

HUMAN RIGHTS TREATIES, INVALID RESERVATIONS, AND STATE CONSENT

By Ryan Goodman *

A continuing debate in international human rights law concerns the result of invalid reservations to multilateral treaties. The cardinal rule holds that a reservation cannot be incompatible with the object and purpose of a treaty.¹ Yet a normative puzzle remains: what legal remedy should follow the determination of the invalidity of a reservation? Leading commentators have discussed a limited set of options.² Three choices can be identified:

- Option 1:* The state remains bound to the treaty except for the provision(s) to which the reservation related.
- Option 2:* The invalidity of a reservation nullifies the instrument of ratification as a whole and thus the state is no longer a party to the agreement.
- Option 3:* An invalid reservation can be severed from the instrument of ratification such that the state remains bound to the treaty including the provision(s) to which the reservation related.

The third option—holding that an invalid reservation can be severed—has recently encountered strong opposition. According to this view, which I call the anti-severability (AS) position, international law permits only the first or second remedy. That is, the AS position categorically rejects the possibility that an invalid reservation could be severed (leaving the reserving state bound to the treaty without the benefit of the reservation). Proponents of the AS position ground their argument on a foundational precept of international law: the principle of state consent. They argue that a state cannot be bound by treaty terms that it specifically declined to accept. Because its normative foundations are cast in terms of state consent, an AS consensus has quickly begun to emerge.

In this article, I argue that reservations to human rights treaties should be presumed to be severable unless for a specific treaty there is evidence of a ratifying state's intent to the contrary.³ This argument has two parts: the first part contends that severability should be an

*J. Sinclair Armstrong Assistant Professor of International, Foreign, and Comparative Law, Harvard Law School. This article benefited greatly from presentations before the faculties of Boston University School of Law, Harvard Law School, the University of Maryland School of Law, the University of Michigan School of Law, and the University of Pennsylvania Law School. I wish to thank especially the participants of the Faculty Works-in-Progress at the University of Chicago Law School, as well as Douglas Baird, David Barron, Adam Feibelman, Richard Friedman, Jack Goldsmith, James Hathaway, Don Herzog, Derek Jinks, David Kennedy, Harold Hongju Koh, Saul Levmore, Catharine MacKinnon, Eric Posner, David Sloss, Peter Spiro, Henry Steiner, William Stuntz, and Adrian Vermeule for helpful comments and suggestions.

¹Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 19, 1155 UNTS 331; ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 110–12 (2000).

²*E.g.*, Belilos Case: Note of the Public Hearings, Oct. 26, 1987 (morning), Eur. Ct. H.R. Doc. Cour/Misc (87) 237, at 45–47 (statement by Luzius Wildhaber) (on file with author); FRANK HORN, *RESERVATIONS AND INTERPRETATIVE DECLARATIONS TO MULTILATERAL TREATIES* 219 (1988); Iain Cameron & Frank Horn, *Reservations to the European Convention on Human Rights: The Belilos Case*, 1990 GERMAN Y.B. INT'L L. 69, 115–16.

³This article concerns human rights treaties exclusively; whether its conclusions extend to other areas of public international law raises important considerations that are not addressed here. Its implications are especially limited, or nonexistent, in areas in which treaty regimes generally do not permit reservations—e.g., arms control. The reasons that some states enter human rights regimes—e.g., to lock in domestic policy choices or to promote obligations in other countries—may have analogues in other areas, such as global environmental regulation or

option for a third-party institution (e.g., a domestic court, a national human rights commission, a regional court, the International Court of Justice (ICJ), a treaty body) to invoke after having found a reservation invalid; the second part contends that severance should be presumed to be the optimal remedy. In application, the severance test that I propose would involve an intent-based inquiry: deciding whether the invalid reservation constituted an essential condition of the state's consent to be bound. A reservation is not essential if the state would have ratified the treaty without it. An inessential reservation would be nullified, and the state would remain bound to the treaty without the benefit of the reservation.

This approach better reflects and protects state consent than the AS position. In part II, I discuss the consent of other state parties: allowing a state to remain a party to a treaty with exemptions that are incompatible with its object and purpose would infringe other state parties' interests. In part III, I discuss the consent of the reserving state: a state's consent to be bound involves a complex balancing of concerns such that denying severance as a remedy in certain circumstances will actually abrogate the reserving state's overriding interests.

If these contentions are correct, they demonstrate a false opposition at the heart of the severability debate. The ongoing dispute has been cast in terms of a choice between protecting state consent and protecting human rights and long-term international agreements. This conceptualization is understandable since earlier debates correctly pitted the very capacity to enter reservations against the interest of state consent, and treaty law often raises concerns about state sovereignty. On closer examination, however, a different impression emerges: a human rights regime that allows for severing invalid reservations maximizes state consent.

I. THE SEVERABILITY CONTROVERSY

According to conventional wisdom, severing invalid reservations tramples on state consent. This understanding has accordingly shaped the terms of the severability debate. Opposition to severability has now been expressed by the governments of France, the United Kingdom, and the United States;⁴ members of the International Law Commission;⁵ some members of the Human Rights Committee;⁶ and prominent international legal scholars.⁷ Together, these actors' views form the AS position, whose strength is built on the principle of state consent.

Rather than discuss each of these actors' particular claims, I propose to describe their points of agreement, which essentially define the AS position. That position can be divided into its positive and normative components. The positive component maintains that international law currently provides for only two remedial responses to an invalid reservation: the state remains party to the treaty but is still not bound by those terms that the reservation modified or excluded (option 1), or the state is no longer party to the treaty (option 2).⁸

humanitarian law. However, one would have to study treaty practices and governmental objectives closely before rendering any conclusions on the efficacy or normative appeal of severability in those domains.

⁴ Observations by France on General Comment 24, 4 INT'L HUM. RTS. REP. 6 (1997) [hereinafter France Observations]; Observations by the United Kingdom on General Comment 24, 3 INT'L HUM. RTS. REP. 261 (1996) [hereinafter UK Observations]; Observations by the United States on General Comment 24, 3 INT'L HUM. RTS. REP. 265 (1996) [hereinafter U.S. Observations]. For the Human Rights Committee's General Comment No. 24, see UN Doc. CCPR/C/21/Rev.1/Add. 6 (1994), available at <<http://www.unhcr.ch/tbs/doc.nsf>>.

⁵ Report of the International Law Commission on the Work of Its Forty-ninth Session, UN GAOR, 52d Sess., Supp. No. 10, at 107, paras. 83, 142, UN Doc. A/52/10 (1997).

⁶ *Kennedy v. Trinidad and Tobago*, Communication No. 845/1999, app., UN Doc. CCPR/C/67/D/845/1999 (dissenting opinion).

⁷ See, e.g., Roberto Baratta, *Should Invalid Reservations to Human Rights Treaties Be Disregarded?* 11 EUR. J. INT'L L. 413 (2000); Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 PA. L. REV. 399, 438 (2000); cf. P. R. GHANDHI, *THE HUMAN RIGHTS COMMITTEE AND THE RIGHT OF INDIVIDUAL COMMUNICATION* 376 (1998).

⁸ See, e.g., U.S. Observations, *supra* note 4, at 269; Bradley & Goldsmith, *supra* note 7, at 438.

Some AS proponents recognize that the first option effectively leaves the state in the same position as if the reservation were in force.⁹ Given the unpersuasive nature of this outcome, AS proponents place emphasis on the second option.

The normative component of the AS view rests on the principle of state consent: AS proponents contend that severability conflicts with a state's having ratified on the condition that it not be bound by certain terms of the agreement. Severing an invalid reservation and thus binding the state to the very provisions it rejected is thought to transgress foundational normative commitments.¹⁰ This argument appears so persuasive that other commentators, including those who favor severing invalid reservations, conceive of severability as in opposition to state consent.¹¹

In short, the issue of state consent dominates the severability debate, and participants in that debate generally accept that the principle of state consent undercuts the appeal of a severability regime. Although I reject this common conception, I make no attempt to unsettle the centrality of state consent. Instead, I argue that its relevance and implications have been misunderstood.

II. CONSENT OF OTHER STATE PARTIES

The first remedial option—i.e., that the state remains bound to the treaty except for the obligations to which the incompatible reservation related—would infringe the interest of other state parties. Their interest consists in preserving the bargained-for elements of a multilateral agreement, which incompatible reservations or similar arrangements would defeat. No scholar has offered a sustained defense of the first remedy, and various commentators have referred to it as implausible.¹² Nevertheless, the U.S. government recently suggested that it is a viable option,¹³ and some AS proponents have described it as congruent with positive international law.¹⁴ Therefore, the relationship between the incompatibility test and other state parties' consent must be analyzed to show why the first remedial option is not viable in contemporary treaty practice.

The structure of modern reservations law, as set forth in the ICJ's opinion in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* and in the Vienna Convention on the Law of Treaties,¹⁵ is committed to safeguarding these interests of state parties. Prior to the *Reservations* opinion, international practice generally applied a unanimity rule: a state could enter a reservation to a multilateral treaty only if it was accepted by all the other parties.¹⁶ The rule reflected a rigid dedication to maintaining the integrity of all terms of a treaty and to obtaining every state party's consent to any changes in it.¹⁷ As

⁹ Bradley & Goldsmith, *supra* note 7, at 438.

¹⁰ See, e.g., France Observations, *supra* note 4, at 8; UK Observations, *supra* note 4, at 264–65; U.S. Observations, *supra* note 4, at 269; GHANDHI, *supra* note 7, at 376; Baratta, *supra* note 7, at 419, 420; Bradley & Goldsmith, *supra* note 7, at 436–37.

¹¹ See, e.g., Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, BERKELEY J. INT'L L. 277, 303, 326 (1999); Henry J. Bourguignon, *The Belilos Case: New Light on Reservations to Multilateral Treaties*, 29 VA. J. INT'L L. 347, 380, 382 (1989); Richard W. Edwards, Jr., *Reservations to Treaties*, 10 MICH. J. INT'L L. 362, 373 (1989).

¹² See, e.g., Cameron & Horn, *supra* note 2, at 116; 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, 317 (1995); cf. AUST, *supra* note 1, at 118–19 (not even entertaining this remedy as an option).

¹³ U.S. Observations, *supra* note 4, at 268–69.

¹⁴ E.g., Bradley & Goldsmith, *supra* note 7, at 438.

¹⁵ Vienna Convention, *supra* note 1; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ REP. 15 (May 28) [hereinafter Reservations].

¹⁶ Jean Kyongun Koh, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT'L L. J. 71, 80–84 (1982) (describing different approach followed in Latin American regional agreements).

¹⁷ IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 54–56 (2d rev. ed. 1984); G. G. Fitzmaurice, *Reservations to Multilateral Conventions*, 2 INT'L & COMP. L. Q. 1 (1953).

a pragmatic matter, the unanimity rule became increasingly unworkable owing to the rising number of states involved in treaty negotiations and the quest for universal ratification of important treaties. As for the normative foundation of the unanimity rule—its concern for the consent of other state parties—the modern law of reservations largely incorporated, rather than abandoned, it.

The two basic features of the modern approach provide substantial protection for this dimension of state consent. Under the system, (1) states are free to enter reservations that are compatible with the object and purpose of a treaty, and (2) an official objection by a state (state *O*) to a validly entered reservation by another state (state *R*) alters the treaty relationship only between those two parties.¹⁸ The first feature—the prohibition on incompatible reservations—creates an important floor. It protects against infringements of the core aspects of the agreement bargained for by the negotiating states. Allowing a state to remain a party to the treaty with an incompatible reservation—or allowing the equivalent (i.e., the first remedial option)—would undermine the consent of the states that drafted and ratified the treaty. Any reservation that contravenes the object and purpose of the treaty thus requires the unanimous approval of all state parties, because it constitutes a fundamental change to the agreement.¹⁹

Thus, while the incompatibility test restricts the conditions states can place on their consent to join a treaty, it does so in consideration of the consent of the other state parties. This continuity between unanimity and flexibility was implicitly reflected in the *Reservations* opinion. The Court began its analysis by acknowledging the importance of state consent under the unanimity rule: “It is well established that in its treaty relations a State cannot be bound without its consent . . . [N]one of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d’être* of the convention.”²⁰ The incompatibility test functions so that the “purpose and *raison d’être* of [a] convention” could not be subject to reservations, while superficial or minor aspects of the convention could be. Thus, in articulating the new rule, the Court explained that core aspects of the treaty would not be sacrificed to an excessive quest for universal ratification: “[E]ven less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them.”²¹ The *Reservations* opinion suggested, and the Vienna Convention later confirmed, that the limit on “the freedom of making reservations” involves a direct prohibition on states’ ability to formulate reservations.²²

Concerns to maintain the core of an agreement assume special significance in the case of human rights treaties. In such contexts, the very purpose of the multilateral regime is to codify and maintain a minimum level of global standards. Allowing states to join the treaty with incompatible reservations would repudiate or downgrade its normative, or standard-setting, base. This result, of course, cannot be controlled by individual state objections, because state *O*’s objections apply only to the relationship between itself and state *R*. Accordingly,

¹⁸ Vienna Convention, *supra* note 1, Arts. 19–21; Reservations, 1951 ICJ REP. at 26–27.

¹⁹ Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AJIL 281, 306 (1991).

²⁰ Reservations, 1951 ICJ REP. at 21.

²¹ *Id.* at 24. The 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. *See, e.g.*, AUST, *supra* note 1, at 117 (describing contrary view as “most unlikely”); HORN, *supra* note 2, at 121; D.W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 1976–77 BRIT. Y.B. INT’L L. 67, 83; Clark, *supra* note 19, at 304; Catherine Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, 1993 BRIT. Y.B. INT’L L. 245, 257; *cf.* SINCLAIR, *supra* note 17, at 81 n.78. *But see* José M. Ruda, *Reservations to Treaties*, 146 RECUEIL DES COURS 95, 111, 190 (1975 III).

²² Reservations, 1951 ICJ REP. at 26–27, 24.

state *O* cannot prevent the incompatible reservations from affecting the constitutive elements of the treaty.

In sum, the modern approach should be viewed as harmonizing—rather than choosing between—universality and integrity. A question might be posed: universal accession to what? According to the contemporary approach, the answer is universal accession to the object and purpose of the treaty; for human rights treaties, this means obtaining universal agreement on a set of fundamental normative propositions. Allowing states to accede to the treaty with incompatible amendments would thus negate a central reason for achieving universality. In short, universality and integrity serve a common objective, and the law of reservations reflects state parties' interests by promoting that common pursuit.

The place and importance of state consent within the modern law of reservations demonstrates the main problem with the first remedial option. AS proponents notably do not contest the purpose or virtues of the incompatibility rule. Indeed, it would be difficult, if not impossible, to maintain durable multilateral treaty regimes without it. Yet allowing the first remedial option is functionally equivalent to allowing states to maintain incompatible reservations. Perhaps this result explains AS proponents' reluctance to endorse the first remedial option explicitly. For example, AS proponents Curtis Bradley and Jack Goldsmith suggest that the first remedial option is available as a matter of positive international law.²³ They acknowledge, however, that, in accordance with this remedy, the state would “not [be] a party to the treaty provisions with respect to which it has reserved . . . which yields the same result as if the [reservation] were enforced.”²⁴ Allowing such a result would negate the purpose of having a determination of incompatibility in the first place. Why decide whether the reservation is incompatible if the remedy for incompatibility is to maintain the same result? As the above discussion makes clear, accepting the first remedial option would reject the balance between universality and integrity, which the modern law of reservations is designed to protect. In terms of interstate considerations, the first remedial option would thus contravene the interests of state consent, that is, the interests in preserving the core principles of the treaty.

For these reasons, the reservations controversy has essentially centered on the two other options: sever the reservation or invalidate the act of ratification. The choice between them substantially depends on the implications for the consent of the reserving state.

III. CONSENT OF THE RESERVING STATE

The normative appeal of a severability regime can be grounded in its protection of state consent. Specifically, the following analysis advances a theory that conforms the severability inquiry to the functions and motivations of state accession to multilateral treaties. I argue that this approach reflects aspects of the reserving state's consent that an AS regime overlooks. This discussion exclusively considers the internal interests of the reserving state, not those of other state parties.

Admittedly, the AS position is at its strongest in this regard: severing a reservation appears to tread significantly on a reserving state's consent. AS proponents conclude that the better solution would be to find that the state is no longer a party to the treaty; that is, to consider its entire act of accession void. The following discussion evaluates the AS view on its own terms, determining which reservations regime—one that allows for severability or one that does not—would better maximize state consent.

This discussion makes four claims. Some of these claims will initially seem counterintuitive and can be fully evaluated only against the empirical analysis that follows. Indeed, the AS perspective might appear at first blush to be commonsensical. I contend, however, that the

²³ Bradley & Goldsmith, *supra* note 7, at 438.

²⁴ *Id.* (emphasis added).

AS position rests on questionable assumptions, which if modified or relaxed render the position unpersuasive. For the purpose of clarity, let me sketch the four basic claims at the outset.

The first claim is that, in many cases, AS proponents' second remedial option—considering a state with an invalid reservation no longer a party to a treaty—would produce significant negative impacts for state consent.²⁵ For instance, as evidenced below, expelling a state might unravel an interconnected arrangement of civil rights guarantees or unlock policy choices that were intended to be sealed shut.²⁶ The second claim is that, in many cases, states discount, or would not suffer, domestic sovereignty costs that AS proponents suggest result from severing a reservation and keeping the state bound. This may be the case, for instance, in post-totalitarian states that deliberately invest their future in international legal developments out of a marked distrust of domestic institutions.²⁷ In these cases, the “loss” to domestic sovereignty is a price the domestic polity is more than willing to pay. The third claim involves a balancing of the first two: in many cases, the harm to state consent in voiding its membership in a treaty will outweigh the harm in voiding only the reservation and keeping the state bound.

Finally, in evaluating the competing concerns identified by the first three claims, “critical” reservations must be distinguished from “accessory” reservations. The former involve conditions a state considers essential to its ratification regardless of the benefits of being party to the treaty. The latter involve conditions a state considers ideal, but dispensable in order to obtain the benefits of treaty membership. A severability regime would sort between the costs and benefits (as identified in the first three factors) based on these two types of reservations.²⁸ Accordingly, the appropriate test for determining whether a reservation is severable turns on an intent-based inquiry: whether the reservation was an essential condition of consent in that the state would not have ratified the treaty without it.²⁹ The foundation for these claims, however, remains to be shown.

The Structure of Conditional Consent

In consenting to multilateral human rights treaties, states generally try to accomplish two goals: (1) to promote human rights standards (whether domestically or internationally or both); and (2) to minimize the treaty's infringement on aspects of domestic sovereignty that the state does not want to relinquish. Reservations are devices for meeting both goals. By submitting a reservation as a condition of ratification, a state can become a party to a multilateral treaty while limiting aspects of the agreement that contravene domestic interests the state seeks to protect.

²⁵ A severability regime will also be able to capture benefits of the second remedial option because the system would have the decision between severance and voiding the state's membership determined by an evaluation of state consent in the given circumstance.

²⁶ See *infra* text at notes 39–65 & 83–100.

²⁷ See *infra* text at notes 39–65.

²⁸ Providing a catalogue of these types of reservations is beyond the scope of this article. Depending on the interpretive material used to evaluate whether a reservation is essential, such a catalogue would probably require analyzing the legislative history of a country's ratification and could not be discerned from the face of the reservation alone. Representative examples of inessential reservations might include the Swiss reservation in *Belilos*, Turkey's reservation in *Loizidou*, and the types of “phase out” reservations described below. Some states' reservations on rights to a fair trial—for example, Russia's reservations to the European Convention on Human Rights—might also fit this category. In short, for a significant set of reservations a third-party institution could potentially (even mistakenly) find the condition incompatible with the object and purpose of the treaty, but the state would not have predicated joining the regime on that condition.

²⁹ This approach resembles approaches taken in American contracts law and statutory construction. See *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932) (“Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.”); RESTATEMENT (SECOND) OF CONTRACTS §184(1) (1981) (“If less than all of an agreement is unenforceable . . . , a court may nevertheless enforce the rest of the agreement in favor of a party . . . if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange.”).

On its face, this description simply reiterates the standard account that reservations are essential to obtaining the universal ratification of treaties. That is, without the ability to submit a reservation, many states would be unwilling to assent to all terms of a particular treaty and thus would never submit to ratification. The politics of treaty relations, however, adds a complication to this account. For fairly straightforward reasons, a state may include more reservations than required to obtain its consent. Whether counting on other states not to object to its reservations or discounting the cost of such objections, a state may include supererogatory conditions in its package of reservations. Although some reservations are essential—integral to the state's consent to the treaty—others may be described as what Judge Armand-Ugon, in a related context, called “an accessory stipulation.”³⁰

In various multilateral agreements, especially those without a juridical supervisory organ, states may incur little cost for submitting accessory reservations. Under the Vienna Convention, state *R* generally suffers only bilateral costs if another state objects to its reservation. That is, the effect of state *O*'s objection to state *R*'s reservation is either (1) that the treaty terms to which the reservation relates do not apply between the two states, or (2) that the treaty as a whole does not enter into force between the two states.³¹ Primarily owing to diplomatic sensitivities, states avoid choosing the second option, if they are politically willing to enter an objection at all. As for the first option, because the rule of reciprocity produces the exact same result as the reservation,³² state *R* loses nothing if state *O* selects this alternative. States consequently have little incentive to avoid submitting accessory reservations.

The administrative costs of monitoring and reviewing other states' reservations make states “sluggish in their reaction to reservations . . . [I]t is a fact of international life.”³³ This feature of treaty practice is even more pronounced in the area of human rights. Human rights treaties do not involve the kind of reciprocal duties between states that directly affect one another's domestic interests. Admittedly, some states, especially leading military powers, may consider grave human rights violations in other countries a threat to their own security interests, and some states may perceive the promotion of universal human rights standards as a constitutive part of their country's political identity.³⁴ Still, neither of these interests is as direct, or affects domestic constituencies as immediately, as the reciprocal duties imposed in other multilateral contexts such as trade and arms control. A state may find another state's reservations objectionable, or even violative of the basic understanding of the treaty, but unless the former's own domestic interests are directly implicated, monitoring, scrutinizing, and reacting to other states' reservations are simply not priorities.³⁵

The political context of human rights agreements is thus conducive to the submission, if not piling on, of accessory reservations. The package of reservations a state submits reflects the ideal relationship it wishes to have in relation to the treaty, not the essential one it requires so as to be bound. Consequently, a severance determination must distinguish between essential and accessory reservations, weighing the dual goals of treaty ratification in that calculation. By taking these factors and the various modalities of state practice into account, we can assess which reservations regime best protects state consent.

³⁰ *Interhandel (Switz. v. U.S.)*, Preliminary Objections, 1959 ICJ REP. 6, 94 (Mar. 21) (Armand-Ugon, J., dissenting).

³¹ Vienna Convention, *supra* note 1, Art. 21(3).

³² Vienna Convention, *supra* note 1, Art. 21(1); SINCLAIR, *supra* note 17, at 76–77 (“Most commentators accordingly believe that, even in the case of a ‘modifying’ reservation, the legal effects of an objection to and acceptance of the reservation are identical, when the treaty remains in force between the objecting and reserving States.”).

³³ SINCLAIR, *supra* note 17, at 63 (explaining that this phenomenon results “if only for the reason that many administrations are simply not equipped to keep under constant review reservations to multilateral conventions formulated by other States”); *see also* AUST, *supra* note 1, at 115–16 (“Even in the best managed ministries reservations are not always given the attention they deserve. . . . If one studies any list of reservations it is surprising how few states object even though a clearly objectionable reservation has been made.”).

³⁴ *See* Ryan Goodman, *Norms and National Security: The WTO as a Catalyst for Inquiry*, 2 CHL.J. INT'L L. 101 (2001).

³⁵ *See, e.g.*, Clark, *supra* note 19, at 281.

The Modalities of Conditional Consent

Situations in which a state would prefer severability to nonseverability are common and can be fairly easily appreciated. They involve cases in which a state submits a reservation when ratifying a treaty but, on balance, would have assented to the treaty without the condition. In these cases, the state gains substantial benefits in terms of the first goal discussed above—promoting human rights (whether domestically or abroad or both)—whereas the second goal—protecting certain domestic interests—is not an essential condition of the state's consent to be bound. If the two goals conflict, achieving the first goal matters more to the state than the protection the reservation affords to the second.

Before analyzing the specific modalities of state practice, I should address two concerns: one related to the appropriateness of the decision whether to sever, and the other related to the appropriate decision maker. With regard to the first, an objection might be raised that considering a state no longer a party to a treaty is more respectful of its consent in these situations because this remedy would allow the state to re-accede to the treaty without the reservation if that is what the state truly desires. The problem with this argument is its failure to consider (1) the potential impact on a state of expelling it from a treaty regime, and (2) the massive transaction costs a government, or domestic polity, might have to deal with to re-accede to the treaty. In the United States, the latter would likely entail exceptional political efforts to obtain the president's and Senate's support for a treaty all over again. Some of those transaction costs can severely delay or, worse, preclude reratification despite the polity's interest in joining the treaty. As for the former concern, in many countries expulsion from treaty membership—without a searching inquiry into whether the state's original consent to be bound accords with this outcome—would release the state from a commitment that the original ratification was mainly meant to lock firmly in place. These circumstances are more clearly demonstrated in the detailed analysis of modalities of state consent presented below. The discussion in part IV of an interpretive presumption in favor of severability also addresses aspects of this first objection.

A separate objection may be raised that the best solution is simply to give the state the choice—to decide between withdrawing the invalid reservation and withdrawing from the treaty as a whole. Before I address this objection, note that the foundation for its claim also repudiates the AS view. The objection suggests leaving the choice up to the state, and thus treats the AS proponents' second remedial option (excluding the state from treaty membership) as equally unacceptable. The objection therefore shares some features with arguments I have raised against the AS view. Nevertheless, if valid, this objection challenges the idea of embracing a severability regime as well.

Several reasons show that the objection is unwarranted, and that the scheme it suggests is a second-best alternative to a regime in which a third-party institution determines the issue of severability. First, as explained in part II, under well-settled international law the interpretation of a state's consent to be bound focuses on the state's expression of intent at the time of ratification (time 1). While a state's concerns at time 2 (when the reservation is called into question) are important, the inquiry turns on the interpretation of the state's intent and the purpose of the reservation at time 1. That initial decision is what all the parties, the adjudicator and state *R* included, are analyzing. Thus, the severance approach and the objection to it may share the commitment to respecting the state's ability to decide. The latter, however, privileges the state's interests at the wrong point in time.

Second, even if we relax this assumption, or feature, of how international law operates, a severability regime adequately protects a state's decisional freedom at time 2. A safeguard of a severability regime is that a state can withdraw from the treaty if the reservation is severed. As I explain below, the costs are much lower for a state in this scenario than in one where a state is ousted from the treaty and seeks reratification.

Third, in many cases giving the state the option, or suspending its treaty status until it decides, would defy the state's consent. Newly established democracies and established democracies with genuinely monist constitutions may prefer severance of an inessential reservation and continuous membership in the treaty. Giving the state the option may invite domestic turmoil, rollbacks of liberal gains, significant costs from having to re-debate fundamental questions of governance, and the indefinite suspension of a wide array of rights guarantees. Third-party severance of an inessential reservation, especially for many newly established democracies, would maintain a central purpose of ratifying the treaty: to guard against significant fluctuations in the status of international law under domestic law.

Fourth, even if we examine state interests only at time 2, the idea that a state should choose between withdrawing the reservation and withdrawing its membership as a whole is not practical in many situations of third-party evaluation. For example, the U.S. government would not make that choice based on a singular decision of the Nevada Supreme Court. Thus, the state court would still have to decide as an interpretive matter whether the reservation should be considered severed or the entire ratification void. As another example, a determination by the Human Rights Committee that a reservation should be considered severed does not bind any state. Certainly, such a determination by the Committee helps open a critical discourse and may be used as persuasive authority by other institutions. Because the decision is nonbinding, however, a government is not legally compelled to decide between the reservation and treaty membership. The effect of the Committee's decision is restricted to its zone of authority, namely, its functions of reviewing states' periodic reports and cases under the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). Since a state is unlikely to withdraw from the Covenant as a whole in response to the Committee's concerns, the Committee must still decide the appropriate—even if somewhat theoretical—outcome.

Finally, even if we consider only state *R*'s interests at time 2, a third-party institution will not be able to escape severance analysis if the state ultimately decides not to choose. Notably, others have contemplated such a scenario. In response to a suggestion that state *R* be given the option whether to remove an invalid reservation or withdraw from a treaty, the Swedish representative, at a meeting of the Sixth Committee, countered: “[O]ther States parties and monitoring bodies [also] have a role to play in bringing about such a desired result. And what happens if the reserving State does not take action?”³⁶ The Swedish statement reflects the current state of affairs between the Human Rights Committee and the United States. The Committee has informed the United States that it considers two of the government's reservations invalid. The United States, however, has maintained both the reservation and its treaty membership, partly by virtue of the previous factor I discussed (non-enforceability of the Committee's views). In situations such as these, the third-party institution must decide.³⁷ If a third-party institution with binding authority were to leave the severance question for the state to decide and the state simply did not exercise a choice, the decision whether to sever would fall squarely back on the institution.³⁸

³⁶ Lars Magnuson, *Elements of Nordic Practice 1997: The Nordic Countries in Coordination*, 67 *NORDIC J. INT'L L.* 345, 350 (1998) (reproducing text of Swedish statement on behalf of Nordic countries before Sixth Committee, Nov. 4, 1997).

³⁷ Another problem in giving a state the decisional choice is that it does not appropriately address issues of justice in the instant case (e.g., the interest of the defendant in a juvenile death penalty case). With regard to the case at hand, is the state bound to the treaty with the reservation voided or was the state's accession never truly valid? The answer to these questions may affect not only the remedy for the case at hand, but also retrospective relief for cases that proceeded under the treaty when it was considered to be in force.

³⁸ Antonio Cassese, *A New Reservations Clause*, in *RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE À PAUL GUGGENHEIM* 266, 280 (1986) (suggesting the same problem might arise in a collegiate system in which the collection of state parties decides that state *R*'s reservation is invalid, but state *R* chooses neither to remove the reservation nor to withdraw from the treaty).

With these objections and the answers to them in mind, the following analysis provides a basis for evaluating whether a severability regime or an AS regime most effectively serves state consent.

Newly established democracies. The greatest potential cost of an AS regime would be to newly established democracies. Andrew Moravcsik recently presented “the first systematic empirical test”³⁹ of international relations theories that try to explain why states establish and bind themselves to international human rights regimes. Moravcsik argues that republican liberal theory best explains the dynamics of the accession by newly democratic states to binding human rights agreements: “[It] is a tactic used by governments to ‘lock in’ and consolidate democratic institutions, thereby enhancing their credibility and stability vis-à-vis nondemocratic political threats.”⁴⁰ That is, these regimes attempt to entrench certain political choices in fear, or anticipation, that a future illiberal regime will roll back liberal gains. Treaties, especially if incorporated as higher law, allow governments to perform that task. Regardless of which international relations theory wins out, the empirical record seems clear that this phenomenon of state practice is widespread.

How much success the strategy of solidifying liberal gains achieves is questionable. Nevertheless, it is the policy choice of these governments, one that would be considerably undermined by the instability resulting from an AS regime. Under an AS regime, newly established democracies could not rely on the treaties for the purposes they desire. Without severance as a remedial option, they might more easily lose their membership in human rights treaties at some point in the future. This level of prospective uncertainty is not what these states want, nor is it the ground on which their consent to the treaty was built.

State accession to treaties in the manner described by Moravcsik appears to be useful (1) in reducing the excesses of a future illiberal government (e.g., through the protection of rights of minorities), but also (2) in hedging against illiberal tendencies short of a regime takeover, and (3) in providing guarantees of political rights that can assist in preventing these illiberal developments in the first place (e.g., by protecting freedom of speech and freedom of association). Of course, a treaty alone may not achieve these results, but it is a useful mechanism for supporting the liberal effort to do so. In terms of ascertaining the intent behind a state’s ratification, it would accordingly be inappropriate to eliminate the severance option categorically. A system that rigidly precludes severance would potentially invite instability at important stages of consolidating liberal regimes. Therefore, when it comes to state consent to be bound, a superior strategy in the face of an invalid reservation is emplacement of a system that can respect the primacy of the lock-in motive over the competing interests served by the reservation.

Related state interests in consent to be bound should also be taken into account. Newly established democracies, for example, may opt for entrenching particular political decisions through a treaty so as to integrate themselves into the liberal international community. Such initiatives may reflect a desire not only to prevent backsliding, but also to tie the state to the currents of international legal developments. This strategy may thus reflect a pragmatic calculation that the international legal order has more conceptual and material resources than the fledgling domestic liberal order. More important, the interest in fastening the state to international normative and legal developments may emanate directly from a profound distrust of domestic institutions due to recent experience with, and emergence from, a totalitarian past. As a result, the dominant political sentiment in such states may significantly discount the “sovereignty cost” in tying the government’s hands to external human rights regimes.⁴¹

³⁹ Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 219 (2000).

⁴⁰ *Id.* at 220.

⁴¹ Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT’L L. 211, 214 (1997).

Consistent with this account, and with the predictive aspect of Moravcsik's project, are the constitutional systems of newly established democracies in post-Communist Eastern Europe and the former Soviet republics. Many of these countries' constitutions include provisions incorporating treaties as enforceable domestic law and as superior in constitutional status to statutory and administrative law.⁴² In addition, a large number of these states have ratified the major human rights treaties, including the First Optional Protocol to the ICCPR.⁴³ Some of these states have also enacted a national law on international treaties, which elaborates the constitutional relationship between treaties, the domestic legal system, and foreign relations powers. A remarkable aspect of these national laws is the number of provisions regulating domestic political actors by reference to standards of "international law" or "international norms."⁴⁴ Structurally, these systems reflect faith in the international legal order as a tool for organizing and controlling internal politics and juridical practices.

Beneath these formal constitutional arrangements can be found significant evidence of a genuine commitment to using treaties to lock in liberal gains or to advance the domestic system along the path of liberal consolidation. First, international law affords a repository of conceptual resources and juridical analogues to bridge gaps in domestic norms during the passage from one political regime to the next. As Ruti Teitel argues in her comparative project on liberal transitions, international law thus offers one of the tropes in which the new state enfold and defines itself and through which judges render decisions, even if only in appearance, according to a consistent rule of law.⁴⁵ Second, the political history of the drafting and approval of many of these constitutional provisions suggests that such measures are not superficial. They are often the result of hard-fought battles between reformers and conservatives over the structure of the future regime.⁴⁶ Third, while the data are still limited, an expanding record of constitutional court cases in various countries indicates the willingness of the judiciary to rely on international law in striking down domestic legislation.⁴⁷ These three factors help prove that the monist constitutional provisions of newly established democracies reflect and propel important political commitments with regard to international law. Taken together, these factors also indicate a lack of domestic costs in severing a reservation and keeping a state bound to a treaty regime. In these contexts, severance will be fully consistent with the state's general approach to letting international law govern.

⁴² See, e.g., ARM. CONST. Art. 6, cl. 5; BULG. CONST. Art. 5, §4; CZECH REP. CONST. Art. 10; EST. CONST. Art. 123, §2; GEOR. CONST. Art. 6, §2; KAZ. CONST. Art. 4, §3; MOLD. CONST. Art. 4, §2; POL. CONST. Art. 91, §2; ROM. CONST. Art. 20, §2; RUSS. CONST. Art. 15, §4; SLOV. CONST. Art. 11; TAJ. CONST. Art. 10, cls. 3–4. For English translations of the above Constitutions, see CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flantz eds., 1971–).

⁴³ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3 [hereinafter ICESCR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 331 [hereinafter ICCPR]; First Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171. Between 1990 and 1999, the following states ratified the ICESCR, the ICCPR, and the Optional Protocol to the ICCPR, respectively: Armenia (1993, 1993, 1993); Bosnia and Herzegovina (1992, 1993, 1995); Croatia (1991, 1992, 1995); the Czech Republic (1993, 1993, 1993); Estonia (1991, 1991, 1991); Georgia (1994, 1994, 1994); Kyrgyzstan (1994, 1994, 1995); Latvia (1992, 1992, 1994); Lithuania (1991, 1991, 1991); Macedonia (1994, 1994, 1994); Slovakia (1993, 1993, 1993); Slovenia (1992, 1992, 1992); Tajikistan (1999, 1999, 1999); Turkmenistan (1997, 1997, 1997); Uzbekistan (1995, 1995, 1995). Office of the UN High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (May 13, 2002), at <<http://www.unhcr.ch/pdf/report.pdf>>.

⁴⁴ See, e.g., Law on International Treaties, Oct. 16, 1997 (Geor.), translated in 4 SUDEBNIK 389 (1999); Law on International Treaties, July 21, 1999 (Kyrg.), translated in *id.* at 410; Edict of the President of the Republic of Kazakhstan Having the Force of a Law on the Procedure for the Conclusion, Performance, and Denunciation of International Treaties, Dec. 12, 1995, translated in *id.* at 405 (1996); Federal Law on International Treaties of the Russian Federation, June 16, 1995, translated in *id.* at 456; Law on International Treaties, Dec. 22, 1995 (Uzb.), translated in *id.* at 487.

⁴⁵ RUTI TEITEL, TRANSITIONAL JUSTICE 20–21, 33–34 (2000).

⁴⁶ See, e.g., *infra* text at notes 50–53.

⁴⁷ Vladlen S. Vereshchetin, *New Constitutions and the Old Problem of the Relationship Between International Law and National Law*, 7 EUR. J. INT'L L. 29 (1996) (describing recent constitutional court cases in Hungary, Poland, and Russia).

Such abstract statements should be tested against empirical conditions, and the Russian experience offers a suitable case study in this regard. In terms of national orientation toward the international legal system, Professor Gennady Danilenko, a leading expert on the region, remarked, "In many respects, Russia is an illustration of the Eastern European trend."⁴⁸ Danilenko described Russian citizens' and policymakers' confidence and political investment in international institutions over domestic ones:

The focus on international law was motivated by several politico-legal considerations, some of which retain their validity for Russia today. First, there was a consensus among policy makers and citizens that Soviet internal law lagged behind legal standards that had been developed at the international level. Second, the reliance on international law indicated that international institutions were accorded more trust than national institutions, which had lost much of their legitimacy after the failure of the Communist idea and revelations in the media about the totalitarian state's gross violations of human rights. Third, international standards, in particular human rights standards, enjoyed a high degree of legitimacy The legitimacy attributed to international human rights standards was also based on the general perception that they expressed "universal human values" shared by the majority of the international community.⁴⁹

The new Russian Constitution of 1993 reflected these perceptions through a monist approach to international law, a structural decision that took place only after an intense struggle between reformers and conservatives. A driving force behind the reformers' efforts was the country's preoccupation with the question whether Russia would become *pravovoe gosudarstvo* (a law-based state).⁵⁰ In 1991 the Russian legislature adopted the Declaration of the Rights and Freedoms of the Individual and Citizen, Article 1 of which proclaimed that "generally recognized international norms concerning human rights have priority over laws of the Russian Federation and directly create rights and obligations for the citizens of the Russian Federation."⁵¹ In 1992 the legislature adopted the declaration, including Article 1, as an amendment to the 1978 Constitution.⁵² "By incorporating the whole body of international human rights law into Russian domestic law, the drafters of the 1992 amendment hoped to effect rapid changes in the legal environment."⁵³

During the country's transitional period, the Constitutional Court began to rely on international human rights law before these formal constitutional changes occurred. In *The Labor Code Case*, the Court stated:

It follows from Art. 28 of the [1978] Constitution that Russia ensures good faith fulfillment of obligations arising from the generally recognized principles and norms of international law and from international treaties and agreements signed by Russia. The latter's supremacy over Russian laws is confirmed by the Declaration of the Rights and Freedoms of the Individual and Citizen.⁵⁴

⁴⁸ Gennady M. Danilenko, *International Law in the Russian Legal System*, 91 ASIL PROC. 295, 295 (1997).

⁴⁹ Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AJIL 451, 459 (1994).

⁵⁰ ROBERT AHDIEH, RUSSIA'S CONSTITUTIONAL REVOLUTION 13, 18–19 (1997); Alexander N. Domrin, *Issues and Options in the Soviet Transition to the Rule of Law*, COEXISTENCE: A REVIEW OF EAST-WEST AND DEVELOPMENT ISSUES, Mar. 1993, at 1, 5.

⁵¹ Quoted in GENNADY M. DANILENKO & WILLIAM BURNHAM, LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION 34 (2d ed. 2000).

⁵² Danilenko, *supra* note 49, at 461.

⁵³ Danilenko, *supra* note 48, at 296; cf. Lori Fisler Damrosch, *International Human Rights Law in Soviet and American Courts*, 100 YALE L.J. 2315, 2324 (1991) ("Viewing the linkage from the other direction, Soviet jurists have also emphasized that establishing the primacy of international human rights law could help consolidate the domestic rule of law within the Soviet Union.")

⁵⁴ The Labor Code Case, Vestnik Konstitutsionnogo Suda RF [Vestn. Konst. Suda RF], 1993, No. 1, at 29, reprinted in DANILENKO & BURNHAM, *supra* note 51, at 30, 32.

The Court's reliance on the 1978 Constitution and the declaration was specious. The former had not yet been amended,⁵⁵ and the latter was not binding.⁵⁶ The Court's approach, here and in similar decisions during this period, reflected the fact that greater faith was being invested in international human rights than in domestic institutional norms, even to the point of seriously fudging the interpretation of formal domestic enactments.

An internationalist perspective triumphed both in the drafting of the new Russian Constitution and in subsequent judicial decisions. The final text of Article 15 of the 1993 Constitution gives treaties higher status than statutory and administrative law. It states:

The universally recognized principles and norms of the international law and the international treaties of the Russian Federation are a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those established by the law, the rules of the international treaty shall apply.⁵⁷

Article 46 authorizes recourse by citizens to international bodies to appeal adverse domestic judicial and administrative decisions: "Everyone in conformity with the international treaties of the Russian Federation has the right to turn to international organs concerned with the protection of human rights and freedoms if all the means of legal protection available within the state have been exhausted."⁵⁸

As for judicial decisions under the new Constitution, the Constitutional Court has frequently referred to human rights treaties.⁵⁹ In 1996 the Court issued a judgment in an especially important case concerning the Criminal Procedure Code and Article 46 of the Constitution. The Court held that decisions by international organs, presumably including the United Nations Human Rights Committee, may lead to domestic reexamination of previously decided criminal cases.⁶⁰ In 1995 the Court issued an important "guiding explanation"⁶¹ to lower courts.⁶² It instructed the rest of the judiciary that Article 9 of the ICCPR (rights under arrest and detention) has "priority over [the Russian Federation's] domestic legislation" and must be applied so that individuals are guaranteed the ability to petition courts on the lawfulness of their detention.⁶³ The following year, the Court issued another guiding explanation to lower courts explaining that Article 15(4) meant that self-executing treaties trumped federal law without any need for implementing legislation.⁶⁴ Lower courts have now begun to apply treaties in individual cases.⁶⁵

⁵⁵ DANILENKO & BURNHAM, *supra* note 51, at 33. Danilenko and Burnham also explain that "this broad clause [Article 28 of the 1978 Constitution] was never interpreted as a general incorporation of international law into the Soviet or Soviet Russian law." *Id.*

⁵⁶ *Id.* at 34.

⁵⁷ CONST. Art. 15, §4.

⁵⁸ *Id.* Art. 46.

⁵⁹ Jane Henderson, *Reference to International Law in Decided Cases of the First Russian Constitutional Court*, in CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE 59, 66–70 (Rein Mullerson et al. eds., 1998) (collecting early cases); see also AHDIEH, *supra* note 50, at 154 (describing importance of Court's reliance on international norms in "raising Russia's constitutional standards"); DANILENKO & BURNHAM, *supra* note 51, at 30.

⁶⁰ Danilenko, *supra* note 48, at 300.

⁶¹ *Id.* at 298 ("Guiding explanations' are abstract opinions that are binding on all lower courts.").

⁶² Ruling of the Plenary Session of the Supreme Court of the Russian Federation, On the Judicial Practice Concerning Verification of the Legality and Justification of Arrests or the Extension of Periods of Detention, *Biulleten' Verkhovnogo Suda RF* [Biull. Verkh. Suda RF], 1995, No. 1, at 3, translated in DANILENKO & BURNHAM, *supra* note 51, at 43.

⁶³ *Id.*

⁶⁴ Ruling of the Plenary Session of the Supreme Court of the Russian Federation, On Some Questions Concerning the Application of the Constitution of the Russian Federation by Courts, *Biull. Verkh. Suda RF*, 1996, No. 1, at 3, translated in DANILENKO & BURNHAM, *supra* note 51, at 41.

⁶⁵ DANILENKO & BURNHAM, *supra* note 51, at 43; see also *In re Belichenko and Others*, *Vestn. Konst. Suda RF*, 1998, No. 1, at 47, translated in DANILENKO & BURNHAM, *supra*, at 44–45 (Moscow Regional Court opinion holding ICCPR prohibition against double jeopardy trumps Russian Criminal Procedure Code).

If the Russian case represents regional trends, as Danilenko suggested, the empirical record amply supports the need for a severability regime. The Russian experience demonstrates the lack of sovereignty costs in transposing international legal decisions onto domestic legal structures. It also shows, beyond formal constitutional arrangements, the depth of political and ideological commitments to tying issues of governance to international developments. Finally, the post-Communist regional experience expands the empirical reach of the lock-in account, as the dynamics of these states closely resemble those in Moravcsik's study of postwar Europe. Based on sheer numbers, if nothing else, the needs of these states should figure prominently in structuring an effective treaty regime and the law of reservations.

Established democracies. In terms of developing a sensible law of reservations, Moravcsik's empirical work is also important in understanding the ambivalent attitude of some established democracies—such as the United States and the United Kingdom—in acceding to international human rights agreements. Moravcsik explains that established democracies perceive little domestic gain in agreeing to such international commitments and a significant sovereignty cost in doing so. The former perception notably corresponds with the first goal identified above, and the latter corresponds with the second. In terms of the lack of domestic benefits, these states operate with a high baseline of strong democratic traditions and civil rights protections. Consider the United Kingdom's postwar ambivalence toward the European Convention on Human Rights: with such a high baseline, a regional human rights regime had substantially less to offer the citizens of the United Kingdom than, for example, the citizens of postwar Austria. Moravcsik concludes that the factor that ultimately encouraged the United Kingdom to ratify the Convention was the perception that a regional human rights regime would help stave off the threat of totalitarianism in Western Europe, a concern well within the security interests of the British government.⁶⁶ The United Kingdom, while being pulled in two directions (wanting to promote human rights abroad but resisting infringements on its own domestic sovereignty), ultimately ratified the Convention on the basis of the international component of the first goal.

The United Kingdom's stance is taken by other established democracies, especially the United States. Moravcsik explains that U.S. unwillingness to accept international human rights obligations represents “the norm . . . among established democracies—a norm related to the relatively low level of offsetting domestic benefits in an established, self-confident democracy.”⁶⁷ He submits that “established democracies can be expected to support rhetorical declarations in favor of human rights and regimes with optional enforcement that bind newly established democracies but exempt themselves.”⁶⁸ Jack Goldsmith has described the latter phenomenon as the “United States double standard,”⁶⁹ and he and Eric Posner have pointed to its manifestation in U.S. reservation practice.⁷⁰ I accept the descriptive accuracy of this aspect of Goldsmith and Posner's claim (and Moravcsik's extension of it to some of the other established democracies⁷¹). As for the normative question, however, a severability regime offers a better reflection of the reality of this double standard than an AS regime.

What these observers of U.S. practice have touched on are the dual goals of treaty accession with reservations. Even though the baseline of a robust democracy and strong domestic

⁶⁶ Moravcsik, *supra* note 39, at 242.

⁶⁷ *Id.* at 244.

⁶⁸ *Id.* at 229; *see also id.* at 243.

⁶⁹ Jack Goldsmith, *International Human Rights and the United States Double Standard*, 1 GREEN BAG (n.s.) 365 (1998).

⁷⁰ Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1175 (1999).

⁷¹ *But see infra* text at note 83 (disagreeing with the empirical accuracy of Moravcsik's model for Nordic states, Belgium, the Netherlands, and others). It should be noted that the United Kingdom appears to be moving from this category of state behavior to one more accepting of international human rights obligations. The enactment of the Human Rights Act in 1998 may make it necessary to cabin my account of UK practice as a pre-1998 representation of this modality.

civil rights protections brings it fewer benefits and a significant sovereignty cost, the United States, as well as other established democracies, has substantial interests in promoting human rights internationally and in participating directly in multilateral treaty regimes (if not in fact adopting a leadership role in such forums). Calling this a “double standard” actually helps highlight the strength of the two poles: the U.S. government exerts tremendous efforts to impose international human rights standards on others and, at the same time, strongly resists the imposition of international human rights standards on its own sovereignty.

The U.S. interests regarding the international dimension of the first goal—promoting human rights abroad—are indicated by the administration’s efforts to encourage the Senate to ratify the ICCPR. In letters to the chair and the ranking minority member of the Committee on Foreign Relations, President George Bush stated that “U.S. ratification would also strengthen our ability to influence the development of appropriate human rights principles in the international community and provide an additional and effective tool in our efforts to improve respect for fundamental freedoms in many problem countries around the world.”⁷² During the ratification hearings, Assistant Secretary of State Richard Schifter emphasized the same general point: “We urge consent to ratification of the Covenant in order to further the observance of human rights in other countries of the world community. The promotion of the increased observance of internationally recognized human rights by all countries is a major foreign policy goal of the United States government.”⁷³

In his prepared statement, Schifter discussed particular ways in which ratification would serve this goal. First, U.S. ratification would provide “additional concrete evidence of our commitment to support respect for human rights everywhere.”⁷⁴ Second, it would “augment the force of the Covenant as a principal instrument at the international level.”⁷⁵ Third, by making it possible to participate in the work of the Human Rights Committee, it would give the United States the opportunity to make “a major contribution . . . to enhanc[ing] the effectiveness of the Human Rights Committee as a watchdog body operating to identify and curb human rights violators.”⁷⁶ Fourth, the optional provision for state-to-state complaint proceedings under Article 41 could provide the United States with “an added recourse for use in bringing pressure to bear upon human rights violators.”⁷⁷

At the same time, Schifter took pains to explain that ratification would involve minimal costs to U.S. sovereignty. He focused on two facets of U.S. ratification: the high U.S. baseline and reservations, declarations, and understandings. First, he explained that, in practice, differences between U.S. domestic law and the ICCPR were so insubstantial that “adherence to the Covenant will bring no fundamental changes to the enjoyment of individual human rights by all Americans.”⁷⁸ Second, in reviewing the proposed reservations, declarations, and understandings, he stressed that the Covenant should be declared a non-self-executing treaty and he assured the Senate that the administration would not propose implementing legislation to counter that effect.⁷⁹

The breadth of U.S. objectives in joining human rights treaties should suggest that in some circumstances those interests would outweigh the interests served by a particular reservation. If the government were faced with the choice of (1) the complete loss of membership in a

⁷² *International Covenant on Civil and Political Rights: Hearing Before the Senate Comm. on Foreign Relations*, 102d Cong. 16 (1992) (statement of Richard Schifter, assistant secretary of state for human rights and humanitarian affairs) (quoting letters from Pres. George Bush to Sen. Claiborne Pell and Sen. Jesse Helms, Aug. 8, 1991)).

⁷³ *Id.* at 17.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 18.

⁷⁸ *Id.*

⁷⁹ *Id.*

treaty or (2) the loss of the application or effect of a particular reservation, in some circumstances the government would prefer the latter. Certain features of the American political system suggest that the number of times when that choice would prevail is not trivial. In her extended analysis of the subject, Natalie Kaufman discusses institutional relationships between executive agencies, the president, and the Senate that lead to “attachments [that] are unnecessary.”⁸⁰ According to Kaufman, wounds left by the debates on the Bricker Amendment in the 1950s often lead the executive branch to overcompensate in submitting its package of reservations to the Senate as a means of securing approval. Kaufman explains that this attitude frequently results in reservations that sweep much more broadly than required for passage:

[T]he drafters of the attachments raised some issues that probably would not otherwise have been raised and reinforced the sense of controversy that the opposition had settled over the treaties in the 1950s. Most of the proposed attachments addressed specifics that had never been a focus of vocal opposition and hardly seem the creation of a sympathetic executive.⁸¹

Kaufman’s work thus suggests additional reasons that a double-standard state’s reservations should not, as a categorical matter, be considered essential to the government’s ratification.⁸²

In determining the legal consequence of an invalid reservation, a severability regime is well equipped to assess which outcome balances the dual aspects of these states’ accession. Some reservations embody essential conditions for the United States or the United Kingdom to assent to a human rights agreement. Others might be expendable—conditions the governments would discard if their retention meant being excluded from, or unable to join, the treaty altogether. Accordingly, expelling these states from a treaty, or voiding their initial act of accession without a more searching inquiry, would in some instances contravene an essential aspect of their consent to be bound. The better approach is to weigh the interest served by the particular reservation against the cost of voiding the act of ratification. A severability regime would maintain the flexibility to balance these competing concerns, while an AS regime would automatically choose one (termination of membership) over the other (severance of the reservation).

Although the above discussion relies partly on Moravcsik’s empirical work, his findings do not suffice for our purposes. Moravcsik’s analysis appears to fit the cases of the United States and the United Kingdom. His model, however, does not deal effectively with established democracies that defy his theoretical predictions. In particular, a set of states possess the same features that Moravcsik and others would use to classify established democracies, but these states do not support—as Moravcsik claims established democracies can be expected to do—“rhetorical declarations in favor of human rights and regimes with optional enforcement that bind newly established democracies but exempt themselves.”⁸³ On the contrary, several established democracies, such as the Netherlands and Belgium, follow a consistent standard with regard to international human rights law. They evince a deep commitment to incorporating human rights treaties in their domestic law and to promoting international human rights abroad: hence, they can be characterized as consistent, rather than double, standard states.

In addition to the Netherlands and Belgium, the five Nordic states (Denmark, Finland, Iceland, Norway, and Sweden) engage in this modality of state practice. In the early 1970s, these states were among the first to ratify the ICCPR and the International Covenant on Economic, Social and Cultural Rights. Upon ratification of the ICCPR, these states also ratified

⁸⁰ NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE* 173 (1990); *see also id.* at 159, 161, 174.

⁸¹ *Id.* at 151.

⁸² *Cf.* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 *YALE J. INT’L L.* 129 (1999) (arguing that executive branch and Senate have had different interpretations of self-executing declarations across different treaties).

⁸³ Moravcsik, *supra* note 39, at 229; *see supra* text at notes 66–68.

the First Optional Protocol. These governments have all dealt with the filing of individual petitions before a treaty body, lost some of those disputes, and implemented the adverse recommendations.

This modality of state practice comprises a significant set of cases. Their governments are important actors within the international political economy, multilateral treaty negotiations, and UN standard-setting procedures. Because their domestic systems are closely tied to international regimes, they also potentially incur significant costs and benefits from developments in the law of treaties. All of these states have submitted reservations to the ICCPR. If a reservation were found invalid—by a domestic court or by another third-party institution—the determination whether the government was still bound to the treaty would have considerable ramifications.

A noteworthy feature of the Nordic states' practice is their official position on the issue of severability itself. They have each begun systematically to review other states' ratifications with a view to opposing invalid reservations.⁸⁴ On several occasions, a Nordic state has officially objected to another state's reservation on the ground that the reservation was incompatible with the treaty and that the consequence was one of severance.⁸⁵ At a recent annual meeting of the General Assembly's Sixth Committee, the Nordic states made their position clear:

[T]he reserving state should be regarded as a party to the treaty without the benefit of the reservation.

This is the so called severability doctrine which has been applied in a number of instances by i.a. the Nordic countries during the past few years.

. . . It is our hope that this part of the report will reflect practice adopted lately by among others the Nordic countries especially in connection with human rights treaties.⁸⁶

Notably, on the basis of this modality of state practice—consistency between the promotion of international rules and domestic incorporation—we should expect these states to respect the same principle of severance if applied to their own systems. That is, the objection they have raised against other states' reservations is one they would accept or embrace having applied to themselves.

The case of the Netherlands points to the negative consequences of a strict AS regime for this modality of state practice. As Henry Schermers explains, Dutch negotiators take particular care in multilateral treaty negotiations because of the direct repercussions of treaty law on domestic governance: "Negotiators from other countries may lightheartedly accept all sorts of treaty obligations which are not subsequently incorporated into their domestic legal systems and therefore become dead letters, whilst a Dutch negotiator always has to take into account that treaty obligations may be invoked in court."⁸⁷ Article 94 of the Dutch Constitution gives primacy to treaty obligations over preexisting and subsequent domestic law.⁸⁸ This provides the judiciary with a form of "human rights review" not otherwise available in the Dutch system. As components of a parliamentary democracy, Dutch courts cannot review the constitutionality of legislative acts.⁸⁹ Hence, a Dutch court can invalidate a law on

⁸⁴ Jan Klabbbers, *Accepting the Unacceptable? A New Nordic Approach to Reservations to Multilateral Treaties*, 69 NORDIC J. INT'L L. 179 (2000); see also Laurids Mikaelson, *Elements of Nordic and International Practice in the Year of 1996: Denmark*, 66 NORDIC J. INT'L L. 319, 322 (1997).

⁸⁵ Klabbbers, *supra* note 84, at 185–86.

⁸⁶ Päivi Kaukoranta & Manta Lehto, *Elements of Nordic Practice 1998: The Nordic Countries in Coordination*, 68 NORDIC J. INT'L L. 205, 209–10 (1999) (reproducing text of Swedish statement on behalf of Nordic countries before Sixth Committee, Oct. 29, 1998); see also Magnuson, *supra* note 36, at 350 (reproducing text of Swedish statement on behalf of Nordic countries before Sixth Committee, Nov. 4, 1997).

⁸⁷ Henry G. Schermers, *Netherlands*, in 7 THE EFFECT OF TREATIES IN DOMESTIC LAW 109, 112 (Francis G. Jacobs & Shelley Roberts eds., 1987).

⁸⁸ CONST. Art. 94; see also Schermers, *supra* note 87, at 113; H. H. M. Sondaal, *Some Features of Dutch Treaty Practice*, 1988 NETH. Y.B. INT'L L. 179, 240.

⁸⁹ CONST. Art. 120 ("The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.").

the ground that it violates a right contained in a multilateral treaty, but not on the ground that it violates a right contained in the Constitution.⁹⁰ Some commentators have described the Dutch system as assigning treaties primacy over the Constitution itself,⁹¹ suggesting that the Dutch example is an extreme outlier.⁹² The main features of the Dutch system, however, are shared by other states (e.g., Belgium, Finland, and others). These states' domestic legal systems not only give human rights treaties primacy over domestic legislation; they do so to the point of dependence on such treaties for substantive civil and political rights protections.

The Dutch record confirms the structural elevation of international treaty obligations over important domestic policy choices. The system ties its fate to international treaty law in a similar fashion to the lock-in dynamics of newly established democracies; though here the government does so out of concern for continued commitments to cosmopolitanism and liberal rights guarantees, not as a hedge against a potential illiberal regime. Dutch practice includes numerous court decisions invalidating legislation on the ground that it violates a treaty.⁹³ Notably, such decisions do not simply apply purely domestic legal expressions against one another (i.e., the government's enactment of a treaty against the government's enactment of a statute).⁹⁴ The courts are willing, if not keen, to rely on international interpretations of the treaty provisions. The courts are also willing to "fill gaps" in domestic legislation by having recourse to treaty obligations.⁹⁵ As for reservations in particular, in a significant case a Dutch court explained that a "reservation constitutes a derogation from the regime of the Convention and should, therefore, be so construed as to respect the intention of the reservation, on the one hand, and *to limit this derogation from the Convention's regime to the fullest possible extent, on the other hand.*"⁹⁶ In another case, the Supreme Court gave the withdrawal of a reservation retroactive effect so as to produce stability among Dutch international commitments.⁹⁷

⁹⁰ Henry G. Schermers, *Some Recent Cases Delaying the Direct Effect of International Treaties in Dutch Law*, 10 MICH. J. INT'L L. 266, 268 (1989).

⁹¹ See, e.g., John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AJIL 310, 320 (1992).

⁹² The degree to which the Dutch system is an outlier is questionable. The constitutional provision empowering courts to invalidate domestic law states only that "[s]tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties." CONST. Art. 94 (emphasis added). Under Article 91(3), treaties that conflict with the Constitution must receive supermajority approval at the same level as required to amend the Constitution itself. E. A. Alkema, *Foreign Relations in the Netherlands Constitution of 1983*, 31 NETH. INT'L L. REV. 307, 320 (1984) ("Article 91, paragraph 3, requires a qualified majority for the approval of treaties containing provisions which conflict with the Constitution. The two-thirds majority is the same as that required for a constitutional amendment.").

⁹³ See, e.g., Aalt Willem Heringa, *Judicial Enforcement of Article 26 of the International Covenant on Civil and Political Rights in the Netherlands*, 1993 NETH. Y.B. INT'L L. 139, 178 (describing cases by the Centrale Raad van Beroep, the highest court in public service and social security matters, striking down legislation in violation of ICCPR); *id.* at 174-75 (describing Supreme Court cases holding legislation violated Article 26 of the ICCPR but allowing Parliament to choose remedy); see also *id.* at 145 n.18 ("On a yearly basis hundreds of cases, dealing mainly with human rights treaties, such as the European Convention and the ICCPR, are decided."); cf. Schermers, *supra* note 87, at 113-14 (collecting cases invalidating legislation under human rights and other treaties).

⁹⁴ Cf. L. ERADES, INTERACTIONS BETWEEN INTERNATIONAL AND MUNICIPAL LAW: A COMPARATIVE CASE LAW STUDY 627-34 (Malgosia Fitzmaurice & Cees Flinterman eds., 1993) (collecting cases).

⁹⁵ See, e.g., T.S.M. Compagnie d'Assurance Transports A.G. v. Geisseler Transport, 1993 NETH. Y.B. INT'L L. 395 (Sup. Ct. Nov. 16, 1990). The Court held:

The Dutch legislature has not so far complied with this obligation. It follows that the Dutch courts, which are obliged to interpret and apply Dutch law as far as possible in such a way that the State complies with its treaty obligations, must fill this "gap in the legislation" . . . in a manner that is in keeping with the system of the law and consistent with the cases regulated by law.

Id. at 397 (citation omitted).

⁹⁶ *Bremi B.V. and Elart-Gunneman B.V. v. Amcor Ltd.*, 1982 NETH. Y.B. INT'L L. 371, 374 (Ct. App. Arnhem Oct. 1, 1979) (emphasis added); see also Schermers, *supra* note 87, at 117 (referring to this case as demonstrating that "[a] reservation should be restrictively interpreted"). Compare *K. M. v. Netherlands*, 1989 NETH. Y.B. INT'L L. 322, 324 (allowing extradition based on narrow interpretation of Dutch reservation to European Convention on Extradition).

⁹⁷ *X. v. Raad voor de Kinderbescherming te s-Gravenhage* [The Hague Child Care and Protection Board], 1989 NETH. Y.B. INT'L L. 341 (Sup. Ct. Jan. 29, 1988) (holding a child maintenance order enforceable despite its having been issued at a time when the reservation—which barred enforcement of such orders—was still in effect).

Some of these court cases generated a political outcry, at times even prompting officials to call for withdrawal from a treaty.⁹⁸ The criticism of these decisions is similar to the objections one might expect in response to a decision severing a reservation: the critics contend that the Netherlands is being held to a commitment that was not clearly understood as an obligation at the time of ratification and that does not accord with the country's national interest. Such claims are even more compelling in the context of the courts' reliance on international sources of interpretation exogenous to the Netherlands political order. Nevertheless, the prevailing political sentiment appears to be a steadfast commitment to membership in these treaties and, to a significant degree, to the international interpretive development of the obligations entailed.⁹⁹ As H. H. M. Sondaal, a senior official in the Dutch Ministry of Foreign Affairs, explains, when the government decides to join a treaty, it knowingly "places itself in a tight straightjacket."¹⁰⁰

A strict AS rule would release the government from this self-constraint, and suspend a panoply of civil and political rights protections in a manner the system would have a difficult time withstanding. For systems like that of the Netherlands, the government's reliance on human rights treaties also suggests that its reservations should not categorically be considered essential to accession. The level of reliance also indicates the disruption that could result if the government's membership in an important treaty were interrupted for even a temporary period. That is, even if the government decided to reratify the convention, the interim period would incur substantial costs. While an AS regime would probably involve such costs, a severability regime would be designed to avoid them.

The double- and consistent-standard states analyzed above constitute opposite ends of a spectrum. Between the two lies an intermediate category of established democracies (such as Australia, Canada, Switzerland, and arguably India). In contrast to the double-standard democracies, these states evince genuine interest in incorporating human rights treaties in domestic law and in maintaining membership in them by dint of domestic political interests, not simply external foreign policy goals. However, their domestic systems of governance are not reliant on, or committed to, these treaties for the same ideational and pragmatic purposes as the consistent-standard states. The intermediate states, like all states, have an incentive to enter both essential and accessory reservations when ratifying multilateral agreements. Like the other states, they would face significant transaction costs if forced to consider reratification after being ejected from the treaty. A determination whether to sever an invalid reservation should therefore try to gauge the overriding goals of state consent in relation to the reservation in question.

The treaty practices of intermediate states indicate that some of their reservations may be considered inessential to their consent to be bound. For example, in *Belilos v. Switzerland*, the European Court of Human Rights considered Switzerland's reservation to Article 6 of the European Convention (the right to a fair trial); the Court found the reservation invalid and severed it.¹⁰¹ Wanting to remain party to the treaty,¹⁰² the Swiss government argued against the possibility that "a State which had made an invalid reservation would simply not

⁹⁸ See, e.g., Heringa, *supra* note 93, at 170.

⁹⁹ Another indication of prevailing political sentiments is the Dutch minister for foreign affairs' response to interrogatories from Parliament on reservations to the Biological Weapons Convention. The minister stated: "Reservations which are incompatible with the object and purpose of a treaty are not void in international law, though a state which makes such reservations can never invoke them successfully." Reservations to the Biological Weapons Convention, 1982 NETH.Y.B. INT'L.L. 216, 216-17. Although a premise of his explanation appears flawed, the minister's statement suggests acceptance of treaty practice in which a reservation may not be available to a state well after ratification because of its incompatibility with the object and purpose of the agreement.

¹⁰⁰ Sondaal, *supra* note 88, at 240.

¹⁰¹ *Belilos v. Switzerland*, 132 Eur. Ct. H.R. (ser. A) (1987).

¹⁰² *Id.* at 28; Edwards, *supra* note 11, at 376-77 ("[P]resumably motivated by a desire to remain a party to the treaty, Switzerland argued against this solution [of nullifying its status as a state party] . . .").

be party to the treaty.”¹⁰³ During oral argument, the Swiss representative made the following plea: “The Swiss Government considers that it would be obviously disproportionate, both in the view of the other Contracting Parties to the Convention and in that of Switzerland, to apply this solution [of annulling its status as a state party] in the *Belilos* case.”¹⁰⁴

A further indication of intermediate states’ accessory reservations is revealed by what might be called tentative or “phase out” reservations. Australia’s reservation to Article 4 of the Convention on the Elimination of Racial Discrimination provides a useful example. Article 4(a) requires state parties to criminalize the dissemination of racist hate speech and propaganda.¹⁰⁵ Australia, however, submitted the following reservation:

Australia is not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a).¹⁰⁶

One must wonder whether this reservation can possibly be conceived of as an essential condition of Australia’s accession to the treaty. While Australia ratified the treaty in 1975, it has yet to enact legislation of the scope envisioned by Article 4(a).¹⁰⁷ If Australia’s reservation were found to be incompatible with the object and purpose of the treaty, it would be highly questionable to consider the reservation a critical component of the state’s accession to the treaty and Australia no longer a party.¹⁰⁸

Of course, this type of analysis can also get a little tricky. For example, in the *Fisheries Jurisdiction* case,¹⁰⁹ the ICJ noted in passing that Canada’s reservation was “not only an integral part of the current declaration but also an essential component of it, and hence of the acceptance by Canada of the Court’s compulsory jurisdiction.”¹¹⁰ Spain had initiated the proceedings within a year of Canada’s submitting the reservation, and the reservation was widely understood to address a particularly time-bound concern of the Canadian government. This understanding was evidenced in a statement by the Canadian minister for foreign affairs before the Canadian Senate: “As you know, to protect the integrity of this legislation, we registered a reservation to the International Court of Justice, explaining that this reservation would of course be temporary”¹¹¹ Admittedly, declarations accepting the Court’s compulsory jurisdiction are not treaties, but they are closely analogous. As with Australia’s reservation to the Convention on Racial Discrimination, the temporary quality of Canada’s reservation is instructive.

¹⁰³ Eur. Ct. H.R. Doc. Cour/Misc (87) 237, *supra* note 2, at 45.

¹⁰⁴ *Id.*

¹⁰⁵ International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, Art. 4, 660 UNTS 195.

¹⁰⁶ International Convention on the Elimination of All Forms of Racial Discrimination, Declarations and Reservations (Feb. 5, 2002), at <http://www.unhchr.ch/html/menu3/b/treaty2_asp.htm>.

¹⁰⁷ During a periodic report to the Committee on Racial Discrimination, Australia explained that it had recently introduced civil penalties (and some criminal sanctions) in accordance with Article 4(a). UN Doc. CERD/C/335/Add.2 (1999). Australia acknowledged that because Article 4 envisions criminal sanctions against racial vilification, “[t]he Government . . . is not in a position to remove the reservation.” *Id.*, para. 416. Admittedly, one might take this to mean that Australia’s reservation is still important to the state’s relationship to the treaty. Whether it is, or ever was, *critically* important is the type of question that this article suggests is the relevant one to ask.

¹⁰⁸ Notably, the Italian government adopted a position similar to Australia’s, in discussing its reservations to Article 4(a). UN Doc. CERD/C/SR.1077, para. 11 (1995).

¹⁰⁹ *Fisheries Jurisdiction* (Spain v. Can.), 1998 ICJ REP. 432 (Dec. 4). The case involved a dispute over Canada’s alleged seizure of a Spanish vessel in international waters. The Court held that it did not have jurisdiction because Canada’s declaration of acceptance of the Court’s compulsory jurisdiction included a reservation barring adjudication of matters relating to conservation and management measures.

¹¹⁰ *Id.* at 457, para. 59.

¹¹¹ *Id.* at 457, para. 60 (quoting Canadian minister for foreign affairs, May 12, 1994).

It invites serious reflection as to whether the reservation would be considered essential in the future. If it were deemed invalid in a different dispute, for example, twenty years later, a strong argument could be made that when submitted the reservation was said not to be essential as a long-term or unending condition.

Nondemocratic states. As a descriptive matter, there are strong reasons to believe—based on recent empirical research in international relations scholarship—that a severability regime would capture important nuances in the practices of nondemocratic states.¹¹² International relations scholars have recently begun to use sociological tools to understand the processes by which states pass from illiberal to liberal regimes. Some of these projects have generated significant insights into the dynamics of nondemocratic states' accession to human rights treaties. For example, Thomas Risse, Stephen Ropp, and Kathryn Sikkink provide a theoretically robust account of how nondemocratic states (1) respond to domestic and international political pressure in ratifying human rights treaties, (2) begin to defend their actions according to international legal rules, and (3) potentially move through a "process of socialization" toward the incorporation of international norms.¹¹³ Their model does not account for all types of nondemocratic states, because extant social and material conditions are not always sufficient to propel the socialization process. However, their systematic analysis of numerous paired case studies (ranging from Tunisia-Morocco to the Philippines-Indonesia to Guatemala-Chile) effectively describes various state practices and forms a strong empirical basis for accepting their theoretical claims.

Most significant for our purposes is the critical step in the socialization process from a phase of "tactical concessions"¹¹⁴ to one of "prescriptive status."¹¹⁵ These are the moments when we can expect states to ratify human rights treaties, and thus the political context in which the value the government attaches to a reservation would be indicated. In the "tactical concession" phase, such governments make cosmetic changes to placate domestic and international pressure groups. For example, a government may release some political prisoners, exercise greater permissiveness toward political demonstrations, or pass relatively superficial legislation.¹¹⁶ These concessions can propel certain causal mechanisms, resulting in further dynamic changes that potentially lead to the phase of "prescriptive status." In this subsequent phase, the state begins to, and then finally does, accept international norms. If successfully completed, the prescriptive status phase will lead to the final phase of rule-consistent behavior.¹¹⁷

Whether or not nondemocratic states attach reservations to treaties may indicate their position in this process and, in turn, how to evaluate the nature of their conditioned consent. Commentators have observed that nondemocratic states (such as Iraq, Libya, and the former Soviet Union) have tended to ratify human rights treaties without any reservations. The standard account is that these states so heavily discount international legal obligations that they do not feel the need to specify conditions that would ensure conformity of their domestic legal arrangements with the requirements of the treaty. They ratify for purely symbolic purposes. At first glance, the minimal use of reservations by nondemocratic states might suggest that the concern about where to place such states in a severability model is

¹¹² I should note at the outset of this section that the following discussion involves a more detailed theoretical analysis of the practice of nondemocratic states than is needed for the descriptive argument. However, I delve into that aspect because the normative questions raised cannot be answered without an appreciation of the theoretical framework.

¹¹³ Thomas Risse, "Let's Argue!": *Communicative Action in World Politics*, 54 INT'L ORG. 1 (2000); Thomas Risse & Stephen C. Ropp, *International Human Rights Norms and Domestic Change*, in THE POWER OF HUMAN RIGHTS 234 (Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink eds., 1999); Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *id.* at 1, 11.

¹¹⁴ Risse & Sikkink, *supra* note 113, at 25.

¹¹⁵ *Id.* at 29.

¹¹⁶ *Id.* at 25.

¹¹⁷ *Id.* at 31.

marginal. While the small number of reservations does diminish the concern, this phenomenon should also prompt heightened attention when nondemocratic states actually use reservations.

On the basis of variations in the empirical case studies, Risse and Ropp¹¹⁸ conclude that a nondemocratic state's accession to a human rights treaty may involve features of both "tactical concession" and "prescriptive status."¹¹⁹ However, the authors do not pay special attention to reservation practices. Yet, because reservations are designed to adjust obligations incurred by a treaty, these scholars' conceptual model suggests that a nondemocratic state that ratifies a treaty with reservations has begun to accept the prescriptive legitimacy of international rules. In these contexts, a state may be genuinely balancing competing goals so that a particular reservation may not be an essential condition of its accession to the treaty.

The dynamic nature of this modality of state practice is illustrated by Chile.¹²⁰ According to Ropp and Sikkink, Chile's phase of tactical concessions lasted from 1975 to 1988.¹²¹ The subsequent phase of prescriptive status concluded in 1990—the year Chile elected a new president through a democratic process, ratified the American Convention on Human Rights, and accepted the compulsory jurisdiction of the Inter-American Court.¹²² Importantly, Chile ratified the Convention Against Torture near the end of the tactical concessions phase. In 1987 General Pinochet sent a draft act of ratification to Chile's legislative body for approval.¹²³ Pinochet's accompanying memorandum spoke in terms of the need to comply with international norms in appearance, if not deed.¹²⁴ The proposed act of ratification included significant reservations, and in 1988 the junta ratified the Convention with these conditions attached.

The need for a severability regime can be seen in relation to Chile's reservation to Article 2 of the Convention Against Torture. Article 2 mandates that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture," and further specifies that "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture."¹²⁵ One of Chile's reservations attempted to carve a hole in that obligation. It stated that if a subordinate initially challenged a superior officer's order to commit torture, Article 2 would not apply in the event the superior re-insisted that the order be followed.¹²⁶ When Chile came up for review before the Committee Against Torture, the validity of the reservation was seriously questioned. The committee informed Chile that it considered the reservation "incompatible with the Convention."¹²⁷ The committee's views

¹¹⁸ Risse, Ropp, and Sikkink sometimes write in teams of two and sometimes alone. All three are the editors of *THE POWER OF HUMAN RIGHTS*, *supra* note 113.

¹¹⁹ *See, e.g.*, Risse & Ropp, *supra* note 113, at 248.

¹²⁰ Stephen C. Ropp & Kathryn Sikkink, *International Norms and Domestic Politics in Chile and Guatemala*, in *THE POWER OF HUMAN RIGHTS*, *supra* note 113, at 172.

¹²¹ *Id.* at 184.

¹²² *Id.* at 190.

¹²³ Augusto Pinochet Ugarte, President of the Republic, to the Honourable Junta de Gobierno, Communication BOL 913-10 (Nov. 11, 1987), at <<http://www.remember-chile.org.uk/news/pintcts1.htm>> [hereinafter Pinochet Comm. 913-10].

¹²⁴ *Id.* The communication stated:

From the point of view of Chile's international position, the aspiration to become a party to the Convention, reflects its actual decision to recognise in practice the existence of fundamental human rights. In this way, it will be possible to disprove the accusations which have been put forward systematically against our country in international forums on human rights.

¹²⁵ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, Art. 2, 1465 UNTS 85.

¹²⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, at n.16 (Feb. 5, 2001), at <http://www.unhchr.ch/html/menu3/b/treaty12_asp.htm> [hereinafter Torture Declarations and Reservations].

¹²⁷ Report of the Committee Against Torture, UN GAOR, 45th Sess., Supp. No. 44, at 64, para. 349, UN Doc. A/45/44 (1990).

were supported by the fact that twenty states had officially objected to Chile's reservation on the ground that it was incompatible with the object and purpose of the treaty.¹²⁸ Some of these states notably took the position that the reservation should be considered severed and Article 2 in full effect.¹²⁹ The committee, however, commented only on the antecedent question of invalidity.

In response to the committee's criticism, the government defended the reservation, explaining that it "had formulated [the] reservation, in order to reconcile the principle of exoneration of responsibility established in its domestic legislation with the obligations arising from the Convention."¹³⁰ Significantly, Chile described its reservations as provisional in nature:

With regard to all the reservations formulated by Chile to the Convention, the representative pointed out that they had been lodged by the Chilean Government partly for reasons of substance, partly for procedural reasons, and partly also because the present Government of Chile was about to be replaced by another government to which it wished to leave the entire responsibility of deciding whether it agreed to be bound by all the provisions of the Convention and thus to withdraw the reservations.¹³¹

To be sure, the above explanation is post hoc and invites skepticism. However, it also indicates significant play in the joints in terms of whether a nondemocratic state's reservation to a treaty is necessarily critical to that state's ratification.

In fact, the documentary record preceding ratification supports the Chilean representative's explanation. When Pinochet forwarded the proposed act of ratification to the legislative body, he discussed two of the reservations in his memorandum, but he did not specifically mention the reservation to Article 2.¹³² He also stated that those reservations that had already been submitted at the time of signature were "considered necessary" but only for "the primary purpose of not accepting the authority of the Committee against Torture."¹³³ More important, a Technical Report by the Ministry of Foreign Affairs accompanied the proposed act of ratification. The Technical Report indicated that the reservation was not vital. Specifically, it stated that domestic law was already in conformity with Article 2: "The third paragraph of Article 2 prescribes that superior orders from an official or public authority may not be invoked as justifying torture. This provision is consistent, for example, with the provisions of article 330 of the Military Justice Code."¹³⁴

In sum, Chile's reservation to Article 2 brings a number of severability-related factors into focus, foremost among these that the record of nondemocratic states' accession to human rights treaties is more complex than one might assume. As Risse, Ropp, and Sikkink's empirical case studies show, the act of ratification itself may bridge the divide between phases of the socialization process. As a response to domestic and international pressure, a state's decision to join a human rights agreement may reflect a tactical concession or an expression of prescriptive status or both. Chile's practice with regard to the Convention Against Torture shows that a reservation may not be essential to a nondemocratic state's decision to ratify a treaty. Indeed, a state's very ratification of an agreement necessarily means that some goals are being pursued by that act of accession. If the state is responding to domestic political pressure or beginning the move to prescriptive status, its decision to join the treaty should be credited as a dimension of the first goal identified above: the culmination and expression of political support (though not through the ballot box) for promoting domestic human rights. Chile's

¹²⁸ Torture Declarations and Reservations, *supra* note 126, at n.16.

¹²⁹ *E.g., id.*, Objections by Australia, Austria, Bulgaria, and Sweden.

¹³⁰ Report of the Committee Against Torture, *supra* note 127, at 67, para. 366.

¹³¹ *Id.*, para. 364.

¹³² Pinochet Comm. 913-10, *supra* note 123.

¹³³ *Id.*

¹³⁴ Republic of Chile, Ministry of Foreign Affairs, Technical Report (n.d. [1987]), at <<http://www.remember-chile.org.uk/news/pintcts2.htm>> (visited June 5, 2002).

reservation to Article 2 shows that, in some cases, honoring a state's initial act of ratification and the expression of political pressures reflected in that decision may require treating a reservation as dispensable. This result would reflect the nondemocratic state's consent.

A treaty regime that respects the choice of nondemocratic states' consent in the same manner that it respects the consent of other states may raise some normative concerns, which should be addressed. In response to such concerns, it is worth emphasizing two aspects of the impact of a severability regime on the human rights practices of nondemocratic states. First, a severability regime provides a meaningful opportunity to keep a state bound to a human rights treaty despite an invalid reservation. In sharp contrast, an AS regime would consistently nullify a state's ratification without ever inquiring into the severability question. The discussion of Chile presents an especially poignant example of that difference.

The British House of Lords' decision concerning Pinochet's extradition turned on the fact that Chile was a party to the Convention Against Torture between 1988 and 1990. According to the Law Lords, the start date of 1988 was set because domestic extradition rules required Chile, Spain, and the United Kingdom to be contemporaneous parties to the Convention. The end date of 1990 was set because Spain's extradition request involved only claims of torture that had occurred before the new Chilean government was established by democratic elections in 1990. If the severability question had been raised in such a case, an AS regime would have potentially quashed the extradition request (if the reservation were deemed invalid), while a severability regime would probably have maintained it. That is, if the reservation were invalid, under an AS regime Chile's act of ratification would appear to be void. Notably, proponents of Pinochet's extradition would not be helped by the fact that, in 1989, Spain and the United Kingdom had officially asserted that Chile's reservation to Article 2 was incompatible with the object and purpose of the Convention, or an unacceptable condition.¹³⁵ Of course, the House of Lords controversy is just one illustration. Similar questions would be raised even more directly by a third-party institution in a case involving subordinate Chilean military officers—whether the case occurred in 1999 or in 1989, and whether it involved an extradition request or not. In such cases, a severability regime would be likely to produce an outcome favorable to human rights protection, while an AS regime would make it difficult, if not impossible, to capture that benefit.

The second important aspect of the impact of a severability regime on nondemocratic states is that it facilitates progressive movement through the phases described by Risse, Ropp, and Sikkink. This understanding helps address perhaps the most serious normative concern regarding the application of a severability regime to such states: the prospect of privileging a nondemocratic state's interests at the time of ratification (time 1) instead of a successor democratic state's interests at the point the reservation comes into question (time 2).¹³⁶ Simply put, in those cases where a reservation was essential at the time of ratification, the successor democratic state may be ejected from the treaty despite its being against the democratic state's interest. Although this concern goes beyond the dispute between a severability regime and an AS regime—and, in fact, might be described as fine-tuning the type of severability regime adopted—it is important enough to be treated here, even if briefly.

First, Risse, Ropp, and Sikkink's model explains in a sophisticated manner how nondemocratic states engage in strategic behavior in earlier phases of the socialization process. If the severability regime privileged state interests at time 2, nondemocratic states would rationally be reluctant to ratify the treaty. This is especially true where a government's authoritarian elements expect to retain some political power, but not enough to counter the successor government's overall preference for severing a reservation deemed to be invalid. A severability

¹³⁵ Torture Declarations and Reservations, *supra* note 126, at n.16.

¹³⁶ Compare *supra* part III, "The Modalities of Conditional Consent" (discussing aspects of this choice in terms of a time 1 (point of ratification) versus a time 2 (point of case or controversy at hand)).

rule that privileges time 1 assures the nondemocratic state of greater control over prospective severance questions than a rule that privileges time 2. Accordingly, this system provides a stronger incentive for such states to ratify the treaty, notably at a time when, for the sake of human rights, the ratification probably matters the most.

Second, a severability regime that privileges time 1 corresponds in important respects with Risse's elaboration of the socialization model. Risse argues that inducing nondemocratic governments to engage openly in the discourse of international legal norms, including juridical justifications to defend their actions, helps to facilitate progressive change.¹³⁷ A severability regime—especially one that applies the default rule proposed in part IV¹³⁸—includes an information-forcing mechanism that stimulates discourse by the nondemocratic state in international legal terms. For example, states have an incentive to defend their reservations as essential or to make such a preference clear at the outset. As I explain in the following part, the degree to which a severance presumption potentially misjudges nondemocratic states' preferences will incidentally advance these states' movement along the socialization process. That is, the steps these states take, in order to avoid that outcome, will engage them in the dialogic process Risse identifies as productive.

To recapitulate: the discussion in part III has addressed, and endeavored to settle, the central controversy in the current dispute over invalid reservations—whether, given the principle of state consent, severance should be an option. The widespread and increasing acceptance of the AS position has effectively made this question the stopping point of any further inquiry into severability because of an assumed relationship between treaties and state consent. The record of state practice, however, clearly demonstrates that foreclosing severance as an option would countermand the principle of state consent. Numerous cases drawn from different modalities of state practice lack the “sovereignty costs” that AS proponents contend are entailed by keeping a state bound to a human rights agreement without the benefit of its reservation. State treaty practices may also reflect a strategy to promote human rights abroad or to stave off domestic political pressure, which would be significantly frustrated if the government were ejected from an agreement and forced to reratify. Indeed, across a range of cases, the remedial option of severance is precisely what states would prefer when binding themselves to such agreements. Greater sovereignty costs, in fact, lie on the side of an AS system in such situations. Once this part of the debate is settled, or its terms better understood, we might begin to think about the appropriate way to structure a regime that includes severance as an option.

IV. TOWARD A PRESUMPTION OF SEVERANCE

The above analysis of state treaty practice not only demonstrates the need for severing invalid reservations in particular circumstances, but also points toward the way to structure a regime that distinguishes between those circumstances and ones in which severance is inappropriate. A central problem in designing or administering such a regime concerns what an adjudicator should do in the face of silence or ambiguity. If a state includes explicit language at the time of ratification stating whether it considers certain reservations essential

¹³⁷ Risse, *supra* note 113, at 28–29. A government's interactions with international and domestic audiences can be conceived as a two-level game. See *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS* (Peter B. Evans, Harold K. Jacobson, & Robert D. Putnam eds., 1993). In the context of nondemocratic states, this dynamic can help produce democratic change because the internal and external audiences share common, mutually reinforcing, liberal democratic objectives. The same may not be true, however, for treaty practices of democratic states. In those cases, a government's actions at the international level may be used to lock out, or constrain, future democratic choices. In that respect, a severability system may appear to work against democratic norms; but a critical point is that for these states, at time 1, ratification with severable reservations is a legitimate exercise of democratic expression. In terms of implications for time 2, one might view these practices as a form of constitutionalism or self-binding behavior in which democratic polities often engage.

¹³⁸ See *infra* text at note 139.

or nonessential conditions of its accession, the adjudicator's task will be simple. When the text is silent or ambiguous, however, a default rule or interpretive presumption is required to determine the outcome. Such a rule will also be required for cases in which states have already acceded to a treaty without knowing to specify their intent at the time; for existing human rights treaties, that retrospective tail will be exceptionally long.

In this part, I sketch the basic outlines of a "severance presumption,"¹³⁹ which I conclude is necessitated by the empirics of state treaty practice. The presumption I propose is that adjudicators should assume an invalid reservation is not an essential condition of a state's decision to ratify a treaty unless evidence to the contrary is provided.¹⁴⁰ A significant factor in setting the appropriate presumption involves reducing error costs. For example, if the adjudicator misjudges the state's intent, is it better for the error to fall in the domain of underinclusiveness or overinclusiveness?

The record of state treaty practice strongly suggests that error costs derived from a nonseverance presumption exceed those from a presumption favoring severance. In most of the cases, states have consented to having aspects of their legal system modified by international legal developments. In the strongest cases of this kind—newly established democracies—states often prefer locking as much of their domestic fates as practicable into international structures. An adjudicator's erroneous expulsion of a state from a treaty risks significant costs along two dimensions: international (e.g., a sovereignty impact from the state's expulsion against its will, reputational costs to the state's international standing, loss of a leadership or participatory role in the regime) and domestic (e.g., the unhinging of a wide array of judicially enforceable civil and political rights protections, facilitation of illiberal rollbacks). The result would probably involve significant transaction costs in the process of reratifying the agreement.

On the other hand, erroneous severance by the adjudicator, maintaining the state's membership in the treaty, would also risk significant, but seemingly more limited, costs: international (e.g., a sovereignty impact from the state's being held against its will) and domestic (e.g., the creation of legal obligations the state was not prepared to accept; the potential infringement of "counter-rights," such as limiting freedom of speech in the name of regulating hate speech). In this situation, however, the state has a relatively easy recourse: withdrawal. This back-end solution helps prevent such errors from producing severe impacts. There are potential reputational costs to withdrawal, but these should be balanced against the fact that the state would have preferred expulsion in the first place.

The virtues and vices of the severance presumption can be usefully considered by reference to the choice between majoritarian default rules and penalty (or information-forcing) default rules in the law of contracts.¹⁴¹ In contracts scholarship, these two default rules are often discussed as the best alternatives in responding to gaps in long-term relational contracts. In the face of silence in an agreement, an adjudicator can adopt either a default rule that mimics what the majority of parties in similar circumstances would have selected (a majoritarian default) or a rule that burdens the party with more information to reveal that information to other parties, as well as to the adjudicator (a penalty, or information-forcing,

¹³⁹ Although the presumption concerns a factual determination and severance is a legal conclusion, for the sake of simplicity I will call the presumption a "severance presumption." Logically, a "nonseverance presumption" would have the adjudicator presume a reservation to be an essential condition of a state's consent to ratification unless contrary proof is provided.

¹⁴⁰ Domestic legal scholars may be familiar with this type of presumption, as it arises in jurisprudential questions regarding the severability of invalid provisions of statutes. In the domestic context, American legal scholars have sharpened an analogous doctrinal question to determining which presumption—one favoring severance or one against it—best fits drafters' intent and dynamics of the legislative process. See, e.g., Emily Sherwin, *Rules and Judicial Review*, 6 LEGAL THEORY 299 (2000); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997).

¹⁴¹ Richard Craswell, *Contract Law: General Theories*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 1 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989).

default). As discussed below, a severance presumption may split the difference by capturing some of the virtues of each of these default rules, while avoiding potential shortcomings.

In the context of reservations to human rights treaties, a strict majoritarian default rule would prove unworkable. Such a rule requires the adjudicator to replicate how the majority of parties would have addressed an issue or resolved a problematic aspect of an agreement. Given the heterogeneity of state treaty practice and the various interests involved in different types of reservations, it would prove practically impossible to set a strict majority default rule.¹⁴² As others have explained, in circumstances of such uncertainty or institutional inability to determine how a majority of parties would act, a better rule is perhaps an information-forcing one.¹⁴³

A penalty default rule also has significant drawbacks when applied in the reservations context but, at the same time, demonstrates certain values the severance presumption would serve. A fundamental problem in applying a device like a penalty default rule to severance of reservations is that it would directly conflict with the principle of state consent. Indeed, “penalty defaults are purposefully set at what the parties would not want—in order to encourage the parties to reveal information to each other or to third parties (especially the courts).”¹⁴⁴

Nevertheless, the penalty default rule does illuminate other benefits of a severance presumption. Specifically, the potential for error costs implicit in a severance presumption should be understood as information forcing. With this presumption as the governing standard, *R* states—which are in the best position to know whether their own reservation is an essential condition of consent—will be encouraged to reveal that information. That is, the knowledge *ex ante* that an adjudicator may interpret their intent incorrectly (error costs) gives *R* states an incentive to reveal more information about their preferences.

This effect also has benefits with respect to the treatment of nondemocratic states. Notably, a default rule is inescapable: one has to be set one way or the other. Setting the default rule will also be likely to burden some parties more than others. The information-forcing feature of a severance presumption has the effect of falling disproportionately on nondemocratic states, because the presumption is probably incorrect in most of those cases. As described in the section on such states in part III, this information-forcing effect produces normatively attractive results by encouraging those states to engage openly in international legal discourse.

A primary reason that a severance presumption captures benefits associated with both default rules relates to the error costs. A presumption favoring nonseverance risks more harmful outcomes than the severance presumption. Perhaps most important is the corrective action that states can adopt: reratification (in response to an erroneous decision not to sever) and withdrawal (in response to an erroneous decision to sever). The corrective action is far more difficult in the former case than in the latter. The coalition building required in ratification struggles, for example, will probably prolong this corrective strategy in many countries. During the interim period, illiberal rollbacks in newly established democracies and suspension of rights guarantees in consistent-standard states are possible. In terms of ultimate effectiveness, the transaction costs of ratification are high enough that successful corrective action might not be achieved in many cases. Accordingly, in selecting which interpretive presumption to incorporate into the management of a reservations regime, states should rationally select a severance presumption. On balance, this choice would limit potential encroachments on states’ overriding interests in acceding to the treaty regime.

This approach to modeling a reservations regime helps explicate the broader relationship between state consent and the presumption selected. My majoritarian analysis above admittedly avoids inquiring into whether, at a narrow level of abstraction, a majority of states would

¹⁴² See Craswell, *supra* note 141, at 4–5 (describing difficulties in adopting majoritarian default rules in highly heterogeneous contexts).

¹⁴³ See, e.g., Cass R. Sunstein, *Must Formalism Be Defended Empirically?* 66 U. CHI. L. REV. 636, 647 (1999).

¹⁴⁴ Ayres & Gertner, *supra* note 141, at 91; see also *id.* at 129–30.

have considered a reservation to be an essential condition of consent. (As a practical reality, I believe such an inquiry would be hopeless, given the divergent modalities of state treaty practice and types of reservations.) Instead, the above analysis applies the sensibility of a majoritarian default rule at a broader level of abstraction by asking what presumptive rule the majority of states would prefer in administering the regime.

Considering the application of the default rule at these two levels of abstraction also helps clarify important aspects of the relationship between state consent and those features of a penalty default rule reflected in a severance presumption. While in certain cases a severance presumption will function as a penalty—when a state had actually intended its reservation to be nonseverable—in terms of a systemwide choice, states should still select this presumption because, on balance, it best preserves interests involved in participating in such treaty regimes. Thus, we should not confuse (1) the infringements on the expression of state consent that result from applying the default rule in particular cases with (2) broader questions evaluating the systemwide impact of deploying a severance presumption or determining whether state consent is maximized by a severability regime.

In the final analysis, these default rules, although generated by law and economics scholars in the context of studying contracts and accordingly limited in their application, can help clarify the rationale for selecting one presumptive rule over another. Scholars have discussed applying such default rules, by analogy, to analyzing the constitutionality or statutory construction of legislation.¹⁴⁵ In our context, these conceptual tools can go only so far. The literature on the law of contracts generally assumes such default rules will be applied strictly. Unless the default rule is applied as an irrebuttable or superstrong presumption, information-forcing effects and the purpose behind seeking majoritarian solutions cannot be obtained.

Indeed, the law and economics approach generally takes efficiency as its organizing principle, which does not fit comfortably with the nature of the concerns related to treaty regimes and state consent. For example, under a conventional law and economics approach, efficiency is maximized by setting a majoritarian default rule because this method, first, allows third-party institutions to bypass figuring out the particularities of individual cases and, second, allows parties to avoid transaction costs in their negotiations *ex ante*. Likewise, a penalty default rule forces the sharing of information, which helps ensure that parties will arrive at the most efficient outcome once preferences and relative capabilities are known.

In the context of our discussion, however, efficiency is not the organizing principle, and greater flexibility in employing a presumption, perhaps even a weak one, is preferable. Thus, reference to default rules should be understood as borrowing by analogy. To achieve its full value, the severance presumption would need to be applied flexibly. In fact, in many cases the presumption is sure to be rebutted by evidence that the state considered the reservation essential to its consent to be bound. Third-party institutions would need to be given the discretion to apply this presumption so that state consent would be respected over the course of administering the regime. The point is not only for third-party institutions to favor the severance option to avoid making costly mistakes, but also for the adjudicator to be provided with the decisional freedom to honor the state's contrary interests (i.e., not severing the reservation) when those interests are sufficiently clear.

A severance presumption can be expected to have the greatest impact in its retrospective application because of the high number of ratifications of human rights treaties. As a prospective matter, however, we might speculate on the behavioral effects that a severance presumption would have on states' ratification practices. Some of these effects may be anticipated, because the severability option and severance presumption are both selected to maximize

¹⁴⁵ See, e.g., Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COL. L. REV. 1395, 1430–36 (1999) (applying these default rules as analogs for evaluating strong presumptions and formalist rules in U.S. foreign relations law); Sunstein, *supra* note 143, at 645–50.

state interests at the time of ratification. Newly established democracies and consistent-standard states, for example, should be more inclined to join human rights regimes that possess these features than regimes without such features. Their governments' future participation in such regimes would be more predictable and stable. States in general would also enjoy greater freedom to attach questionable reservations, because invalid reservations would not automatically jeopardize membership down the line. This freedom should expand the pool of bargaining chips for securing domestic support to enter regimes, and help placate advocates of ratification who disagree with certain proposed reservations. At the same time, third-party institutions (including domestic courts) should feel more empowered to review questionable reservations, because a finding of invalidity would not automatically annul the state's membership. Of course, some states might begin attaching provisos stating that their reservations are essential. The result of such actions for these states would be no different from having an AS regime, but it would be more closely calibrated to reflect state consent. Moreover, as explained, the option of stipulating that some reservations are inessential might enable the government to attach additional reservations to orient its relationship to the treaty regime. Thus, even these states would have an interest in taking advantage of severability.

A final concern is that a severance presumption discourages ratification by reducing ambiguity in the political process. On this view, ambiguity of legislative intent might, in some circumstances, help initiatives pass through the political process and a severance presumption would undermine that dynamic by compelling governmental actors to make clear statements. This concern, however, should also register for an antiseverance presumption and for an AS regime. Both of those would also compel governmental actors to convey clear information if they wanted to counteract the effect of the presumption or rule. Having a loose severance presumption, which can be rebutted both by legislative history and by clear textual statements, should help relieve the concern regarding ambiguity. Such flexibility would allow legislators to draft instruments of ratification against the background of a clearer, but nevertheless modest, presumption.

V. CONCLUSION

The current severability debate has been characterized by an antinomy common to public international law arguments: the imposition of multilateral agreements (especially human rights treaties) versus the interests of sovereignty and state consent. The tendency to think in these terms can be traced to conventional concerns about the penetration of international law into areas of domestic governance and more recent concerns about the erosion of the nation-state's power and autonomy caused by globalization. Some commentators, however, have also started to move away from these categorical oppositions. Recent scholarship has revealed how weaker conceptions of sovereignty existed during and ever since the creation of the Westphalian state.¹⁴⁶ Moreover, other scholars have begun to discuss the need to integrate commitments to international rights and multilateralism with a genuine commitment to sovereignty and state consent.¹⁴⁷ In a sense, much of the international relations scholarship discussed above, by identifying dynamic reasons that states choose to bind themselves to international agreements, points in the same direction.

The argument advanced in this article serves as a practical application of this more recent trend. I have sought to uncover the particular interests that motivate states to bind themselves to multilateral human rights obligations and, on the basis of that empirical record, to determine which reservations regime best reflects state consent. The final result suggests that the

¹⁴⁶ STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999).

¹⁴⁷ See, e.g., ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); Kal Raustiala, *Sovereignty and Multilateralism*, 1 *CHI. J. INT'L L.* 401, 417-18 (2000); Anne-Marie Slaughter, *The Real New World Order*, *FOREIGN AFF.*, Sept.-Oct. 1997, at 183.

debate over the consequence of invalid reservations has been premised on a false opposition. For diverse reasons, which can be catalogued according to particular modalities of state treaty practice, governments bind themselves to international agreements and, at the same time, attach one of two types of reservations: ones that are essential to their consent to be bound and ones that are inessential, or accessory, stipulations. As discussed in part III, a severability regime would best reflect the purpose and interests of states' accession. As discussed in part IV, such a regime should include a rule of decision that favors severing an invalid reservation, that is, considering the reservation supererogatory unless it is established that the state intended otherwise.

Of course, this resolution leaves some questions that proceed from it unanswered. Beyond the scope of this article is a set of questions about what type of evidentiary material constitutes a valid indication of contrary state intent and what burden of proof should be applied for evidence to rebut the severance presumption. A separate set of questions entails determining the optimal treaty regime if we were to suspend the value of state consent or to introduce other normative variables. The first set of questions is derivative of the principal subject of this article and is outside its scope. The second set can be addressed either independently or, better yet, once we first settle how state consent functions and what structural choices best represent those state interests.

Beyond these questions, which are related to the project itself, it is hoped that the type of resolution offered by this article can advance discussions about institutional structure, state consent, and the modalities of divergent governmental practice more broadly. For instance, the conclusions reached here suggest important (though counterintuitive) ways that state consent can be maximized by enhancing third-party institutions' ability to regulate reservations and other state treaty practices. The same conclusions also indicate factors to be taken into account in analyzing and designing international legal arrangements in which various third-party institutions have overlapping or shared institutional authority, some with enforcement power and others with effective control only within their particular spheres of activities.

A general approach is to obtain a better understanding of the empirical dynamics of state consent and to thread those empirical insights through an analysis of the design and functions of international and domestic structures. In that way, we can better address controversies that rest on unexamined empirical assumptions or, at the very least, clarify what is genuinely at stake. In terms of the severability debate, the AS paradigm has gained ascendancy due to its intuitive connection to state consent. A closer examination of treaty practice, however, shows that assumptions underlying that connection are unsustainable. In the end, the antithesis is true. A treaty regime that precludes severing invalid reservations—or, for that matter, a severability regime that considers reservations presumptively essential to a state's ratification—contravenes the normative commitment to state consent.