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Bespoke Custom

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BESPOKE CUSTOM

EDWARD T. SWAINE*

INTRODUCTION

Curtis Bradley and Mitu Gulati’s stimulating article describes a version of customary international law (“CIL”) they claim has been left on the shelf—and which they suggest might be dusted off and employed again.¹ CIL, they argue, was once thought to be subject (sometimes) to a right of unilateral withdrawal. They are at pains to avoid directly advocating a return to that approach, but they do suggest that it deserves serious consideration. Adopting a constrained right of unilateral withdrawal comes across as less of a revolution than a restoration, a return to those halcyon days before CIL was modernized (or, perhaps, radicalized).

Bradley and Gulati deserve great credit for helping to revitalize the debate about CIL, and they correctly perceive that modern discussion neglects the possibility of unilateral withdrawal—and that a reevaluation is in order. This brief Essay simply hopes to extend that dialogue, rather than offering categorical support or opposition to the so-called Default View. It does suggest, though, that Bradley and Gulati’s account of customized custom is itself bespoke. Because their understanding of the intellectual history of CIL, and that history’s continuing significance, is contestable, they tend to understate the novelty of their thought-experiment. This bears, in turn, on their normative assessment of its appeal.

I. THE “DEFAULT VIEW” OF CIL

The “Default View” of CIL, according to Bradley and Gulati, is “that CIL rules were at least *sometimes* subject to unilateral withdrawal.”² The qualifier contemplates two kinds of exceptions. First, it would permit only prospective withdrawal and, perhaps, require reasonable notice in order to protect reliance interests.³ Second, a narrow class of rules—discussed

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1. See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202 (2010). This Essay was originally prepared in reaction to a prior version of their article.

2. *Id.* at 206 (emphasis added).

3. *Id.* at 258-59; see also *id.* at 215.

below—might also be exempted.⁴ But the idea, in all events, is that the Default View is *also* a default view about the appropriate principle: under the Default View, absent unusual circumstances, unilateral withdrawal should be permissible; because of its historical foundations, moreover, we should (they imply) be content with the Default View itself, unless we can explain why it was discarded.

Whose view *was* this, exactly? It seems to be traced to the international law publicists of the eighteenth century, including Vattel—a very good place to start. But if that was all there was to it, the mystery of what happened to the Default View would really be no mystery at all. Vattel was widely cited and highly influential,⁵ but so far as can be determined, his influence had little to do with his abstract principles—rather, his treatise was prized because he pronounced on a number of issues confronted by states, and did so in a way that was sympathetic to their problems and vague enough to be cited by everyone.⁶

Vattel's understanding of CIL, like that of his contemporaries, is so different from ours that the loss of the Default View would be incidental. In part, this difference is due to broader jurisprudential changes that Bradley and Gulati identify—"the shift to the Mandatory View," as they describe it, notwithstanding at least a feint toward voluntarism.⁷ But jurisprudential changes are not the only reason that Vattel and his ilk have lost their

4. *Id.* at 217-18.

5. See Charles G. Fenwick, *The Authority of Vattel*, 7 AM. POL. SCI. REV. 395, 406-10 (1913) (citing authorities discussing Vattel); see also Bradley & Gulati, *supra* note 1, at 219 n.68.

6. Critics of Vattel, though less numerous or vocal than his adherents, are consistent in these criticisms. Charles Fenwick, for example, alludes to Vattel's influence, but only after an extended criticism of his classification of international law. See, e.g., *id.*, at 403 (observing, following summary of Vattel's crucial distinctions between perfect and imperfect rights and external and internal rules, that "[i]t is evident that the above distinctions lead us nowhere"); *id.* at 405 (noting that "a system of international law into which the law of nature enters as the chief constituent element cannot stand the test of critical analysis"); see also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 89 (1989) (describing Vattel's as "a 'realistic' book, especially useful for diplomats and practitioners, not the least because it seemed to offer such compelling rhetoric for the justification of most varied kinds of State action"); James Kent, KENT'S COMMENTARY ON INTERNATIONAL LAW 42 (J.T. Abdy ed., 2d ed. 1878) (praising utility of Vattel as "the statesman's manual and oracle," but adding that "he is deficient in philosophical precision; the classification of his work is faulty . . . nor does he sufficiently support the general doctrines of International Law by historical proofs and precedents"); Arthur Nussbaum, A CONCISE HISTORY OF THE LAW OF NATIONS 159-60 (rev. ed. 1954) (criticizing Vattel for his lack of legal training and for "the striking ambiguity of his formulas and for the inconsistency of many of his conclusions," and claiming that "[a]mong the legal learned Vattel has never met with much praise"); *id.* at 161 (noting the "paradoxical" appeal of Vattel, and explaining that "[t]he ambiguity of Vattel's propositions—indeed, the ambiguity of an oracle—made it only the easier to refer to his treatise in diplomatic correspondence," and "the philosophical paraphernalia could be ignored without diminishing the usefulness of the book").

7. Bradley & Gulati, *supra* note 1, at 226, 227-28.

purchase, and Bradley and Gulati may not sufficiently credit differences that were immanent in the originals. Vattel posited a complicated classification of international law: there was “the necessary law of nations” (in effect, a natural law for nations)⁸ and three species of “the positive law of nations”—the “voluntary” (predicated on presumed consent), “conventional” (predicated on express consent, and synonymous with the law of treaties), and the “customary” (predicated on tacit consent).⁹ This classification was not analytically satisfying, but what is important is how Vattel accounts for what we now call CIL. As Bradley and Gulati observe, Vattel noted several times something that sounds like a right to withdraw. Thus, he was willing to presume consent for customary law, and to assume that it binds all states, but on the condition that the states “have not expressly declared their resolution of not observing it in the future.”¹⁰

It is unclear, however, what class of customary conduct—putting aside, that is, treaty obligations—he had in mind. On the one hand, Vattel seemed to have a broader vision of the kinds of things that might be deemed customary: he did not, notably, impose anything like the modern requirement of *opinio juris*, so it was open for him to deem a practice customary if it was a matter of routine. Withdrawing from such practices could be entirely consistent, consequently, with what Bradley and Gulati address as the Mandatory View, since such customs would probably not qualify as modern CIL in the first place.

On the other hand, Vattel also regarded some obligations that the Mandatory View *would* treat as CIL as *not* subject to a right of withdrawal. If a state operated under what he termed an “external” (meaning, not a question confined to its own judgment and conscience) and “perfect” obligation (meaning, the kind of right that by its nature gave other states rights to demand observance, as opposed to an “imperfect” right, which only vests an opposing state the right to ask that it be observed)—which together seems to constitute the class that Vattel called the “voluntary” law of nations—then states were not free to opt out.¹¹ Bradley and Gulati

8. EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS*, § 7 (Joseph Chitty ed., 1883) (1758).

9. *Id.* at § 27.

10. *Id.* at § 26.

11. *Id.* at § 17 (making distinctions between perfect and imperfect rights); *id.* § 20 (explaining that “[a] nation then is mistress of her own actions so long as they do not affect the proper and perfect rights of any other nation—so long as she is only internally bound, and does not lie under any *external* and *perfect* obligation.”) (emphasis in original); *id.* §§ 21-23 (describing voluntary law of nations and its enforcement).

acknowledge this forthrightly,¹² but understate its significance. Vattel might have deemed much of what we would now term CIL to be part of this “voluntary” law of nations. The remaining “internal” or “imperfect” rules, from which states could withdraw, might also be thought of as customary by modern lights—and perhaps labeled as traditional, soft law, emerging principles, or general principles—without being deemed the kind of legal obligations that brook no withdrawal. Of course, the set of rules that bind even a dissent-minded state under Vattel’s approach and the set of rules that bind that state under the Mandatory View might differ considerably, but that discrepancy can be explained by historical developments (such as the shift toward human rights as the subject of CIL) without turning on any shift from a Default View.¹³

Bradley and Gulati do not cite Vattel only, and it may seem unfair to focus only on his work.¹⁴ But Vattel was, as they stress, influential, and he influenced the work of others; these other writings, too, leave the demarcation of withdrawal-friendly rules quite unclear.¹⁵ Yet other publicists may have been clearer in permitting unilateral withdrawal from the kinds of rules that today would be subject to the Mandatory View, and Bradley and Gulati scarcely bear the burden of demonstrating a universal conviction in favor of the Default View. At some point, though—just as with state practice—it is fair to conclude that views were simply too diverse and unclear to establish much of anything, let alone a well-defined, broadly accepted approach the demise of which requires explaining.

12. Bradley & Gulati, *supra* note 1, at 217-18.

13. For a discussion of this development, see generally Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757 (2001).

14. See Bradley & Gulati, *supra* note 1, at 217 n.57 (citing other examples).

15. Burlamaqui, to whom they refer, indeed described the law of nations as “arbitrary and free,” and “being obligatory only in regard to those who have voluntarily submitted thereto, and only so long as they may please, because they are always at liberty to change or repeal it”—but distinguished that from “an universal, necessary, and self-obligatory law of nations, which differs in nothing from the law of nature, and is consequently immutable, inasmuch that the people or sovereigns cannot dispense with it, even by consent, without transgressing their duty.” J.J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL LAW, IN WHICH THE TRUE SYSTEMS OF MORALITY AND CIVIL GOVERNMENT ARE ESTABLISHED* 199 (Nugent transl. 1748) (1718). Martens said expressly that rights founded on “simple custom” would cease whenever a state made a timely declaration, either express or tacit, of its intention to do so—but imagined a distinction between such rights and inherent rights, rights acquired by possession, rights acquired by treaty, and rights acquired by “tacit convention” while suggesting that some of the latter rights (of particular relevance, those inherent or the product of tacit convention) could not be unilaterally terminated. GEORG F. MARTENS, *A COMPENDIUM OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE* 356 (William Cobbett transl. 1802) (1788). Finally, they cite Bynkershoek, discussed *infra* note 35. CORNELIUS VAN BYNKERSHOEK, *DE FORO LEGATORUM: A MONOGRAPH ON THE JURISDICTION OVER AMBASSADORS IN BOTH CIVIL AND CRIMINAL CASES*, 106-07 (Gordon J. Laing trans., Clarendon Press 1946) (1744).

Interestingly, though modern international law is sometimes lambasted as an academic concoction,¹⁶ the Default View is tethered almost exclusively to the opinions of leading publicists. This is understandable, given that states during its supposed tenure may have failed to assess their own behavior in legal terms, and almost certainly did a worse job at pronouncing their understanding of the fundamental concepts of international law. But it means that states may never have acted in contemplation of the Default View; they may never have supposed, for instance, that they could postpone their disagreement with emerging CIL until some later point, when they could notice their withdrawal from the norm. This leaves considerably more legal and political space for the Mandatory View.

II. THE “MANDATORY” VIEW

Bradley and Gulati contrast the Default View with a now-canonical Mandatory View (we should bracket whether this is genuinely canonical, or unitary, and whether it has really managed to sweep views like Vattel’s under the rug).¹⁷ At points they describe this Mandatory View as “[t]he complete disallowance of unilateral withdrawal from CIL,”¹⁸ but the disallowance seems incomplete if, as they also say, states may be able to persistently object and thereby unilaterally withdraw from (what eventually becomes) CIL.¹⁹ What they seem to mean, more precisely, is that the Mandatory View holds that states cannot object *subsequently* to a fully-formed CIL rule and thereby exempt themselves from its application.²⁰

16. For a clear articulation of this concern, focusing on its consequences for U.S. human rights litigation, see Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457, 468 (2001) (“In effect, these academic experts, like the judges, are engaged in a form of law creation.”).

17. Consensualists would be startled by either suggestion, as would anyone who notes their debt to Vattel—albeit without necessarily having sketched the implications for withdrawal. See, e.g., Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT’L L. 1, 1 (1986) (stating that “[t]he positivists clearly held that no rule of international law could be binding on a State without its consent,” and citing Vattel). Bradley and Gulati quote Charney’s contention that “[n]o authority would permit a State unilaterally to opt out of an existing rule of customary international law,” Bradley & Gulati, *supra* note 1, at 226 (citing *id.* at 2), but that gets to a narrower point—and is based on Charney’s more controversial opinion that consensualists invariably find consent. Charney, *supra*, at 2.

18. Bradley & Gulati, *supra* note 1, at 211 (“The complete disallowance of unilateral withdrawal from CIL is what we call the Mandatory View.”).

19. *Id.* at 233.

20. *Id.* at 205 (citing INT’L LAW ASS’N, COMM. ON THE FORMATION OF CUSTOMARY (GEN.) INT’L LAW, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW, 27 (2000)).

Putting these quarrels aside, what is the Mandatory View, and how closely does it resemble a genuinely “mandatory,” non-derogable, conception of CIL? It is worth pausing, first, over what Bradley and Gulati identify and discuss as “the one exception to the Mandatory View’s disallowance of unilateral opt out”: the persistent objector doctrine, according to which a state may exempt itself from CIL’s binding effect by persistently objecting to a rule before it becomes fully established.²¹ As Bradley and Gulati say, this may not be much of an exception. It seems to have originated sometime after World War II, in a contemporaneous pair of International Court of Justice opinions properly described as ambiguous.²² Subsequent state practice, as they note, suggests little overt employment.²³ It is entirely possible, though, that states wield the possibility of persistent objection as a bargaining chip for moderating objectionable claims to CIL, in which case its influence would be mostly behind the scenes.

If anything, Bradley and Gulati may be the ones making too much of it. They reject suggestions that the persistent objector doctrine was a genuine concession to a consent-oriented vision of CIL.²⁴ Rather, they suggest, the point was to facilitate the growth of CIL by defusing concerns that new rules would require acquiescence by an ever-growing cast of states—simultaneously, it is implied, smoothing the path for accepting the Mandatory View.²⁵ This explanation relies too heavily on their dichotomy

21. *Id.* at 233.

22. *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. 266, 277-78 (Nov. 20); *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116, 131 (Dec. 18).

23. Bradley & Gulati, *supra* note 1, at 33 (citing Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457, 459 (1985)). *But see, e.g.*, Letter from John Bellinger III, Legal Adviser, U.S. Dep’t of State, and William J. Haynes, General Counsel, U.S. Dep’t of Defense, to Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study (Nov. 3, 2006), 46 ILM 514 (2007), available at http://www.defense.gov/home/pdf/Customary_International_Humanitarian_Law.pdf (stating that “the U.S. government thinks that the [persistent objector] doctrine remains valid,” albeit without relying on that doctrine).

24. Bradley & Gulati, *supra* note 1, at 240 (“[T]he rise of the persistent objector doctrine did not represent a shift back towards a greater consent requirement in international law. . . .”). It is not clear whether this simply expresses their view that the consent requirement never truly went away, or a separate point about the consistency of the persistent objector doctrine with consensualism. In either event, it is in tension with their observation that the *Fisheries Case* “could just as easily be read to support the Default View of CIL; there is nothing in [the Court’s] language that suggests that Norway’s opposition must have occurred prior to the establishment of the alleged rule of CIL.” *Id.* at 235. Of course, nothing in the case suggests the Court’s logic should be so extended, given its holding (which they acknowledge) that the alleged rule did not exist.

25. *Id.* at 238-40. This assumes something about the motives of a diverse set of advocates—and their capacity to anticipate the doctrine’s near-irrelevance in practice—that is quite difficult to establish.

between a Default View and a Mandatory View.²⁶ The more neutral explanation is that the persistent objector doctrine—prompted by the postwar growth in customary international law claims, new participants in international lawmaking, and so forth—was simply one more response to a persistent puzzle for international lawyers, who have never resolved whether states individual states enjoy a heckler’s veto against new CIL.

Indeed, the persistent objector debate addressed a problem that afflicts the Default View as well. Vattel and others regarded the tacit consent of states as the predicate for some customary law,²⁷ and a state that has persistently objected can certainly maintain that its consent is no longer a tenable fiction. To be sure, if the Default View already accorded states the capacity to exit unilaterally at any time, the point of persistent objection would be ameliorated, but scarcely eliminated. States that had objected would by definition be unencumbered by any concerns about advance notification or reliance by other states (since no law had yet emerged).²⁸ Moreover, nothing in the Default View preserved a right to withdraw from the voluntary law of nations—as persistent objection might.²⁹

So persistent objection may not be a jury-rigged exception distinctive to the Mandatory View; what is more, it is not the only real exception to that view at all, as is evident from the literature on persistent objection. Regional, particular, or special CIL—which is arguably on display in some of the same cases thought to substantiate the doctrine of persistent objection—may be the more important loophole. The premise is that states may forge for themselves a tailor-made form of custom the formulation of which depends heavily on consent; consistent with that predicate, it has been argued that actual consent is also critical in order for it to be opposed to a particular state.³⁰

26. *But cf. id.* at 240 (suggesting that the debate has instead been stilted by framing it as a choice between the Mandatory View with the persistent objector doctrine and the Mandatory View without it).

27. Charney, *supra* note 17, at 18 (“Only if one actually believes in the reality of the tacit consent theory of international legal obligation might there be any room for the persistent objector rule.”). Professor Charney added that “[i]n that case, it is difficult to limit [the doctrine’s] application only to overt dissent commenced at the formative stages of rule development.” *See id.* Perhaps the supposition was that reliance interests settled in after the rule had flowered, though Bradley and Gulati persuasively argue that reliance interests can be exaggerated. *See* Bradley & Gulati, *supra* note 1, at 254-58.

28. It is a nice point, in any event, whether early proponents of the Default View anticipated the kind of evolutionary capacity in customary international law that the persistent objector doctrine assumes.

29. *Cf.* Charney, *supra* note 17, at 19 n.81 (arguing that the persistent objector rule, if good law, should also apply to *jus cogens* norms).

30. *See generally* ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* Ch. 8 (1971) (discussing, *inter alia*, the Asylum Case and the Fisheries Case). For criticisms of

Even putting aside the persistent objector principle and special CIL, in what sense is modern CIL “mandatory”? Consider, for a moment, a world in which at first there were only purely volitional legal obligations; then suddenly appeared a full-fledged multilateral convention, inconsistent with the behavior and preferences of at least some states, which imposed detailed and substantial constraints on state behavior. The final articles of this hypothetical convention do not spend much time explaining how states become parties and when the convention comes into force, but rather provide that the convention is binding simply by virtue of its hidden negotiation, permits no reservations or withdrawals, and (here’s the kicker) constrains all states.

Is this akin to CIL, as transformed by the Mandatory View? Not really. First, there may have been a point when assessing CIL was like legal archaeology, but increasingly it is generated by international collegial activities that are reasonably conspicuous, subject to contestation, and vulnerable to some of the same choke points as any new multilateral convention.³¹ It is quite hard, in the ordinary case, to claim that a customary

D’Amato’s legal premises, see Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1, 24-25 (1974-75).

To be sure, Bradley and Gulati appear to be focusing on general CIL, and so should not have to account for the function of consent for other bodies of law, but at least one of the cases they cite in support of a doctrine of unilateral withdrawal arguably sounds in regional custom. In *Ware v. Hylton*, as they report, Justice Chase’s opinion stated that the customary law of nations was binding only on those states that adopted it (by providing their tacit consent), which meant that Virginia was free to reject a customary norm to refrain from confiscating private debts. Bradley & Gulati, *supra* note 1, at 219-20 (discussing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 227-28 (1796)).

Their understanding that Justice Chase, at least, supported something like a right to unilateral withdrawal is eminently reasonable. But Justice Chase also reported his understanding, based on Vattel, that the general norm favored the right to confiscate any enemy property during wartime, and that a different custom with regards to private debts had taken hold in Europe. His opinion may thus be read to marginalize something we might now call a regional custom—albeit one of exceptional significance to the development of custom at that time. See *Ware*, 3 U.S. at 227 (“The relaxation or departure from the strict rights of war to confiscate private debts, by the commercial nations of Europe, was not binding on the state of Virginia, because founded on custom only; and she was at liberty to reject, or adopt the custom, as she pleased.”); see also *id.* at 229 (“Great Britain does not consider herself bound to depart from the rigor of the general law of nations, because the commercial powers of Europe wish to adopt a more liberal practice.”); see also *id.* at 254 (“I shall not, however, controvert the position, that, by the rigour of the law of nations, debts of the description just mentioned, may be confiscated. This rule has by some been considered as a relict of barbarism; it is certainly a hard one, and cannot continue long among commercial nations; indeed, it ought not to have existed among any nations, and, perhaps, is generally exploded at the present day in Europe. Hear the language of Vattel [sic] on this subject . . .”). It is also interesting that Vattel’s own language concerning the capacity to withdraw was not invoked as a foil against his opinion that Virginia’s behavior breached customary law, which the Court was evidently resisting—particularly given that he was quoted throughout the opinion.

31. The absence of any formal domestic approval process, which sometimes dooms treaties, is one important difference, but CIL may suffer from comparable limitations when it is actually invoked.

norm has sprung full-grown from the brow of Zeus, and easy to imagine circumstances in which CIL initiatives are wholly derailed. A Mandatory View must afford some room for the possibility that a would-be dissenting state might divert or derail the possibility of law-formation; perhaps more than one state is usually complicit in such resistance, but this merely suggests that more independent, costly gestures are unnecessary.

Second, the hypothetical convention supposed that the obligations involved are well-defined and restrictive, but that is frequently not the case. Because CIL is unwritten and difficult to ascertain, states inevitably have greater capacity to dispute whether there is CIL addressing a particular activity and, if so, whether that CIL permits or prohibits its conduct. Even when its status and content is uncontroversial, CIL typically leaves a substantially greater margin for appreciation. Some states that might be inclined to withdraw unilaterally—or persistently object—may instead remain within the CIL process by contesting its status, its details, or its application.³²

Third, the Mandatory View allows yet another exception inherited from the Default View: the possibility of incorporating consent into the rule itself—employing withdrawal, that is, not as a means of exiting CIL, but rather as a means of adapting CIL to the state’s preferences. For example, under modern international law, a state has at least some capacity to temper immunity rules by unilaterally declaring in advance the terms under which another state or its diplomats engage the state;³³ likewise a state may, within limits, regulate the use of its water or other territory.³⁴ The two kinds of gestures are easy to confuse with one another—and may, indeed, account for some of the apparent support for the Default View from commentators³⁵ and early judicial decisions.³⁶ It should be apparent,

32. See, e.g., Bellinger & Haynes, *supra* note 23, at 9 (disagreeing with depiction of the United States, France, and the United Kingdom as persistent objectors to a particular rule, and contending that the opposition of those specially affected states meant “rather that the rule has not formed into a customary rule at all”).

33. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 324 (7th ed. 2008) (“By license the agents of one state may enter the territory of another and there act in their official capacity . . . [A]s a general principle this immunity is delimited by a right on the part of the receiving state to use reasonable force to prevent or terminate activities which are in excess of the license conferred . . .”).

34. See, e.g., *Right of Passage Over Indian Territory* (Port. v. India), 1960 I.C.J. 6, 44-45 (April 12) (indicating that, at least in the instance of a bilateral custom, India retained the authority to regulate and control passage rights enjoyed by Portugal).

35. Bradley and Gulati cite Bynkershoek, for example, whose treatise was devoted to the law of ambassadors, “actually endors[ing] the Default View of CIL.” Bradley & Gulati, *supra* note 1, at 239 n.161. As they note, after asking whether a state can abolish ambassadorial immunities established by the “common law of the nations,” Bynkershoek answered: “I think that it can if it makes a public

though, that they are materially different in their consequences. So far as can be determined from the Default View, a state that withdraws unilaterally from CIL is a stranger to it.³⁷ On the other hand, a state that avails itself of exemptions within the rule is not, and does not thereby disable the rule's application to its relations with other states (or even,

announcement in regard to them, because these immunities owe such validity as they have not to any law but only to a tacit presumption. One nation does not bind another, and not even a consensus of all nations except one binds that one, isolated though it be, if it is independent and has decreed to use other laws." BYNKERSHOEK, *supra* note 15, at 106. It may be noteworthy, though, that Bynkershoek stated that "these immunities" depend on only a tacit presumption, and that in the discussion immediately following he stressed both the general point properly cited by Bradley and Gulati and the observation that "it may truthfully be said of ambassadors' privileges in general that they are of no avail if a formal announcement to the contrary has been made," *id.* at 107—something consistent with modern suggestions regarding ambassadorial immunity.

Vattel's clearest elaboration of unilateral withdrawal, too, took place in the context of ambassadorial privileges and immunities. See Bradley & Gulati, *supra* note 1, at 216-17 (citing Vattel, *supra* note 8, Book IV, § 106. Establishing what he meant is difficult. On the one hand, he directly stated that he was addressing not only the kind of obligations as "concerns ministers, but also in any other instance, in general." Vattel, *supra* note 8, at § 106. Accordingly he was not confining himself to a feature of ambassadorial law, such as a peculiar capacity to modify the application of that kind of rule, and purported to be stating a general capacity for a state to declare that it would no longer observe a rule. That said, the ensuing discussion makes it reasonably clear that he was contemplating a declaration by a state that it would not observe customary law with respect to a particular state, rather than a declaration that it was opting out of the norm altogether—though he hastens to add that it is more appropriate to make a general declaration to reduce the prospect of offense.

More important, his discussion emphasizes the difference he perceived between indefeasible custom and lesser norms—perhaps tracking his distinction between perfect and imperfect rights—insofar as he says that advance notification permits withdrawal "provided that the privileges and honours which are withheld be not essential to the nature of the embassy, and necessary to ensure its legitimate success"—since those privileges and honors must be observed unless refusal is "founded on some very substantial reason," presumably articulated by the rule itself. *Id.* at § 106. This means, again, that only some custom was subject to withdrawal, and that other custom—which might be more like what the Mandatory View purportedly regards as mandatory—was subject to internal exemptions of the kind discussed in the text. And again, Vattel's discussion of the kinds of privileges and honors that were subject to unilateral withdrawal made it appear as they might be more customary than legal in character, and therefore would not even be recognized by the Mandatory View as CIL—such that no right of withdrawal would be necessary.

36. Thus, in addition to *Ware v. Hylton*, discussed *supra* note 30, Bradley and Gulati cite the famous case of *Schooner Exch. v. McFaddon*, which chastised the United States for violating a tacit commitment to respect France's sovereign immunity "suddenly and without previous notice." Bradley & Gulati, *supra* note 1, at 220-21 (quoting 11 U.S. (7 Cranch) 116, 137, 147 (1812)). But the decision is at least equally amenable to the reading that the United States had erred in not employing a capacity to *alter the application* of the rule to France; the French ship, the Court reasoned, "supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him," *Schooner Exch.*, 11 U.S. at 137, but it remained open to the United States *within the terms of that rule—not by withdrawing from it*—to let France know otherwise.

37. Among the many logistical details never resolved by those suggesting a capacity for unilateral withdrawal, including Bradley and Gulati, is whether a withdrawing state could opt back in—but it seems like its withdrawal would, for such time as took effect, be comprehensive.

necessarily, on other occasions in relation to the same state); moreover, whether the rule is one that permits such exemption depends on the substance of the rule in question, rather than being a feature of all CIL (save for the nebulous category of perfect rights).

Finally, whose is the Mandatory View? A case may be made that states have accepted the Mandatory View, though it is a matter of compiling inferences. The fact that states rarely seem to avail themselves of a persistent objector exception may, as Bradley and Gulati claim, indicate that states do not take the Mandatory View seriously,³⁸ but this rareness is also consistent with the notion that states found it more productive to quarrel over the content or application of international law as opposed to its theoretical reach.³⁹ The Statute of the International Court of Justice (“ICJ”), on the other hand, appears fully consistent with the Mandatory View,⁴⁰ and certainly missed the opportunity to clarify that international custom was subject to a litigating state’s advance negative; states do not seem to have objected to the ICJ (or, before that, the Permanent Court International Justice) decisions that generally apply CIL without regard to consent,⁴¹ though they would seemingly have every reason to protest when that CIL was opposed to them. And if it is true that states have acquiesced in this less forgiving version of CIL, it should at least inform the normative analysis – at the very least, by explaining how one might, other than by a universal treaty, accomplish the reversion to a Default View.

III. NORMATIVE IMPLICATIONS

Bradley and Gulati do not make their normative assessment turn on the absence of consent in the Mandatory View—no tears are wept for the conscripted state.⁴² Their concern, rather, has to do with suboptimal

38. Bradley & Gulati, *supra* note 1, at 239-41.

39. Those negotiating the Vienna Convention on the Law of Treaties included articles that sacrificed treaty provisions to peremptory norms in the teeth of objections that persistent objection, a lesser concession than the Default View, should be maintained as a defense even for those norms.

40. Statute of the International Court of Justice art 38, June 26, 1945, 59 Stat. 1031, 3 Bevans 1179 (“The Court . . . shall apply . . . international custom, as evidence of a general practice accepted as law.”).

41. *See, e.g.*, North Sea Continental Shelf (F.R.G./Den. v. F.R.G./Neth.), 1969 I.C.J. 3, 38-39 (Feb. 20) (“[C]ustomary law rules . . . must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.”); *see also* Legality of Use of Force (Yug. v. U.S.), 1999 I.C.J. 916, 965 (June 2); Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. / Can.), 1984 I.C.J. 246, 292-93 (Oct. 12).

42. This may reflect their relatively glancing engagement with the longstanding debate over the role of consent, *see* Bradley & Gulati, *supra* note 1, at 213-14, a debate that necessarily touches on many of the same equities as their conception of a Mandatory View.

lawmaking. Much of what they say is persuasive; the abstract nature of the Default View, at this preliminary phase in its revival, means that it is probably unproductive to debate some of the nuances. But the contrast to their descriptive argument deserves highlighting. Despite being admirably sensitive to the evolution of CIL principles, they pay less attention to the development of alternative forms of lawmaking, which complicates the analysis considerably.

Bradley and Gulati's assessment of the "functional desirability of the Mandatory View" (really, reasons why it is *undesirable*), taken by itself, seems reasonable, if limited. Their argument that the difficulty in altering CIL is out of sync with its murky and relaxed process of formation is dubious to the extent it assumes that *real* CIL—that is, the kind persuasively invoked against states by states, or by other prominent actors, as opposed to that asserted by academics or interest groups—is easily made.⁴³ Were that assumption valid, in any case, it tempers the supposed problem of holdouts: if CIL is formed easily or by an inscrutable process, threats by would-be dissenters would lack force and credibility.⁴⁴

Some of the more interesting claims, though, compare CIL to withdrawal rights under treaties—which, Bradley and Gulati contend, have not led to excessive withdrawals, and make it easier to adapt to change, but may be impaired by overlapping CIL norms from which states cannot withdraw.⁴⁵ It seems difficult to conjecture about any two-level withdrawal scenario—that is, the predicament of a state capable of withdrawing from a treaty but unable to withdraw from a similar CIL rule. Such a state may wish to avoid certain mechanisms unique to the treaty, such as dispute resolution; may contemplate an eventual return to the treaty; or may simply be unlikely to contemplate withdrawal from the class of treaties that overlap with CIL (withdrawal might, for example, be more common with respect to treaties grown out of sync with otherwise prevailing norms).

In any case, Bradley and Gulati may be criticized for celebrating the diversity of treaty withdrawal schemes without taking equal account of nuances in the CIL subject to the Mandatory View. Just as Vattel contended, not all custom is alike. For CIL emerging in what might be

43. Bradley & Gulati, *supra* note 1, at 242-45; *but cf.* Robert Y. Jennings, *The Identification of International Law*, in INTERNATIONAL LAW: TEACHING AND PRACTICE 3, 5 (Bin Cheng ed., 1982) (claiming that "most of what we perversely persist in calling customary international law is not only *not* customary law," but "it does not even faintly resemble a customary law").

44. Bradley & Gulati, *supra* note 1, at 249 (describing the holdout problem as "the concern that a disallowance of unilateral opt-out will cause nations to act opportunistically and demand concessions before agreeing to any alterations of CIL (even efficient ones)").

45. *See id.* at 245-46, 251-53.

called coordination games, concerns about affording room for withdrawal are simply misplaced—states will have little incentive to change, and the legal obligations will actually do little work.⁴⁶ Where CIL is struggling to secure genuine cooperation, on the other hand, exit may yet be accomplished by other means—like temporizing about whether custom exists, challenging its terms, or quarreling with its application.⁴⁷ Distinguishing among different rules is entirely consistent with the final section of the article, in which Bradley and Gulati properly plead for disaggregating claims about the reliance, externality, and agency interests supposedly served by the Mandatory View. Taking this approach seriously, one might impose withdrawal rules for CIL that paralleled any withdrawal rules employed for parallel treaty obligations—or, more crudely, handicap or exclude as evidence of emerging CIL any multilateral treaty with a withdrawal mechanism, perhaps subject to a period of examination as to whether that mechanism is exploited.

The most fundamental point is that any normative assessment has to credit the fact that CIL is only one choice for using law to address international problems. As compared to conventional obligations, CIL does seem limited in the design options it permits—albeit less so if some of its substantive rules permit unilateral exemption, as has been argued. Still, even under the Mandatory View depicted by Bradley and Gulati, states retain the capacity to choose among treaties, custom, soft law, international lawmaking institutions, and domestic alternatives when considering whether and how to regulate. At first blush, it seems reasonable, then, for the international system to have developed CIL with some distinctive features, like the difficulty of withdrawal, in order to better serve situations requiring such an instrument.

Of course, CIL's distinctive terms may nonetheless be unreasonable if, for example, it is invariably inefficient (perhaps for some of the reasons Bradley and Gulati suggest), or because it is structurally flawed (perhaps because it is foisted upon un-consenting states), or because its selection cannot be optimized (perhaps because CIL is harnessed by different players, perhaps not states at all, than those who select among the other options for international lawmaking). But these are more extreme arguments than the tentative and insightful normative account offered in *Withdrawing from International Custom*. Unless the title proposes comprehensively withdrawing from the system of international custom, as

46. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005). Whether these norms should be termed CIL is another question, but Bradley and Gulati do not seem to take a position on that.

47. See *supra* text accompanying note 35.

opposed to the possibility for states of withdrawing from particular rules, it remains to assess whether custom can do any distinctive good within a complex regime—one that may or may not require distinctions among types of custom, for purposes of withdrawal, but which certainly requires considering every type of law before any particular form is revamped.