallout, and criticism of U.S. indulgence of other states with human rights compliance issues).

220. Every state, however, is subject to such considerations. PETER BAEHR, *THE ROLE OF HUMAN RIGHTS IN FOREIGN POLICY* 157-58 (1994) (noting competing considerations posing dilemmas for governments concerned with human rights); *id.* at 145-46 (noting acknowledgment by the Netherlands that human rights must be reconciled with other aspects of an overall foreign policy); KAMMINGA, *supra* note 214, at 57 (noting competing considerations confronting any state concerned with human rights).

221. For example, objecting might be appealing when the relationship is beyond salvaging, or perhaps when the relationship is so strong as to withstand disagreement.

222. A more reticent state may, for example, prefer to gauge the reaction of other states; other objections may reduce pressure to call attention to the problem, provide cover should another state wish to follow suit, and inform a state's decision by providing feedback on how seriously other states perceive the risks posed by the reservation. Some have suggested that prior objection by a third state deters further objections, because “additional objections would make no legal difference.” Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on the Customary Law of Human*

example) lead a state's executive branch to prefer increasing or reducing the opportunities for objection.²²³ This contingency is exactly the point. Non-reserving states likely appreciate rules that give them flexibility in reacting to reservations and, in particular, allow them to reserve judgment as to whether, how, and when reservations may be opposed—the better to manage the risk that the reservations themselves seek to control.

IV. REVISITING THE VIENNA CONVENTION

A fuller theory of the interests of non-reserving states permits a fuller appreciation of the Vienna Convention. To be sure, the Vienna Convention's drafters may have been inattentive to those interests²²⁴ or willing to compromise them,²²⁵ and perhaps state dissatisfaction with the result has simply been insufficient to spur revision.²²⁶ But it is also possible that non-reserving states benefit from the reservation regime and its ambiguities to an unexpected degree, and that state practices under the Convention are closer to an equilibrium solution than has been supposed. If so, even the relatively modest reforms proposed to date by the International Law Commission may be undertheorized. It is useful, then, to reexamine some of the Vienna Convention's ambiguities, and their possible resolution, in this light. This is, unavoidably, a normative inquiry, but a relatively modest one: the question is simply whether the potential tradeoffs have been adequately understood, on the assumption that discernible interests should not be blithely ignored.

A. *The Initial Standing of Reservations*

To date, the International Law Commission has not attempted to resolve the debate between the permissibility and opposability approaches to the Vienna Convention,²²⁷ even though maintaining a viable opposability

Rights, 25 GA. J. INT'L & COMP. L. 99, 124 (1995-96). For reasons previously mentioned, additional objections *do* make a legal difference, but perhaps not a sufficient one.

223. In the United States, the President has traditionally been less receptive to human rights concerns and more disinclined to exert pressure on "reluctant friendly foreign governments," while Congress has generally been more receptive to populist human rights pressures. HENKIN, *supra* note 157, at 67-70, 73. The same dynamic is apparent in other international contexts, such as trade, where Congress has attempted to constrain the authority of the U.S. Trade Representative to underenforce violations of international agreements.

224. Negotiators sometimes seemed heedless of distributional consequences. For example, the convention reversed a presumption that objections would prevent the entry into force of the treaty between the reserving and objecting parties, but an expert consultant, Sir Humphrey Waldock, opined that it mattered little which way the rule was stated "provided it was perfectly clear." United Nations Conference on the Law of Treaties, Second Session, Apr. 9- May 22, 1969, Vienna, Austria, *Official Records, Tenth Plenary Meeting*, ¶ 74, U.N. Doc. A/Conf.39/11 (1971). *Cf. infra* notes 273-278 and accompanying text (discussing emphasis on clarity).

225. Vaguer standards like incompatibility may have been useful in securing agreement. *Cf.* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (discussing purposeful ambiguity in Article 2 of the Uniform Commercial Code).

226. Contrast, in this regard, the reaction by private parties to Article 2. Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009 (2002).

227. *E.g.*, Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fiftieth Session*, at 202-203, U.N. Doc. A/53/10 (1998) [hereinafter *1998 ILC Report*] (distinguishing between definition of reservations and their permissibility and impermissibility); *cf.* Special Rapporteur, *Eighth Report, First Add.*, *supra* note 71, ¶ 76 (indicating that "it would be better not to mention the

interpretation—which lets individual states judge for themselves which reservations are compatible with the object and purpose of a treaty—seems to neglect the interests of non-reserving states. In practice, given inadequate incentives to object, opposability entrusts *reserving* states with substantial responsibility for determining what is acceptable to everyone else; while they likely care whether their reservations generate ill-will, even absent objections, this may seem inadequate.

Unpacking the interests of non-reserving states helps redeem this state of affairs, but raises other quandaries. As noted previously, reservations provide information concerning the reserving state's likelihood of deviating from the treaty's negotiated terms—information facilitated by the prior negotiation of more stringent terms, which are themselves facilitated by the possibility of reservations. But why would states divulge such information, which risks portraying them as “bad,” nonconforming types with whom treaty arrangements are less profitable? Any reservations regime provides a partial answer: the principal effect of reservations is to immunize the reserving states' related conduct from complaints of breach, and reservations also allow those states to signal that they take their treaty obligations seriously.

The peccadilloes of the Vienna Convention regime provide additional inducements. Most significantly, the Convention's scheme caps the downside of disclosure.²²⁸ Unlike private contracting, in which a party revealing information may face renegotiation on key terms, reservations by definition postdate conclusion of the treaty's terms.²²⁹ The Vienna Convention also limits other forms of reprisal: as previously explained, reserving states make the initial assessment of compatibility; ordinary objections, when made, tend to leave the reserving state with what it sought in the first place; and by default, no reservation is a cause for severing treaty relations.²³⁰ Finally, if something should go awry, the Convention makes withdrawing reservations

moment when an objection can be formulated” in defining objections, but that it should instead be examined and addressed separately). Perhaps the most attention to date has been lavished on the proper terminology. *See* Special Rapporteur, *Tenth Report*, *supra* note 7, ¶¶ 1-9; *2005 ILC Report*, *supra* note 7, ¶¶ 391-99.

228. This highlights a familiar tension in the signaling argument. If non-reserving states benefit from the information at the expense of reserving states, this will diminish the number of states willing to make such disclosures, and thus the significance of the mechanism. If, on the other hand, reservations are costless—because they have little adverse consequence, or substantial collateral benefits—their ability to signal anything about the reserving state's general trustworthiness may be doubted, since a reservation can be made without sacrifice. For immediate purposes, it suffices to suggest that the signal is somewhat costly, even if it is not optimized. *But cf.* David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 *Nw. U. L. REV.* 879, 882 & n.20 (2003) (noting varying emphases on costliness as a precondition for signaling).

229. *But see infra* text accompanying note 293 (discussing objections with intermediate effect, and reservations dialogues in general).

230. To be sure, much of the potential information is revealed with the *formulation* of the reservations, and does not require that those reservations be tolerated. But if reservations were vigorously and immediately scrutinized, and risked preventing the reserving state from becoming a party, significant disclosures would presumably become rarer. States would tend to keep mum about any expectations that they supposed others could decisively oppose, and instead simply engage in that conduct if and when necessary. If, on the other hand, the consequences of an unacceptable reservation are less certain, and in any event delayed, states have less cause to be circumspect, and more information will be produced.

strikingly easy²³¹—a feature welcomed, no doubt, by those wishing to reduce the number of extant reservations, but one that also reduces the risk associated with lodging them in the first place.

To be sure, the Vienna Convention rules are not the only means of addressing reservations or generating information. Negotiations over draft treaties that prohibit reservations, or give states only limited options,²³² can expose the preferences of would-be reservers,²³³ as can the choices that states make afterwards.²³⁴ At present, however, such negotiations are held against the default of the Vienna Convention, so the relevant question is whether adopting a different default would be more productive. It likely would not, though the matter is speculative. Under a default rule barring reservations,²³⁵ states would pursue the possibility of reservations (and reveal information in the process) only if it looked like they might secure sufficient support from other states; the information about any particular state would also be obscured, save when it led a campaign.²³⁶

It remains open to debate whether the Vienna Convention's approach to the initial standing of reservations elicits the kinds of reservations that disclose information. Superficially, there is considerable tension. On the traditional view, the worst reservations are those conflicting with a treaty's object and purpose. Once the informational virtues are considered, however, incompatible reservations become marginally more attractive—since, by hypothesis, they reveal information keenly relevant to fulfilling treaty obligations. As compared to other comparably harmful, but compatible,

231. Vienna Convention, *supra* note 2, art. 22(1) (“Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.”). The International Law Commission is taking a similarly accommodating approach. Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fifty-Fifth Session*, at 189-244, U.N. Doc. A/58/10 (May 5-June 6 & July 7-Aug. 8 2003) [hereinafter *2003 ILC Report*].

232. *See supra* text accompanying notes 102-108 (noting alternative treaty forms).

233. Discussions over limited reservations to the Cybercrime Convention, for example, “highlight[ed] the areas of disagreement . . . and emphasiz[ed] (by their absence) areas of consensus,” Amalie M. Weber, *The Council of Europe's Convention on Cybercrime*, 18 BERKELEY TECH. L.J. 425, 440 (2003), and the selection of permissible reservations highlighted areas of likely deviance. Convention on Cybercrime art. 4(2), Nov. 23, 2001, Eur. T.S. No. 185, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm> (permitting reservation by federal states). Such alternatives, however, do not effectively capture information from parties that bypass negotiations—though they may compel participation by some states that are disengaged under the Vienna Convention, expecting that they can freely accede later with reservations—nor do they capture as effectively disclosures by participants in the ratification process, such as legislatures and domestic interest groups. *See supra* text accompanying notes 180-183.

234. Assuming, at least, that some reservations are permitted. If a state is unable to achieve critical latitude for itself during treaty negotiations, its refusal to sign or ratify generates little additional information—save concerning the strength of its preference—and the benefits of its participation, informational and otherwise, are lost. If a state chooses instead to ratify the treaty and later breach, information is revealed only at a cost to all parties concerned, and without any reciprocal rights for the non-reserving state. *Cf.* Vienna Convention, *supra* note 2, art. 60(2), (5) (providing that only states specially affected or radically unsettled by a material breach may react by suspending the treaty, and never for treaties of a humanitarian character).

235. Whatever the merits of more tailored options, such as treaties in which reservations may be made to some provisions and not to others, no default rule could be designed to emulate them.

236. *See supra* text accompanying note 134 (discussing U.S. lobbying for reservations in Tobacco Convention).

reservations, incompatible reservations are also more likely to be legally ineffective, meaning that (in theory) they convey information with less tangible consequences. But if the means of constraining the legal effect of incompatible reservations is imperfect, there is a clear cost to encouraging them, and an impulse to discourage them somehow.

Because the proper approach to incompatible reservations very much remains in play before the International Law Commission, it may be useful to examine several of the Special Rapporteur's proposals in light of these conflicting imperatives. Perhaps the most modest, if quixotic, are the standards proposed for identifying a treaty's object and purpose.²³⁷ The unstated purpose is to facilitate objections to incompatible reservations, and otherwise to deter them; the tradeoff is that carefully delineating a treaty's object and purpose encourages reservations that might (mistakenly) have been withheld or withdrawn as incompatible under a less acute understanding. Such standards simultaneously serve the more modest function of improving detection, permitting non-reserving states to identify—preliminary to any action or inaction—the kind of reservations that are likely to be inconsistent with the treaty's ends. The calculus changes for the particularized standards that the Special Rapporteur has proposed for reservations to dispute settlement clauses, human rights treaties, and domestic law; here, there seems to be no correlation with information-production, but rather an attempt to reason from first principles.²³⁸ If such an effort is pursued, it may be more useful to pay heed to state practice, which might profitably identify the sorts of reservations to which states were inclined to object if informed.²³⁹

Vague reservations, a second area of concern, are another matter. While hopelessly obscure reservations are somewhat self-detering,²⁴⁰ some reservations test the outer bounds of communication—for example,

237. See Special Rapporteur, *Tenth Report, First Add*, *supra* note 7, ¶¶ 75-92 (discussing the difficulty of the question and a variety of unsuccessful approaches, but nevertheless proposing draft guideline 3.1.6).

238. The Special Rapporteur's discussion of reservations to dispute settlement provisions, for example, acknowledges that reservations to such provisions are common and objections rare, and that the ICJ jurisprudence is inconsistent with that of the Human Rights Committee, but then appears to pluck a "[s]ome general lessons" from the experience. *See id.* ¶¶ 96-99 (proposing draft guideline 3.1.13). After discussing, skeptically, the standards employed by human rights bodies for reservations to human rights treaties, and noting "the wide range of practices in the matter," a guideline is proposed that is "drafted in a flexible way to allow sufficient leeway for interpretation." *Id.* ¶¶ 100-02 (draft guideline 3.1.12). With regard to domestic law, the Special Rapporteur opines that "[w]hat matters here is that the State or international organization formulating the reservation should not use its domestic law as a cover for not actually accepting any new international obligation even though a treaty would have it change its practice"—a point which is almost certainly the reason for most such reservations—before indicating, unhelpfully, that such a reservation "may be formulated only if it is not incompatible with the object and purpose of the treaty." *Id.* ¶¶ 105-06 (draft guideline 3.1.11).

239. Such an inquiry might also turn up the type of reservations about which states were likely already to have learned—but the density of objections might be a particularly good proxy.

240. Not only will the reserving states be disadvantaged if it is hard to establish that later conduct falls within the reservation, but they may find that other states object to reservations that they cannot comprehend. *See* Seibert-Fohr, *supra* note 197, at 194 ("To formulate reservations in specific and transparent terms should be in a States party's own interest. It avoids objections and the risk that the reservation is misinterpreted."); *see also infra* note 251 and accompanying text (discussing objections to an over-vague reservation).

reservations that allude generally to domestic constitutional²⁴¹ or religious barriers.²⁴² Vague reservations are often criticized as inherently inconsistent with any treaty's object and purpose,²⁴³ and some treaties, such as the European Convention on Human Rights, preclude them as part of a bar on "general" reservations.²⁴⁴ In practice, this is understood not only to preclude reservations that are so vague or broad as to make it impossible to "determine their exact meaning and scope,"²⁴⁵ but also to require advertent to particular provisions of the relevant convention and extant provisions of national law.²⁴⁶

The Commission has not yet subscribed to the Council of Europe's approach.²⁴⁷ An initial passel of provisionally adopted draft guidelines would diverge somewhat in permitting reservations relating to multiple treaty

241. See *supra* note 86 (cited sources discussing Guatemalan and U.S. reservations).

242. See generally BUNN-LIVINGSTONE, *supra* note 114; LIJZAAD, *supra* note 20; RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME, *supra* note 138.

243. Objections to general reservations are sometimes put in terms of a treaty's object and purpose, and sometimes allude to a more general norm. See, e.g., *General Comment 24*, *supra* note 6, ¶ 19 ("Reservations must be specific and transparent . . . [and] may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto."); *U.S. Observations*, *supra* note 59 (indicating general agreement, though stating that the general comment goes too far); 1 MULTILATERAL TREATIES, *supra* note 70, at 182-83 (reprinting Finnish objection to reservation invoking existing national law, stating that "such general reservations raises doubts as to the commitment of Kuwait to the object and purpose of the [ICCPR]," and "contribute to undermining the basis of international treaty law"); *id.* at 186 (noting similar Swedish objection to U.S. reservation to ICCPR); Hanna Beate Schöpp-Schilling, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women: An Unresolved Issue or (No) New Developments?*, in RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME, *supra* note 138, at 3, 8 (citing views that general reservations violate the object and purpose of CEDAW).

244. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 64(1), Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights]. Other treaties also bar general reservations. E.g., CITES, *supra* note 108, art. 23(1).

245. *Belilos v. Switz.*, 132 Eur. Ct. H.R. (ser. A) 26, ¶ 55 (1988), *reprinted in* 10 Eur. H.R. Rep. 466 (1988).

246. Iain Cameron & Frank Horn, *Reservations to the European Convention on Human Rights: The Bellilos Case*, 33 GERM. Y.B. INT'L L. 69, 99 (1990) (noting interpretation by European Commission of Human Rights that a reservation is "of a general character if it does not refer to a specific provision of the Convention or if it is worded in such a way that its scope cannot be defined") (quoting *Temeltasch v. Switz*, App. No. 9116/80, 31 Eur. Comm'n HR Dec. & Rep. 138, ¶ 89 (1983)); *id.* at 100-05 (construing bar on generality to include reservations relating to the Convention as a whole, or permitting application to changed domestic law); see European Convention on Human Rights, *supra* note 244, art. 64(1)-(2) (providing that states may reserve "in respect of any particular provision" to the extent of existing national law, which it enforces by requiring that reservations "contain a brief statement of the law concerned"); Sia Spiliopoulou Åkermark, *Reservation Clauses in Treaties Concluded Within the Council of Europe*, 48 INT'L & COMP. L.Q. 479, 488-90, 512-13 (1999) (suggesting that Council of Europe reservations practices, which "can claim to have become regional customary rules," include a preference for making reservations clauses "as detailed as possible," permitting reservations only as to legislation in force, and requesting parties to give brief accounts of such legislation). These limits, too, are not wholly distinctive. See, e.g., Inter-American Convention on Forced Disappearance of Persons art. 19, June 9, 1994, 33 I.L.M. 1532 (permitting reservations "as long as they refer to one or more specific provisions" of the Convention).

247. Differences are predictable in any event, not the least because the greater stability and homogeneity of the parties to Council of Europe treaties permits more stringent constraints. Compare, e.g., Rainer Hofmann, *Declarations to the Council of Europe Framework Convention for the Protection of National Minorities: Practice of the Advisory Committee*, in RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME, *supra* note 138, at 133, 145 (noting apparently unanimous acceptance of the competence of treaty bodies to test reservations for incompatibility), *with infra* note 304 (noting disagreement over the same issue at the United Nations).

provisions, or to the treaty as a whole,²⁴⁸ notwithstanding the argument that this is contraindicated by the Vienna Convention.²⁴⁹ While the Special Rapporteur has proposed treating a reservation “worded in vague, general language which does not allow its scope to be determined” as per se incompatible with a treaty’s object and purpose,²⁵⁰ that approach has not yet been endorsed, leaving vague reservations prohibited by the Council of Europe opposable by states, rather than barred outright.

Perhaps counter-intuitively, this hesitation is defensible from an informational standpoint. Even if vague or “across-the-board” reservations show less than would an optimally detailed reservation, the process of developing any reservation may be revelatory—occasioning, for example, public disagreements between a foreign state’s legislative and executive branches—as might the reserving state’s subsequent responses to objections and queries from other states.²⁵¹ Rules that mandate disclosure, moreover, risk dampening a state’s ability to signal its distinctive characteristics through voluntarily disclosure—here, by forgoing general reservations in favor of detailed reservations that more tightly limit its discretion.

The better course may be to eschew any proscription on formulating such reservations in favor of limiting their utility in practice.²⁵² One possibility would be to create a menu of options for individual states responding to general reservations;²⁵³ even if this compromises any unified effort for treaty-based restrictions on reservations,²⁵⁴ the resulting interrogation of reserving states may serve state interests beyond the bargaining table. If a more draconian reaction is preferred, reserving states formulating vague reservations may be prevented from ratifying until the reservations are clarified to the extent feasible. Such an approach may be presumed inconsistent with the interest in breadth, but it should be recalled that vague and general reservations are not inherently “incompatible,” and

248. 1998 ILC Report, *supra* note 227, at 199 (setting out draft guideline 1.1.1 and accompanying commentary).

249. *Id.* at 199-201 (noting potential tension with Vienna Convention terms); Special Rapporteur, *Third Report, Third Add.*, *supra* note 8, at 12 (same); see Vienna Convention, *supra* note 2, art. 2(1)(d) (defining a reservation as relating to “certain provisions of the treaty”).

250. Special Rapporteur, *Tenth Report, First Add.*, *supra* note 7, ¶ 115 (draft guideline 3.1.7).

251. 1997 ILC Report, *supra* note 8, at 123 (“In the case of general reservations, some States declared the reservation impermissible and requested the reserving State to provide additional information designed to ensure that such a reservation was compatible with the object and purpose of the treaty.”).

252. See BAIRD, *supra* note 172, at 145-47 (discussing plant closure laws).

253. See Recommendation No. R(99)13, *supra* note 14 (detailing model responses to non-specific reservations).

254. The Council of Europe and the European Union have both urged cooperative strategies, including in negotiations, as a means of redressing imbalances in the Vienna regime. *Id.* (recommending “common approach”); CAHDI, Practical Issues, *supra* note 14 (recommendation that states coordinate in seeking bans on general reservations); Council of the European Union, Note from the Presidency to the Council on EU Plan of Action on Combating Terrorism—Update, at 10, Doc. No. 14330/1/04 Rev. 1 (Nov. 29, 2004) (encouraging “[c]oordinated EU position on reservations”); Franz Cede, *European Responses to Questionable Reservations*, in DEVELOPMENT AND DEVELOPING INTERNATIONAL AND EUROPEAN LAW: ESSAYS IN HONOUR OF KONRAD GINTHER ON THE OCCASION OF HIS 65TH BIRTHDAY 21, 27-33 (Wolfgang Benedek et al. eds., 1999) (describing attempts to coordinate objections and diplomatic responses to reservations).

may possibly be clarified and made opposable by states without posing any intractable obstacle to ratification.²⁵⁵

Third, the Special Rapporteur has directed special attention to customary and peremptory norms, taking the position—contrary to that espoused by the Human Rights Committee²⁵⁶—that reservations relating to customary norms are not invariably contrary to a treaty’s object and purpose, noting *inter alia* that a state’s reservation may relate to the particular treaty mechanisms and that the norm’s binding force under customary international law remains unaffected.²⁵⁷ While acknowledging that nearly the same reasoning applies to reservations relating to peremptory norms,²⁵⁸ the Special Rapporteur would nevertheless deem them null and void; the explanation is unconvincing, and is in any event rooted in considerations having nothing to do with the law of reservations.²⁵⁹

Instead of relying on extrinsic principles, the bar on reservations relating to peremptory norms may conceivably be rationalized in terms of the interests of non-reserving states. The main point of assimilating such reservations to

255. Special Rapporteur, *Tenth Report, First Add.*, *supra* note 7, ¶ 113 (“[I]t is the impossibility of assessing the compatibility of such reservations with the object and purpose of the treaty, rather than the certainty that they are incompatible, which makes them fall within the purview of article 19(c) of the Convention on the Law of Treaties.”).

256. *See supra* note 59.

257. Special Rapporteur, *Tenth Report, First Add.*, *supra* note 7, ¶ 120.

258. As the Special Rapporteur explained, “[w]hile accepting the content of the rule, [the reserving state] may wish to escape the consequences arising out of it, particularly in respect of monitoring, and on this point, there is no reason why the reasoning followed in respect of customary rules which are merely binding should not be transposed to peremptory norms. However, as regrettable as this may seem, reservations do not have to be justified, and in fact, they seldom are. In the absence of clear justification, therefore, it is impossible for the other contracting parties or for monitoring bodies to verify the validity of the reservation, and it is best to adopt the principle that any reservation to a provision which formulates a rule of *jus cogens* is null and void *ipso jure*.” *Id.* ¶ 136. Clearly, the same problem afflicting states reserving with respect to peremptory norms—that, while their objectives may be appropriate, those objectives are not always volunteered, such that a prophylactic rule is required—applies equally to reservations relating to custom. In excusing the effect on well-intentioned reservations, moreover, the Special Rapporteur explains that any impact may be ameliorated by making reservation to treaty-specific aspects of the peremptory norm—a workaround equally available for reservations bearing on custom. *See id.* ¶ 137 (noting that “there are other ways for States to avoid the consequences of the inclusion in a treaty of a peremptory norm of general international law: they may formulate a reservation not to the substantive provision concerned, but to ‘secondary’ articles governing treaty relations (monitoring, dispute settlement, interpretation), even if this means restricting its scope to a particular substantive provision”).

259. Special Rapporteur, *Tenth Report, First Add.*, *supra* note 7, ¶ 146 (draft guideline 3.1.9); *id.* ¶ 137 (noting that “this prohibition [on reservations relating to peremptory norms] does not result from article 19(c) of the Vienna Convention but, *mutatis mutandis*, from the principle set out in Article 53”); *see* Vienna Convention, *supra* note 2, art. 53 (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”). But Article 53 prevents treaties from forcing conflicts with peremptory norms, rather than addressing whether treaties may be disapplied when state behavior would remain regulated by such norms. While the Special Rapporteur also asserts, citing legal commentary, that “the rule prohibiting derogation from a rule of *jus cogens* applies not only to treaty relations, but also to all legal acts, including unilateral acts,” Special Rapporteur, *Tenth Report, First Add.*, *supra* note 7, ¶ 135, the derogation implied by a reservation is weak—it is no different in consequence from a state’s failure to ratify the same treaty on the ground that it reflects a peremptory norm, which presumably is not foreclosed—and not a unilateral act of the kind normally meant.

If successful, however, this reasoning would distinguish reservations relating to custom. *See id.* ¶ 120 (noting that “unlike the case of peremptory norms, states may opt out [of customary rules] by agreement *inter se*.”).

those violating object and purpose is to make them more than merely opposable—since, after all, states are already free to object on the ground that a reservation violates a peremptory norm and to judge for themselves the merits of any absolute position to that effect—and to serve non-reserving states by holding other states to those norms.²⁶⁰ There is relatively little offsetting cost. Any negative effect on breadth and depth should be trivial; since reserving states are in theory completely constrained by such norms even absent the treaty, barring reservations should not substantially affect their willingness to bargain or ratify. The capacity of non-reserving states to reserve judgment would also be enhanced, to the extent that inconsistency with peremptory norms is not self-defining and may be asserted at those states' convenience.²⁶¹ The clearest loss is information, given that the bar would marginally reduce the incentive for states to object and, consequently, to help articulate the underlying norms.²⁶² Considering these sorts of non-reserving state interests offers no clear prescription, but it at least situates the analysis within the premises of reservations doctrine, rather than outside it.

Finally, while maintaining lexical neutrality in the debate between permissibility and neutrality,²⁶³ and explicitly hedging regarding the *consequences* of state violations,²⁶⁴ the Special Rapporteur has tentatively addressed the fundamental and vexing question of the effects of formulating reservations contrary to a treaty's object and purpose—indicating that any such reservation is “not valid,” “null and void,” and beyond redemption via

260. It is not a certainty, however, to the extent that mingling nascent peremptory norms with treaty obligations may make their independently obligatory character more difficult to perceive. Such a consideration also suggests, moreover, that disclaiming automatic nullity—as the Special Rapporteur would for reservations relating to custom and, in a similar fashion, for non-derogable principles—reduces such opportunities. *Id.* ¶ 129 (setting out draft guideline 3.1.8 for reservations relating to custom); *id.*

¶ 146 (setting out draft guideline 3.1.10 for reservations relating to non-derogable rights).

261. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4, 19, 514-17 (5th ed. 1998); *see, e.g.*, *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES*, *supra* note 51, § 331 cmt. e (advising that “a peremptory norm would be invoked by a party as a basis for invalidating its consent, or for terminating the agreement . . . but the uncertain scope of the doctrine makes particularly strong the need for an impartial determination of its applicability,” and that “[a] domestic court should not on its own authority refuse to give effect to an agreement on the ground that it violates a peremptory norm”).

262. *Cf.* COMM. ON FORMATION OF CUSTOMARY (GEN.) INT'L LAW, INT'L LAW ASS'N, FINAL REPORT: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 21 (2000) (suggesting that “it could probably also be shown that all or most . . . ‘axiomatic’ principles . . . actually took some time to become generally accepted”). Peremptory norms may, of course, succeed one another. Vienna Convention, *supra* note 2, art. 53 (“For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

263. Special Rapporteur, *Tenth Report*, *supra* note 7, ¶¶ 1-8 (settling on use of term “validity” in preference to prejudging the question).

264. Special Rapporteur, *Tenth Report, Second Add.*, *supra* note 7, ¶¶ 195-99 (reviewing considerations); *id.* ¶ 200 (indicating that “[i]t is too early for the Commission to take a position on whether the nullity of the reservation invalidates the consent to be bound itself”). One proposed draft guideline would, probably unnecessarily, clarify that a state proposing a reservation that is contrary to a treaty's object and purpose does not thereby assume tort liability. *Id.* ¶ 194 (setting out draft guideline 3.3.1, improperly noted as guideline 3.1.1).

the acceptance of non-reserving states.²⁶⁵ The implications of the Special Rapporteur's position, and whether it will be accepted by the Commission, are as yet unclear, but the rationale is revealing. The reasoning, unsurprisingly, is heavily doctrinal and purposive, and tries to minimize two points that are essentially conceded—first, that this “‘normative gap’ may . . . have been deliberately created by the authors of the Convention,”²⁶⁶ and second, that in contrast to the comparison case of reservations expressly or implicitly barred by a treaty, it is relatively difficult for a reserving state to discern whether a treaty's object and purpose are at risk.²⁶⁷

While these are treated as grudging admissions, they may actually be strong arguments for the Special Rapporteur's approach, for reasons that have already been spelled out. The Convention's drafting history indicates that “the admissibility or otherwise of a reservation [under Article 19(c)] is in every case very much a matter of the appreciation of the acceptability of the reservation by the other contracting States,” and that the bar on incompatible reservations “has to be read in close conjunction with the provisions of [Article 20] regarding acceptance of and objection to reservations,” in no small part because it was understood that a treaty's object and purpose were not transparent.²⁶⁸ Absent any self-enforcing mechanism for rebuffing and discouraging arguably incompatible reservations, the notion that such reservations are null and void *ab initio*—subject, in the end, to their eventual evaluation by non-reserving states, which may not be of one mind—potentially effects a substantial transfer of authority to the non-reserving state, without dampening the other values reservations may serve. The scope of that authority depends on the ancillary rules regarding the consequences, including those relating to the form, timing, and effect of objections.

B. *The Form and Timing of Objections*

As discussed in Part I, one factor encouraging late objections is the unresolved tension between the permissibility and opposability schools. If incompatible reservations are genuinely void *ab initio*, then non-reserving states need not object at all, and if they do they are surely entitled to relief from the normal twelve-month deadline. Indeed, states sometimes expressly justify late objections with the argument that impermissible reservations can never be tacitly accepted, and the Secretary-General appears to indulge them to some degree.²⁶⁹

The International Law Commission has yet to speak to this issue, and it should tread carefully when it does. Reinforcing the twelve-month limit might be seen as a way of encouraging states to file what are now dilatory objections

265. See *id.* ¶¶ 187, 200, 202 (proposing, respectively, draft guidelines 3.3, 3.3.2, and 3.3.3).

266. *Id.* ¶ 181.

267. *Id.* ¶ 185 (comparing object-and-purpose inquiry with other grounds for invalidity arguably more observable by reserving states); see also, e.g., *id.* ¶ 147 (noting subjectivity of inquiry).

268. 1966 ILC Report, *supra* note 15, at 57, [1966] 2 Y.B. Int'l L. Comm'n 226; see also Special Rapporteur, Tenth Report, Add. 2, *supra* note 7, ¶ 182 (describing drafting history).

269. See *supra* text accompanying note 73.

on time.²⁷⁰ But delay also serves more enduring interests—in particular, the interest in recovering some of the risk management allocated to the reserving state. If non-reserving states are able to formulate late objections, at least in the case of arguably incompatible reservations, they may wait to see if objecting is advisable—and diminish the certainty and flexibility that the reservation affords its author. On this view, late objections and their tolerance are less a lack of discipline than an attempt to exploit a doctrinal ambiguity central to the Vienna Convention. One might be wary, then, of disturbing this situation, particularly if it would further diminish the defenses available to opponents of reservations.²⁷¹

This equipoise is indirectly affected by the Commission's early work on the form of objections. One relevant initiative concerns standards of clarity for objections. The Special Rapporteur, reacting to the prevalence of tentative or quasi-objections,²⁷² has opined that “legal security” required determining whether such responses are true objections, much as the interest in certainty—and the tendency of states to speak ambiguously—required more precise reservations.²⁷³ But the fact that reservations and objections may each be vague does not commend an identical solution.²⁷⁴ For reasons previously discussed, reservations purposefully shift the costs of uncertainty to non-reserving states; uncertainty about the effect of a *response* to a reservation may help level the playing field, much like the lingering possibility that an incompatible reservation may draw objections after a year has passed. To be sure, it may be prudent for states to make the grounds for their objections

270. As noted previously, some states devote insufficient resources and attention to reservations; reinforcing the deadline might have an effect not only on the kind of objections that are now lodged after a year's passage, but also those that states never make after discovering that the deadline has passed. *See, e.g.,* Clark, *supra* note 37, at 313 (citing example of would-be objections by Sweden to reservations by Egypt, Mauritius, Jamaica, the Republic of Korea, and New Zealand to CEDAW, for which Sweden ran out of time but noted putatively “as a matter of principle”).

271. If anything, two aspects of the Commission's project indirectly support delayed objecting. First, its draft guidelines would permit late reservations, which vest non-reserving states with the aggregate power to extend their decision horizon, since late reservations may be made only if *no* state objects within twelve months. Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fifty-Third Session*, at 476-506, U.N. Doc. A/56/10 (Apr. 23-June 1 & July 2-Aug. 10, 2001) [hereinafter *2001 ILC Report*] (setting out draft guidelines 2.3.1 et seq. concerning late reservations, with accompanying commentary). A provision with similar effect concerns the enlargement of reservations. *See 2003 ILC Report, supra* note 231, ¶¶ 353-55 (summarizing discussion); Koskenniemi & Mosley, *supra* note 7, at 108-09 (same); *2004 ILC Report, supra* note 83, at 260, 269-74 (setting out draft guideline 2.3.5, with accompanying commentary).

Second, as discussed more extensively below, the Commission would also approve of the depositary's power to draw “manifestly impermissible” reservations to the attention of interested parties. *See infra* notes 318-324 and accompanying text. The ongoing review this suggests, which almost certainly extends beyond any twelve-month deadline, seems inconsistent with any pure opposability approach, and would encourage belated incompatibility objections. *Cf. Hampson Report, supra* note 13, ¶ 33; Special Rapporteur, *Tenth Report, Second Add., supra* note 7, ¶ 163 (rejecting argument that the right of treaty monitoring bodies to opine regarding reservations should be limited to similar twelve-month period).

272. *See supra* note 71.

273. Special Rapporteur, *Ninth Report, supra* note 82, ¶ 3; Special Rapporteur, *Eighth Report, First Add., supra* note 71, ¶¶ 91-92.

274. *Cf. Topical Summary 2004, supra* note 55, ¶¶ 177-92 (summarizing criticisms of the parallel); *see also* Special Rapporteur, *Ninth Report, supra* note 82, ¶¶ 6-29 (describing debate).

plain, particularly if that might secure the reservation's withdrawal.²⁷⁵ But the virtues of *insecurity*—coupled with the risks of misclassifying a state's response²⁷⁶—seem to outweigh the benefits of any Commission intervention. At a minimum, due indulgence should be given to states' tentative reactions to general reservations, which sometimes condition the position of non-reserving states²⁷⁷ or simply reserve judgment,²⁷⁸ at least until such point as other methods for querying reservations may be developed.

A second issue concerns a false cognate of general reservations—general objections, by which states make it known that they object to any reservations to a treaty,²⁷⁹ indicate a class of unacceptable reservations, or list states that have entered disfavored reservations.²⁸⁰ Notwithstanding criticism that such objections are unduly vague,²⁸¹ they may more effectively convey the nature of a state's position, or make up for any vagueness with efficiency. As relevant here, their function may also be to circumvent any stringent approach to the deadline for objections, or even to invert the possibility of tacit acceptance—since states desiring to resist reservations may, in theory,

275. See, e.g., *Topical Summary 2004*, *supra* note 55, ¶¶ 198-99 (reporting support for “the prompt circulation of the reasoning for objecting to reservations as a means to induce the reserving party to reconsider its position and possibly withdraw the reservation,” including because doing so might attract the support of other non-reserving states); *id.* ¶¶ 199-200 (reporting view that while states were increasingly willing to articulate the grounds for their objections, practice was mixed, and it “was a policy issue rather than a legal question”).

276. While the Special Rapporteur's approach would allow statements to be deemed objections regardless of how a state labels them, see Special Rapporteur, *Ninth Report*, *supra* note 82, ¶ 3, and would not categorically exclude statements that pursue unorthodox effects, see *id.* ¶¶ 14-19, the approach would certainly exclude statements that do not “purport” to deny the reserving state that which it seeks. *Id.* ¶¶ 14-19; Special Rapporteur, *Eighth Report, First Add.*, *supra* note 71, ¶ 91. This is an exclusivity that is lacking under the present regime, and which may limit the ability of states to employ place-holding statements that are fully eligible to become objections at a later point.

277. See, e.g., 1 MULTILATERAL TREATIES, *supra* note 70, at 306 (reprinting Austrian response to Malaysia's reservations to the Convention on the Rights of the Child, concluding that the “general character” of the reservations prevented their final assessment, and conditionally objecting pending further information from Malaysia or subsequent practice confirming compatibility with the Convention's object and purpose); Special Rapporteur, *Eighth Report, First Add.*, *supra* note 71, ¶¶ 88-89; cf. 2 MULTILATERAL TREATIES, *supra* note 70, at 248-49 (statements by Germany and the Netherlands, in connection with the Convention on the High Seas, making objections dependent on whether statements by other states were more than mere declarations). Were states denied the opportunity to lodge provisional or tentative objections, they might always have recourse to definite objections based on a provisional appraisal, but that sacrifices a degree of flexibility. See, e.g., *id.* at 306-10, 313 (noting objections by Finland, Germany, Ireland, the Netherlands, Norway, Portugal, and Sweden to the Malaysian reservation, and communications from Belgium and Denmark).

278. See, e.g., 2 MULTILATERAL TREATIES, *supra* note 70, at 243 (statement of the Netherlands to the effect that it “reserves all rights” regarding Venezuelan reservations to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone).

279. Thus, Greece stated that it would not accept any prior or future reservations to the Genocide Convention. See *id.* at 128. *But cf. id.* (separate objection by Greece to U.S. reservation). Similarly, the U.S. Senate stated in identical terms that it would not countenance (other) reservations to any of the 1949 Geneva Conventions. See, e.g., Third Geneva Convention, *supra* note 199 (signing statement of President Eisenhower) (“Rejecting the reservations which States have made with respect to the Geneva convention . . . the United States accepts treaty relations with all parties to that convention, except as to the changes proposed by such reservations.”).

280. See HORN, *supra* note 24, at 184, 196-97 (citing examples); e.g., 2 MULTILATERAL TREATIES, *supra* note 70, at 331-33 (statements by Japan, the Netherlands, and Sweden that they object to any reservations made to the dispute settlement provisions of the Vienna Convention on the Law of Treaties).

281. Special Rapporteur, *Eighth Report, First Add.*, *supra* note 71, at 10 n.135 (citing Horn).

lodge a general objection and later retract such objection piecemeal, as need be, in response to acceptable reservations.

A third initiative involves withdrawing reservations. The Vienna Convention explicitly allows unilateral withdrawal,²⁸² but it does not address the question of partial withdrawals—actions by which reserving states purport to narrow, without relinquishing, reservations they have previously formulated.²⁸³ The Commission has waded into a rather tedious debate about whether partial withdrawals were better characterized as amendments of reservations or as withdrawals followed by the substitution of new (and narrower) reservations²⁸⁴—favoring the former view, which, it reasons, suggests that partial withdrawal should be virtually unfettered.²⁸⁵

A theory of the interests of non-reserving states suggests a less doctrinal approach. Partial withdrawals tend to be viewed favorably because they reduce the pox of reservations on multilateral treaties in a manner consistent with state consent.²⁸⁶ On a broader view, partial withdrawals are helpful in conveying additional information about the reserving state's preferences, but they are not an unalloyed good. A permissive approach may artificially encourage states to formulate broader reservations initially, since they can always narrow them later on—thus reducing the risk that any overbroad reservation may be indicted as incompatible *en toto* by a state or treaty body, or come to be more favorable to non-reserving states enjoying reciprocity.²⁸⁷ Partial withdrawals may thus shift the balance of interests perceived by non-reserving states, necessitating objection. The Commission has suggested that objecting to partial withdrawals is permissible only if the resulting reservation

282. Vienna Convention, *supra* note 2, art. 22. The possibility of partial withdrawals was vetted during the drafting of the Convention, but it appears to have been dropped without explanation. 2003 ILC Report, *supra* note 231, at 246-47.

283. 2003 ILC Report, *supra* note 231, at 244 (detailing draft guideline 2.5.10, defining partial withdrawal as that which “limits the legal effect of the reservation and achieves a more complete application” of the treaty to the withdrawing party).

284. Partial withdrawals have not been wholly uncommon in practice, *see* 2003 ILC Report, *supra* note 231, at 252-53 (citing examples), but absent specific provision for them in particular treaties, *see id.* at 245-46 (citing examples), opinion regarding their nature seemed to divide along the indicated lines—albeit with some confusion. Compare 2003 ILC Report, *supra* note 231, at 248-51 (citing practices under Council of Europe treaties generally supporting amendment theory), with *Summary of Practice*, *supra* note 73, ¶ 206 (describing position of the U.N. Secretary-General that changing reservations “amount[s] to a withdrawal of the initial reservations—which raised no difficulty—and the making of (new) reservations”). *But cf.* 2003 ILC Report, *supra* note 231, at 254-55 (citing U.N. communications taking the view that “as far as possible, communications which are no more than partial withdrawals of reservations should not be subjected to the procedure that is appropriate for modifications of reservations”).

285. 2003 ILC Report, *supra* note 231, at 244-46 (citing “point of departure of draft guideline 2.5.10” that “nothing prevents the modification of a reservation if the modification reduces the scope of the reservation and amounts to a partial withdrawal”); 1997 ILC Report, *supra* note 8, at 127, ¶ 10 (stating preliminary conclusion that a state formulating an inadmissible reservation may react, *inter alia*, by “modifying its reservation so as to eliminate the inadmissibility”).

286. *See, e.g.,* 2003 ILC Report, *supra* note 231, at 251 (opining that “the treaty’s integrity is better ensured” by permitting partial withdrawals).

287. The Commission views these as advantages—as they may be, not the least to the reserving state. 2003 ILC Report, *supra* note 231, at 251 (citing possibility that partial withdrawals will defuse objections); *id.* (adding that partial withdrawals permit longstanding parties to adapt reservations to any treaty body’s views regarding incompatibility, reducing an advantage otherwise accruing to parties joining in contemplation of the body’s views).

discriminates against the non-reserving state,²⁸⁸ but that is bottomed on a purely mechanical view of the withdrawal's effect on the reserving state's obligations.²⁸⁹ It is at least equally plausible that the resulting reservation better communicates a position that the non-reserving state wishes to oppose, or perhaps even deprives it of any credible claim that the reservation was inadmissible and thus could legitimately have been objected to at any point. In short, the guidelines would be well advised to recognize, along with the innovation of partial withdrawal, a robust right to object to same. The effect of such objections is another matter entirely.

C. *The Effect of Objections*

An enduring enigma of the Vienna Convention concerns the effect of objections. Article 21 of the Convention suggests three possible paths for non-reserving states—acceptance, a simple objection with “minimum” effect, and an objection with the “maximum” effect of denying treaty relations with the reserving state—with puzzlingly little difference between the first two. The weakness of simple objections is particularly striking when the objections are predicated on a reservation's incompatibility with a treaty's object and purpose.

As previously noted, practice has not stood pat. In recent years, states have asserted the power to determine which treaty provisions remain in force after a reservation has been formulated, including by disapplying treaty provisions other than those that were the subject of the reservation (objections with “intermediate effect”) or, conversely, asserting that the entire treaty remains in force between the reserving and objecting states (those with “super-maximum” effect).²⁹⁰ These innovative objections are most common in relation to human rights treaties, but their rationale is not so confined.²⁹¹

These practices are of uncertain legality,²⁹² due in part to the unresolved status of incompatible reservations and the behaviors they may justify, and are

288. *2003 ILC Report*, *supra* note 231, at 256 (reprinting draft guideline 2.5.11); *see id.* at 259 (acknowledging that “there seems to be no example” in which a partial withdrawal resulted in discrimination against particular parties).

289. The Commission reasoned that a partial withdrawal brings the reserving state into closer conformity with the treaty, and thus is no different in principle than a complete withdrawal, at least on the assumption that other parties “have adapted to the initial reservation.” *2003 ILC Report*, *supra* note 231, at 259.

290. *2004 ILC Report*, *supra* note 83, at 276 (discussing interpretive declarations); Special Rapporteur, *Eighth Report, First Add.*, *supra* note 71, ¶ 95; *see, e.g.*, 2 MULTILATERAL TREATIES, *supra* note 70, at 330 (statement that “Canada does not consider itself in treaty relations with [Syria] in respect of those provisions of the Vienna Convention on the Law of Treaties to which the compulsory conciliation procedures set out in the annex to that Convention are applicable”); *id.* at 331-35 (similar statements by Japan, the Netherlands, Sweden, the United Kingdom, and the United States, in relation to reservations to dispute settlement provisions).

291. *See supra* notes 82-86 and accompanying text.

292. The *expressio unius* maxim suggests that specifying two types of objections was intended to preclude others; attempts to defend innovative objections, therefore, sometimes portray them as constructive law-breaking. *See, e.g.*, Klabbers, *supra* note 16, at 187-88. Other opinion is more equivocal. *See, e.g.*, *2003 ILC Report*, *supra* note 231, ¶ 346 (recalling that, as relevant to innovative objections, “the regime of objections was very incomplete”); Special Rapporteur, *Eighth Report, First Add.*, *supra* note 71, ¶ 95 (alluding to insufficiency of relying on the options established by Article 21).

also of uncertain status within the Commission. Some participants have expressed the view that objections with intermediate effect are an established practice,²⁹³ while others liken them to unlawful reprisals.²⁹⁴ Objections with super-maximum effect are viewed with greater hostility, on the ground that they—unlike objections with intermediate effect—profoundly “diverged” from the “consensual framework on which the Vienna regime was based,”²⁹⁵ though they too have their supporters.²⁹⁶ Criticisms have to date had relatively little purchase. The Special Rapporteur’s initial attempt to define objections in terms of the legal consequences sought was criticized, and later withdrawn, because it was regarded as prejudging (and excluding) the validity of innovative objections.²⁹⁷ The now-prevailing draft definition of objections does not seek to exclude either type,²⁹⁸ and it may be doubted, given the difficulty of reconciling rival views on the Commission, whether subsequent articles will be successful in doing so.²⁹⁹

What explains this state of affairs? On the one hand, some states that regarded the Vienna Convention as imbalanced, to the extent that they cooperatively created innovative objections and applauded their inclusion on the Commission agenda,³⁰⁰ appear to accept that they will secure no clear license for them. Their failure casts doubt on any hypothesis that the Convention’s terms are a mistake that states are committed to rectifying. But it is also hard to reconcile this situation with the view that reservations are irrelevant, given opposition to innovative objections within the Commission,

293. See, e.g., Special Rapporteur, *Eighth Report, First Add.*, *supra* note 71, ¶ 95 (describing intermediate effect as an “established practice” among states).

294. *2004 ILC Report*, *supra* note 83, ¶ 285.

295. *Id.* ¶ 293(d) (remarks by the Special Rapporteur); see also Special Rapporteur, *Ninth Report*, *supra* note 82, ¶ 20 (indicating discomfort with the notion that objections could “maintain[] that the treaty as a whole is binding upon the author of a reservation despite its reservation”); *Topical Summary 2005*, *supra* note 7, ¶ 89 (noting similar criticism); *Topical Summary 2004*, *supra* note 55, ¶ 192 (same); *2004 ILC Report*, *supra* note 83, ¶ 289 (same).

296. See, e.g., *Topical Summary 2005*, *supra* note 7, ¶¶ 85-96 (noting support and criticism).

297. *Id.* ¶¶ 85-87 (summarizing discussions); Special Rapporteur, *Ninth Report*, *supra* note 82, ¶¶ 12-14 (acknowledging and agreeing with criticisms); Koskenniemi & Mosley, *supra* note 7, at 99-100 (summarizing discussions at the Commission’s 2003 meetings); Michael J. Matheson, *The Fifty-Sixth Session of the International Law Commission*, 99 AM. J. INT’L L. 211, 216-17 (2005) (summarizing discussions at the Commission’s 2004 meetings); Michael J. Matheson & Sara Bickler, *The Fifty-Fifth Session of the International Law Commission*, 98 AM. J. INT’L L. 317, 320 (2004) (summarizing discussions at the Commission’s 2003 meetings).

298. Compare Special Rapporteur, *Eighth Report, First Add.*, *supra* note 71, ¶ 97 (suggesting that objections with super-maximum effect were not “objections” within the meaning of the Vienna Convention), with Special Rapporteur, *Ninth Report*, *supra* note 82, ¶ 14 (changing draft definition to “include in the definition of objections the unilateral statements purporting to produce effects not provided for in the Vienna Conventions” (emphasis omitted)); *id.* ¶¶ 14-20.

299. It would be particularly difficult to justify intuitions that while super-maximum objections seemed to fall outside the Vienna Convention, objections with intermediate effect *prima facie* fall within it. See *2004 ILC Report*, *supra* note 83, ¶ 293(d). So far as state consent is concerned, each objection proposes a bargain to which the reserving state has not agreed. If anything, the objection with super maximum effect is arguably *less* transgressive, since in those instances the treaty’s terms are restored to their condition but for the reserving state’s violation of Article 19; an objection with intermediate effect, in contrast, leaves a more uncertain, jury-rigged result in place. Cf. *Topical Summary 2005*, *supra* note 7, ¶ 93 (cautioning that such objections “might leave a treaty permanently open”).

300. Magnuson, *supra* note 85, at 349-50 (quoting statement by Swedish representative to the Sixth Committee of the U.N. General Assembly relating to inadmissible reservations and objections with super-maximum effect).

or with the notion that the interest in reservations always prevails. Are the interests favoring and disfavoring reservations simply in a standoff, or is it impossible to achieve the Commission's commitment to leaving both the Vienna Convention and state practices intact?³⁰¹

The key is to appreciate innovative objections in terms of the subtler interests articulated earlier. Until they are expressly countenanced, such objections do not shift authority from reserving to non-reserving states, since neither conclusively gives the objecting state the end it asserts. Instead, they counter one uncertain expression of treaty relations (the reserving state's submission that the treaty is modified by an incompatible reservation) with another. Given this, the tolerance of objections by states favoring reservations is not wholly surprising. At the same time, innovative objections do more than simply muddy the waters. For one, such objections counter the reserving state's power of initiation. Non-reserving states are liberated to choose among several options, which vary in likelihood of provoking the reserving state. Those options include: express acceptance; silence (and tacit acceptance); querying a reservation; objections with incidental effect; objections that propose reformulating treaty relations; objections that deny treaty relations; and objections that would keep the whole treaty in effect. The practical effect is that reserving states no longer unilaterally manage the risks of treaty-making. The inconclusive character of innovative objections also allows them to act like placeholders, or even preliminary objections, that extend the time horizon for mutual evaluation by the reserving and objecting states³⁰²—even while signaling a basis by which other states, too, may lodge late objections or otherwise oppose a reserving state's invocation of its limited obligations.

The theory of non-reserving state interests is equally germane to the assertion by some treaty monitoring bodies of authority to determine the standing of reservations. Such assertions pose a similar puzzle: why would states continue to tolerate them? Reserving states have sometimes responded vociferously to such intervention.³⁰³ Even if treaty bodies rarely intervene in practice, it might do to decisively repudiate their asserted authority to do so, unless states wanted to rectify the Convention's widely acknowledged biases. Even the consensual interests of non-reserving states in making their own determinations about whether to object seem compromised.

The Special Rapporteur's view is that the more parties capable of opining about reservations, the merrier; to that end, he has proposed draft guidelines indicating that treaty bodies are competent to assess the validity of

301. Cf. *Diplomatic and Parliamentary Practice*, 13 ITALIAN Y.B. INT'L L. 265, 265 (2003) (quoting comments of Italian delegate to the Sixth Committee of the U.N. General Assembly that the Commission's guidelines should not modify "the effect of objections, which should remain the same as defined in the Vienna Convention," but alluding as well to the Convention's unsatisfactory character and to the Commission's more general "mandate not to change anything in the treaty regime").

302. See also *infra* text accompanying notes 308-310 (discussing, and contrasting, "reservations dialogue").

303. See *supra* text accompanying notes 90 & 92. States may, perhaps, "have become less unwilling to respond to intercession by a respected multilateral body in limited circumstances" while not "much more willing to scrutinize or be scrutinized by other states," HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 213 (1995), but many treaty bodies are substantially influenced by states. See HENKIN, *supra* note 157, at 22.

reservations, that states and international organizations should specify the nature and limits to such competence, and that those formulating reservations should “take fully into account” the assessments issued by those bodies.³⁰⁴ More so than many of the other guidelines, such suggestions are subject to the prospective choices of treaty negotiators, with the possible exception of the suggestion that treaty bodies are competent to assess reservations simply by virtue of their assignment to monitor application of the treaty.³⁰⁵ The notion that assigning (or arrogating) such competence “neither excludes nor affects in any other way the competence” of non-reserving states seems naïve,³⁰⁶ as does styling the myriad avenues for assessment as mutually reinforcing methods of “verifying” the compatibility of reservations with a treaty’s object and purpose.³⁰⁷ For reasons previously stated, however, such assessments almost certainly serve the interest of non-reserving states in reserving their own subjective judgments as to acceptability, and doubtless help inform those judgments.

Such considerations are even more apparent in the more modest, if progressive, provisions initially adopted by the Commission to date. Treaty bodies, particularly those associated with human rights, are depicted as taking part in a “reservations dialogue”³⁰⁸ in which they urge states periodically to review reservations³⁰⁹ and urge other states to apply pressure as well.³¹⁰ Such

304. See Special Rapporteur, *Tenth Report, Second Add.*, *supra* note 7, ¶¶ 167, 171, 177, 179 (proposing, respectively, draft guidelines 3.2, 3.2.1, 3.2.2, and 3.2.3). The Commission had previously tabled draft guidelines providing that a reserving state must act “accordingly” in the event that a treaty body finds its reservation impermissible, including by withdrawing its reservation. Int’l Law Comm’n, *Report of the International Law Commission on the Work of Its Fifty-Fourth Session*, ¶ 59, U.N. Doc. A/57/10 (Aug. 16, 2002) (reprinting draft guideline 2.5.4); *id.* ¶¶ 71-76 (reviewing objections); *id.* ¶¶ 95-99 (noting withdrawal from the drafting process by the Special Rapporteur following objections); 2005 *ILC Report*, *supra* note 7. Those objecting were concerned that the treaty body’s recommendation, unlike a depositary’s commentary, might bind the reserving state. Int’l Law Comm’n, *Report of the International Law Commission on the Work of its Fifty-Fourth Session (2002): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During Its Fifty-Seventh Session*, ¶¶ 73-80, U.N. Doc. A/CN.4/529 (Aug. 8, 2003) [hereinafter *Topical Summary 2003*] (summarizing objections voiced in the Sixth Committee). The more convincing distinction is that a treaty body’s intervention, which might come at any point, would (for better or for worse) substantially extend the reserving state’s risk horizon.

305. See Special Rapporteur, *Tenth Report, Second Add.*, *supra* note 7, ¶¶ 169-71. Notably, this recommendation broadens the scope of the preliminary conclusion initially indicated by the Commission, which spoke only to competence within human rights treaties. *Id.*

306. *Id.* ¶ 172 (draft guideline 3.2.4).

307. *Id.* ¶ 162.

308. See, e.g., 2004 *ILC Report*, *supra* note 83, ¶ 186.

309. See 2003 *ILC Report*, *supra* note 231, at 207 (citing examples of periodic review); see, e.g., CEDAW, *Compilation of Guidelines on the Form and Content of Reports To Be Submitted by States Parties to the International Human Rights Treaties, Second Addendum*, at 2, U.N. Doc. HRI/GEN/2/Rev.1/Add.2 (May 5, 2003); The Secretary-General, *Report of the Fifth Meeting of Persons Chairing the Human Rights Treaty Bodies*, ¶ 30, U.N. Doc. A/49/537 (Oct. 19, 1994); Comm. on the Rights of the Child, Office of the High Comm’r for Human Rights, *Tenth Anniversary of the Convention on the Rights of the Child Commemorative Meeting: Achievements and Challenges* (Sept. 30-Oct. 1, 1999), available at <http://www.unhchr.ch/html/menu2/6/10than.htm>. These admonitions are focused on reservations offending a treaty’s object and purpose, but are not necessarily limited to them. See Tyagi, *supra* note 61, at 236.

310. Chairperson, CEDAW, *Report of CEDAW to the General Assembly*, at 24, U.N. Doc. A/49/38 (Feb. 4, 1994) (encouraging states to enter into reservations dialogue on a bilateral basis with those states lodging objections).

initiatives are less intrusive and controversial than any independent and authoritative evaluation of reservations,³¹¹ while at the same time offering some prospect that the review will lead states to voluntarily withdraw reservations.³¹² Consistent with that depiction, the International Law Commission has adopted a draft guideline extolling those making reservations to “undertake a periodic review of such reservations and consider withdrawing those which no longer serve their purpose.”³¹³

This does little to promote the interest of non-reserving states, traditionally (and narrowly) understood, in limiting reservations. Review is likely to prune deadwood, such as reservations that the reserving state may no longer need, but these were also of little continuing significance in the first place.³¹⁴ The process, however, is far more significant: periodic review can communicate a state’s present commitment to, and understanding of, its reservations, either of which may have evolved since the reservation was first formulated. Indirect evidence is provided by the reports requested by some treaty bodies, which are far more detailed than would be necessary to draw a state’s attention to the merits of its own reservations. For example, the Chairpersons of the Human Rights Treaty Bodies recently issued harmonized guidelines that would require a reporting state to provide information of keen interest to its non-reserving peers:

(i) The scope of [its] reservations; (ii) The reason why [they] were considered to be necessary and have been maintained; (iii) The precise effect of the reservation in terms of national law and policy; (iv) Whether any reservations entered . . . are consistent with obligations with regard to the same rights set forth in other treaties; and (v) . . . any plans to limit the effect of reservations and ultimately withdraw them within a specific time frame.³¹⁵

From an informational standpoint, the Commission’s draft guideline seems relatively underwhelming. One difference concerns how forthcoming it asks states to be.³¹⁶ The more significant difference concerns the inquiry’s

311. Special Rapporteur, *Eighth Report*, *supra* note 62, ¶ 20 (citing observation by the Committee on the Elimination of Racial Discrimination that “opening a legal struggle with all the reservation States and insisting that some of their reservations have no legal effect . . . could distract the Committee from its main task” of promoting complete treaty application and compliance); *Treaty Bodies’ Practice*, *supra* note 93, ¶ 17 (same).

312. Tyagi, *supra* note 61, at 218 (citing strategy as best means of reducing reservations, and observing that “States do not object to such requests; they occasionally review some of their reservations; and quite a few have withdrawn some reservations”).

313. *2003 ILC Report*, *supra* note 231, at 207 (reprinting draft Guideline 2.5.3).

314. The Commission has essentially acknowledged as much. *See, e.g., 2003 ILC Report*, *supra* note 231, at 208 (explaining that it is “not . . . out of place to draw its users’ attention to the drawbacks of these ‘forgotten,’ obsolete or superfluous reservations and the benefits of reconsidering them periodically with a view to withdrawing them totally or partially”).

315. Fourth Inter-Committee Mtg., Geneva, Switz., June 20-22, 2005 & Seventeenth Mtg. of the Chairpersons of the Human Rights Treaty Bodies, Geneva, Switz., June 23-24, 2005, *Harmonized Guidelines on Reporting Under the International Human Rights Treaties, Including Guidelines on a Common Core Document and Treaty-Specific Targeted Documents*, ¶ 45(b), U.N. Doc. HRI/MC/2005/3 (June 1, 2005); *see also* Chairperson, CEDAW, *Report of CEDAW to the General Assembly*, *supra* note 310, at 14 (requiring similar degree of detail).

316. At present, guideline 2.5.3 urges states and organizations to “give consideration to the usefulness of retaining the reservations, in particular in relation to developments in their internal law

expression. While the draft guideline would encourage state introspection, treaty bodies have exhorted states to provide the relevant information as part of a reporting process, which better ensures that they and non-reserving states can understand the reservation's continuing basis and scope. The Commission might likewise recommend that periodic review be accommodated within any reporting procedure that already exists, or even recommend reporting for purposes of reservations alone.³¹⁷

The Commission's approach to "manifestly impermissible" reservations, which addresses the role of another non-state actor, the depositary, is also generally consistent with a broader understanding of state interests. Under the draft guideline, depositaries are urged to point out clear trespasses to the reserving state; if the state maintains the reservation, the depositary circulates it to other parties while "indicating the nature of legal problems" raised.³¹⁸ This enhances, in limited circumstances, the information afforded non-reserving states,³¹⁹ but the guideline is more notable for what it does not do. Debate within the General Assembly suggested a division between those urging a passive role for the depositary, in which it would pass on all reservations without commentary, and those arguing that the depositary must refuse to circulate any manifestly impermissible reservations.³²⁰ Neither alternative advanced the interest of non-reserving states in information. The former tack would hinder the ability of other states to screen for important (and legally vulnerable) reservations,³²¹ thus impairing the very privilege of non-reserving states that advocates of a passive depositary sought to preserve.³²² The latter approach, while thwarting some incompatible

since the reservations were formulated," in light of "the aim of preserving the integrity of multilateral treaties." 2003 *ILC Report*, *supra* note 231, at 207.

317. For cautionary notes on the efficacy of reporting, however, see *supra* notes 156-160 and accompanying text.

318. Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fifty-Fourth Session*, at 112, U.N. Doc. A/57/10 (Aug. 16, 2002) [hereinafter 2002 *ILC Report*] (setting out draft guideline 2.1.8). As the Commission indicates in its accompanying commentary, the term "manifestly impermissible" is provisional only. *Id.* at 114.

319. For direct allusions to the communication function, see Int'l Law Comm'n, *Report of the International Law Commission on the Work of its Fifty-Third Session (2001): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly during its Fifty-Seventh Session*, ¶¶ 61-66, A/CN.4/521 (Aug. 16, 2002).

320. *Topical Summary 2003*, *supra* note 304, ¶¶ 61-72; 2002 *ILC Report*, *supra* note 318, at 113.

321. U.N. GAOR 6th Comm., 57th Sess., 23d mtg. ¶ 27, U.N. Doc. A/C.6/57/SR.23 (Dec. 2, 2002) (remarks of New Zealand representative) (noting that "[m]any foreign ministries . . . would not have the resources to verify the permissibility of every reservation of which they were notified, but a note from the depositary would draw attention to the possible need to take a position on the reservation in question"). Some, to be sure, would welcome this. *E.g.*, *id.* ¶ 5 (remarks of Iranian representative) (indicating that intervention by the depositary regarding incompatibility "might prompt other States to react, which would not help to resolve the problem").

322. *See, e.g.*, U.N. GAOR 6th Comm., 57th Sess., 26th mtg. ¶¶ 12, 60, U.N. Doc. A/C.6/57/SR.26 (Nov. 6, 2002) (remarks of Indian and Cuban representatives); U.N. GAOR 6th Comm., 57th Sess., 23d mtg., *supra* note 321, ¶¶ 5, 35, 51, 74 (remarks of Iranian, U.K., U.S., and Australian representatives); U.N. GAOR 6th Comm., 57th Sess., 22d mtg. ¶ 89, U.N. Doc. A/C.6/57/SR.22 (Nov. 29, 2002) (remarks of French representative). Other commentators suggested that additional information was consistent with the primacy of states. *Id.* ¶¶ 82, 94 (remarks of Swedish and Hungarian representatives); U.N. GAOR 6th Comm., 57th Sess., 26th mtg. ¶ 29, U.N. Doc. A/C.6/57/SR.26 (Nov. 6, 2002) (remarks of Greek representative). Defenders of a more passive role for depositaries also opposed the draft guideline on other grounds, such as its supposed inconsistency with the limited role

reservations, would also have reduced the understanding by non-reserving states of the reserving state's intentions and ability to comply. Yet a third approach, the Special Rapporteur's proposal to circulate the depositary's exchange of views with the reserving state,³²³ which facially increased information sharing, may go too far in invading the reserving state's prerogatives—reducing candor and, by discouraging reservations, reducing the flow of information.³²⁴

The Special Rapporteur has thus far stopped short of articulating the consequences of third-party assessment of reservations,³²⁵ and the matter certainly requires nuanced analysis. While one may assume that states would prefer not to have their reservations open to additional questioning, the impact is easily exaggerated: third-party intervention probably cannot change a reserving state's treaty obligations toward other states,³²⁶ but rather interferes with the state's ability to rely on the reservation in certain settings (for example, in connection with state reports or interstate complaints), which themselves are often contingent on the state's willingness to cooperate.³²⁷ Intervention probably also benefits states confronted by reservations, though the matter is not free from doubt. Such intervention may increase the information available to non-reserving states and improve their ability to challenge, at the time and under the circumstances of their choosing, the legitimacy and legal force of another's reservations. At the same time, enhancing intervention—at the extreme, by authorizing treaty bodies to sever incompatible reservations—may, by decreasing the ability to rely on reservations (or in lesser measures, by increasing disclosure), risk weakening treaty terms, driving reservations underground without increasing compliance, and diminishing the willingness of states to ratify.³²⁸ Even if discouraging

for the depositary contemplated by the Vienna Convention. See U.N. GAOR 6th Comm., 57th Sess., 27th mtg., ¶ 20, U.N. Doc. A/C.6/57/SR.27 (Dec. 3, 2002) (remarks of Chairman of the International Law Commission) (noting concerns, but suggesting that non-obligatory nature of the depositary's role should have resolved them).

323. See Special Rapporteur, Int'l Law Comm'n, *Seventh Report on Reservations to Treaties*, ¶¶ 44-47, U.N. Doc. A/CN.4/526 (Apr. 5, 2002) (prepared by Alain Pellet).

324. See *supra* text accompanying notes 227-236 (noting balance necessary in effecting disclosure). *But see* U.N. GAOR 6th Comm., 57th Sess., 23d mtg., *supra* note 321, ¶ 2 (remarks of Italian representative) (commending fact that “annexing the exchange of views to the communication . . . would encourage States to refrain from making any reservation contrary to the object and purpose of the treaty”).

325. See Special Rapporteur, *Tenth Report, Second Add.*, *supra* note 7, ¶ 173 (taking view that it is more appropriate to postpone consideration of the question).

326. See *supra* notes 87-89 and accompanying text. This appears consistent with the Special Rapporteur's most recent submissions, though the position is not entirely clear. Special Rapporteur, *Tenth Report, Second Add.*, *supra* note 7, ¶ 155 & n.375.

327. See *U.K. Observations*, *supra* note 55, ¶ 11 (describing implications of a reservation's assessment by the Human Rights Committee).

328. In an important article, Ryan Goodman has observed that states that would have assented to a treaty even without the right to reserve might prefer severability to the loss of treaty relations—especially if ratification was originally intended to lock the state into the treaty. Goodman, *supra* note 54, at 538-39. This probably understates the degree to which severability offends traditional understandings of state consent. See Elena A. Baylis, *Correspondence*, 97 AM. J. INT'L L. 107, 107-08 (2003). A fuller assessment of state decision-making, however, would take into account not only the preferences of states consenting to the treaty (and, potentially, being startled by a treaty body's decision to sever, and even by its assertion of power to do so), but also the effect of severability's prospect on

reservations is the only objective, increasing third-party intervention may inadvertently further diminish the attentiveness of states—a point the Commission as a whole, like the Special Rapporteur, might prefer to assume away.³²⁹

V. CONCLUSION

The limited number of topics examined—the initial standing of reservations, the form and timing of objections, and the effect of those objections—is merely the tip of the iceberg. Similar consideration of rival and complementary interests should inform the Commission’s future examination of related questions, such as the advisability of echoing calls on states to refrain from reservations.³³⁰ While often linked with pleas for withdrawal,³³¹ requests that reservations not be formulated in the first place directly suppress disclosure, whereas reserving and then withdrawing help maximize it. Other, more radical proposals require similar analysis, such as the use of temporal limits on reservations. Establishing a shelf life for reservations limits their impact, which is desirable on the conventional view; allowing reservations to be renewed at the end of such a period sacrifices that interest somewhat, but extracts from any extension a new wealth of information.³³²

Given the years of effort the International Law Commission has invested in studying the reservations regime, it is disconcerting to contemplate the work still required to optimize it. A theory of non-reserving state interests may only worsen the problem. It is difficult to aggregate the interests of a non-reserving state with respect to one treaty, let alone for *all* non-reserving states across the range of treaties that the Vienna Convention serves. Comparing these interests to those of reserving states—more exactly, assessing whether the safeguards against reservations serve the contingent interests of states that will sometimes reserve themselves—is still more difficult, and requires asking whether risk aversion, or distributional equity

states that might react by negotiating weaker treaty terms, disguising potential noncompliance, or simply declining to ratify in the first place.

329. See *supra* text accompanying notes 90-94 (discussing states’ resistance to the evaluation of reservations by treaty bodies); *1997 ILC Report*, *supra* note 8, at 126 ¶ 6 (stating preliminary conclusion that “this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties”); cf. Special Rapporteur, *Tenth Report, Second Add.*, *supra* note 7, ¶ 153 (noting concern that consensual objection processes “do not encourage State parties to maintain the special vigilance that can be expected of them”).

330. See, e.g., Special Rapporteur, Int’l Law Comm’n, *Fourth Report on Reservations to Treaties*, ¶ 12, U.N. Doc. A/CN.4/499 (Mar. 25, 1999) (*prepared by Alain Pellet*) (citing correspondence from the chairpersons of human rights bodies calling for limiting the number and scope of reservations); World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993) (encouraging “universal ratification of human rights treaties,” but also asking states “to avoid, as far as possible, the resort to reservations”); Parliamentary Assembly of the Council of Europe, Recommendation 1223 (1993) on Reservations Made by Member States to Council of Europe Conventions, 51st Sitting (adopted Oct. 1, 1993) (urging Committee of Ministers to take steps to reduce “considerably” the number of reservations to past and future Council of Europe conventions).

331. See, e.g., *Treaty Bodies’ Practice*, *supra* note 93, ¶ 2 (noting agreement “that it was appropriate for treaty bodies to request the withdrawal of reservations to the treaties they monitored”).

332. See *2003 ILC Report*, *supra* note 231, at 205 n.362 (providing examples of renewable and non-renewable time-limited reservations).

among states with different tastes and different needs, should play any role. And the interests of states does not, of course, necessarily equate with the public interest.³³³

Further research—for example, careful canvassing of the state representatives responsible for tendering reservations and evaluating objections, or microlegal analysis of particular treaty negotiations—may be helpful. But at the very least, a more sophisticated understanding of state interests helps to imagine how the present regime may have come to pass, and the potential costs of reforming it. Commentary sometimes supposes that a treaty necessarily exists as it has been negotiated (if falling short of the ideal degree of commitment and enforceability), and among the parties that have in fact ratified it (again, at worst). This tends to resolve the question of reservations before it has been asked: on this view, reservations are unfortunate concessions to demanding norms that other states are willing to shoulder, submitted by states that would otherwise acquiesce. Since the *Genocide Convention* opinion, if not before, many have been skeptical of this account—realizing that states sometimes require reservations to participate in a treaty, which redounds to the benefit of treaty participants as a whole—but at a loss to explain the volume of rent conceded by non-reserving to reserving states.

The account in this article is intended as a partial corrective, perhaps helping to explain some of the unusual contours of the Vienna Convention regime. The argument may also inform the regime's reexamination. At the most general level, it suggests that the regime's perceived indulgence of reservations is not necessarily as hostile to non-reserving states as has been supposed, which may be useful in sustaining the International Law Commission's somewhat conservative approach to its project. At the same time, it cautions that even the lowest hanging fruit may not be as attractive as supposed. While the Commission, like any group of lawyers, has considered clarification to be an unmitigated good,³³⁴ it should consider whether reducing the uncertainty for reserving states, and constraining self-help and innovation by non-reserving states, is consistent with the arc of the regime's evolution to date.

The expansive view of the interests of non-reserving states may also be suggestive for other work. Compliance studies, for example, often reach depressing conclusions regarding the pull of international obligations, or alternatively provide little insight into why states appear to abide by their obligations. Pushing the envelope of the state interests involved—considering, for example, the interests that states have in learning about their peers, or in maximizing their discretion within a legal framework—may help us understand that states often get exactly what they want, so long as what they

333. Cf. BAIRD, *supra* note 172, at 124-25 (distinguishing between signaling function and social benefit).

334. See, e.g., 2003 ILC Report, *supra* note 231, ¶ 362 (proclaiming opposition to “uncertainties or misunderstandings,” and stating that “[r]eserving States and others, whether they object or not, must know where they stand and what the real objections are by comparison with responses to reservations which are not objections”).

want is properly reckoned, and that these interests may already be accommodated within international law.