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Exit Legitimacy

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ABSTRACT

Although it is widely appreciated that rights of exit from a legal order can be important and valuable, there currently exists no adequate account of the relationship between exit rights and legitimacy. This Article cures that deficiency by describing the contribution made by exit rights to the legitimacy of a legal order—a contribution that I call the "exit legitimacy" of that legal order—and offers two accounts of its normative significance. On the "thin" account, exit rights operationalize consent by making it more genuine, more ascertainable, and more closely related to relevant acts and relationships of governance; on the "thick" account, exit rights instantiate a value that I call "political autonomy." The Article offers grounds to think that, while exit legitimacy is salient in legal orders of all kinds, it is particularly significant for international orders and institutions, which often lack the democratic, traditional, and other legitimating resources available to their national equivalents. Finally, to complete the account of exit legitimacy, the Article considers and responds to four of the strongest objections to which it appears vulnerable. It demonstrates that none of these objections convincingly undermines the case for this unique ground of legitimacy, and that each provides useful guidance for promoting exit legitimacy in legal orders of all kinds.

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I. INTRODUCTION

The search for legitimacy—the search for reasons to accept or comply with legal orders and institutions, and with the norms and decisions they announce—may be the oldest problem of political theory, but the explosive emergence of international orders and institutions since 1945 has unleashed a new version of that problem. This new version presents a sharp challenge to our existing toolkit of solutions: familiar accounts of legitimacy, developed with the nation-state in mind, often fail to convince at the international level. But that very fact makes the international sphere a promising setting in which to identify and explore sources of legitimacy that lie hidden from view in national orders, where democracy, tradition, participation, and the sheer weight of history can easily dominate the picture. In this Article, I will argue that one of the most important of these sources is the *exit right*, which makes a distinctive—perhaps even a foundational—legitimating contribution that I will call the *exit legitimacy* of that order.[1] And while exit legitimacy can play an important role in a wide variety of orders and institutions, from private associations and

1. The words "exit," "rights," and "legitimacy" are of course freighted with ambiguity, and I use at least one of them in a slightly idiosyncratic sense. Those wishing to find out immediately what precisely I have in mind may want to jump to Section III.A.

nation-states to international organizations, there are reasons to think that it is particularly significant at the international level.

Rights and mechanisms of "exit" (by which I mean the voluntary renunciation by a governed entity of its membership of an order or institution, along with all the duties, obligations, rights, and benefits that pertain thereto) have interested positive political theorists, liberal rights scholars, social contractarians, international lawyers, and those concerned with secession and self-determination. And while these scholars have illuminated many of the important consequences, benefits, and difficulties associated with exit rights, the relationship between exit and legitimacy has not been seriously explored, except in contractarian scholarship (where, as we shall see, its treatment has been unsatisfactory). One important form of exit right in particular—the right of a state to exit from an international institution—has received virtually no serious attention in normative theory. But this Article will argue that orders and institutions that protect the exit right (e.g., the European Union since the Lisbon Treaty, as the United Kingdom has reminded us very recently with the astonishing outcome of the "Brexit" referendum) enjoy a crucial legitimating resource that is unavailable to those that do not (e.g., the United Nations).

While I will lay my focus primarily on international institutions, I will make my case in terms that are as general as possible, reflecting my view that rights of exit can make a material contribution to the legitimacy of other orders (such as nation-states) too. One consequence of this approach is that I will have relatively little to say in this contribution about law as such: I will reserve for subsequent work the difficult problems of institutionalizing the value of exit legitimacy in specific legal orders and institutions, and the challenges of balancing the demands of exit legitimacy against the myriad of other considerations that typically constrain institutional design or reform. So those expecting specific doctrinal prescriptions for national or international legal orders will be disappointed. My concern here will be very strictly with stating and defending in normative theory the proposition that exit rights ground a particular and valuable source of legitimacy in legal orders, particularly, but not exclusively, international ones.

Accordingly, in the following pages I will set out the case for exit legitimacy and offer two accounts of its normative force. The first, a "thin" account of exit legitimacy, rests upon the broad consensus in international law and liberal thought that consent is an important (perhaps even the dominant) source of legitimacy. This thin account argues that exit rights operationalize consent by making consent more genuine, more ascertainable, and more closely related to the relevant act or situation of governance, while avoiding recourse to doubtful notions of promise or contract. The second, a "thick" account of exit legitimacy, is much more complex and ambitious. On this thick account, exit rights instantiate what I call political autonomy: the

ordering of a political order or institution such that the governed entities are—strictly and literally—free, equal, and independent. I offer here only a sketch of the broader implications of political autonomy.

Finally, I will consider four of the strongest objections that might be directed at exit legitimacy. Put briefly, they are as follows: first, that exit is too difficult or costly to be meaningful in practice; second, that, even when exit is practicable, it is too insubstantial and weak to do the normative work asked of it; third, that, even if exit rights are in some sense desirable, they generate unhelpful and destructive incentives and behaviors among governed entities; and, fourth, that exit rights should not allow an entity with outstanding or undischarged obligations to exit the political order or institution. I will show that none of these objections is fatal and that each of them provides helpful guidance for projects of institutional design motivated by the normative appeal of exit legitimacy.

II. EXIT IN THEORY AND PRACTICE

A. *The Salience of Exit*

The practical importance of the right of exit blazes from the pages of history. For centuries, restrictions on exit have been associated with oppression and privation,[2] exemplified by the ties that bound Ptolemaic peasants or English villeins to their land,[3] the English Poor Laws,[4] and the odious Fugitive Slave Acts.[5] Conversely, exit rights in various forms feature in many of the great achievements of emancipation, from the Delphic manumission rite with its explicit conferral upon the freed person of the right to "house where he desires" and to "dwell in whatever city-state he wishes,"[6] through the Magna Carta with its right to "leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war,"[7] to the most famous exit of all, the Declaration of Independence.

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2. *See generally, e.g.*, ALAN DOWTY, CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT (1987) (discussing the history of human emigration and expulsion and government motives for such policies).

3. *See, e.g.*, J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 468 (2002) (villeins in feudal England); W. L. Westermann, *Between Slavery and Freedom*, 50 AM. HIST. REV. 213, 219 (1945) (peasants in Greco-Roman Egypt).

4. *See, e.g.*, 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 152–57 (Liberty Press 1981) (1776).

5. *See, e.g.*, STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860 (1970).

6. Westermann, *supra* note 3, at 216.

7. MAGNA CARTA cl. 42 (1215), http://www.bl.uk/magna-carta/articles/magna-carta-english-translation [https://perma.cc/5UDN-CXUP] (archived Jan. 21, 2017).

In our own era, too, oppression and suffering have walked hand-in-hand with exit restrictions. Exit rights were prominently curtailed by Bolshevik Russia,[8] Nazi Germany,[9] various states during the Cold War (most famously manifested in the Berlin Wall),[10] and, until very recently, Communist Cuba.[11] Still today, exit restrictions are imposed by North Korea on its citizens,[12] by Israel on Palestinians in the Occupied Territories,[13] and by Iran on women.[14] Conversely, legal instruments for the protection of fundamental rights frequently include rights of exit and emigration: a range of twentieth-century constitutional or quasi-constitutional instruments do so,[15] as do a

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8. *See, e.g.*, Yuri Feltshinsky, *The Legal Foundations of the Immigration and Emigration Policy of the USSR, 1917–27*, 34 SOVIET STUD. 327, 339–42 (1982).

9. *See* REICHSSICHERHEITSHAUPTAMT [REICH SECURITY MAIN OFFICE], *Order Banning the Emigration of Jews from the Reich*, JEWISH VIRTUAL LIBRARY (Oct. 23, 1941), https://www.jewishvirtuallibrary.org/jsource/Holocaust/emigban.html [https://perma.cc/RY4B-AJBC] (archived Jan. 21, 2017).

10. *See* Albert O. Hirschman, *Exit, Voice, and the Fate of the German Democratic Republic: An Essay in Conceptual History*, 45 WORLD POL. 173, 178–86 (1993).

11. *See, e.g.*, Tracy Wilkinson, *Cubans No Longer Need Special Exit Permit to Travel Off Island*, L.A. TIMES (Jan. 15, 2013), http://articles.latimes.com/2013/jan/15/world/la-fg-wn-cuba-travel-reform-20130114 [https://perma.cc/9HFT-RV72] (archived Jan. 19, 2017).

12. *See, e.g.*, Thomas Spoorenberg & Daniel Schwekendiek, *Demographic Changes in North Korea: 1993-2008*, 38 POPULATION & DEV. REV. 133, 139 (2012) (noting that "the country has remained closed for decades and international migration can be considered non-existent").

13. *See, e.g.*, MIGRATION POL'Y. CTR., MIGRATION FACTS: PALESTINE (April 2013), http://www.migrationpolicycentre.eu/docs/fact_sheets/Factsheet%20Palestine.pdf [https://perma.cc/8GNW-4MQF] (archived Jan. 19, 2017).

14. In one recent and high-profile example, the captain of an Iranian women's football team was unable to participate in an international tournament when her husband refused to grant permission to travel. *See* Saeed Kamali Dehghan, *Husband bars Iranian footballer from Asian championships*, GUARDIAN (Sept. 16, 2015), https://www.theguardian.com/world/2015/sep/16/husband-bars-iranian-footballer-from-asian-championships [https://perma.cc/2XJA-8P99] (archived Jan. 19, 2017).

15. *See, e.g.*, Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 6 (U.K.) ("Every citizen of Canada has the right to enter, remain in and leave Canada."); XIANGGANG JIBEN FA art. 31 (H.K.) ("Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region and freedom of emigration to other countries and regions. They shall have freedom to travel and to enter or leave the Region. Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization."); Art 16 COSTITUZIONE [Cost.] (It.) ("Every citizen is free to leave the territory of the republic and return to it, notwithstanding any legal obligations."); NIHONKOKU KENPO [KENPO] [CONSTITUTION], art. 22 (Japan) ("Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate."); KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 27(2) (Russ) ("Everyone may freely leave the Russian Federation. Citizens of the Russian Federation shall have the right to freely return to the Russian Federation."); S. AFR. CONST., 1996, art. 21(2) ("Everyone has the right to leave the Republic."); Basic Law: Human Dignity and Liberty, 1992, S.H. 5752 (Isr.) ("All persons are free to leave Israel."). Other constitutional provisions have been interpreted to include an exit right: thus, for example, Article 2(1) of the German Basic Law is understood to confer such a right. I owe this observation to Thomas Streinz.

number of international and regional agreements for the protection of human rights.[16] Both the European Union and the United States guarantee citizens the right to exit from their component states (although not, oddly, from the unions themselves).[17]

So there are compelling anecdotal grounds, at the very least, to suggest a connection between the spread of exit rights and modern liberal constitutional democracy. And it is not hard to understand why they might be connected: at the heart of much liberal normative theory is "[t]he personal liberty . . . not to be coerced into, or trapped within, ways of life"[18] and the right to have one's fundamental relationships be voluntary rather than imposed.[19] We might also note some implications of exit rights in positive political theory that appeal to the liberal project: for example, as Albert Hirschman famously argued, the threat of exit can deter organizational "decline" that would disserve individual members.[20] When an exit right exists, the desire to avoid members rushing for the door may help to keep an order or institution focused on serving its members, while regimes that are bent upon oppression and expropriation will often find it necessary to restrict exit.[21]

But while an exit right can be helpful and emancipatory in these and other ways, it would be crude not to add the qualification that exit rights are no *substitute* for justice, fairness, efficiency, or any form of rightness within an order or institution. An exit right alone does not normally *solve* internal problems. Those who are unable or unwilling to resort to exit may find that they bear an unjustly heavy share of the burden of institutional life, and, even for those who are able and willing to exit, it is pretty thin gruel to reduce our notions of justice and

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16. African Charter on Human and Peoples' Rights art. 12, June 27, 1981, 1520 U.N.T.S. 26363 ("Every individual shall have the right to leave any country including his own, and to return to his country."); American Convention on Human Rights art. 22, Nov. 22, 1969, 1144 U.N.T.S. 143 ("Every person has the right to leave any country freely, including his own."); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights art. 12 (Dec. 16, 1966) ("Everyone shall be free to leave any country, including his own."); European Convention on Human Rights, Protocol No. 4 art. 2, Sept. 16, 1963, ETS no. 46 ("Everyone shall be free to leave any country, including his own."); G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone has the right to leave any country, including his own, and to return to his country").

17. *See* Charter of Fundamental Rights of the European Union art. 45, Dec. 7, 2000, 2007 O.J. (C 303) 1; Memorial Hospital v. Maricopa County, 415 U.S. 250, 254 (1974).

18. William Galston, *Two Concepts of Liberalism*, 105 ETHICS 516, 522 (1995).

19. Harry Beran, *A Liberal Theory of Secession*, 32 POL. STUD. 21, 26 (1984) ("Liberalism grants [the right to decide upon political relationships to] individual citizens by acknowledging their right to emigrate and to change their nationality.").

20. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 21–29 (1970).

21. *See, e.g.*, Andrew Shorten, *Constitutional Secession Rights, Exit Threats and Multinational Democracy*, 62 POL. STUD. 99, 100 (2014); Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 171 (1998).

fairness to the proposition "you can take it or leave it." These points have been powerfully made, for example, by feminist theorists, who point out that women and girls may be particularly unable to avail themselves of exit rights in many cultures;[22] by scholars of "regulatory competition," who recognize that the prospect of "capital flight" may introduce a bias in favor of mobile capital and against less mobile entities;[23] and by scholars of federalism, who note that many types of undesirable state behavior (like "holdup" when the cooperation of multiple jurisdictions is required) are simply not susceptible to the discipline that exit rights provide.[24] These and other writers caution against thinking of exit as a cure-all for problems of justice and fairness inside orders and institutions, and they are surely right to do so. If the design of political institutions can be likened to designing a house that is at some risk of fire, then an exit right is like a fire escape—our sense that we should include one should not detract from our vigor in minimizing the chances of fire, or fighting one if it breaks out. An exit right is rarely *enough*, but having one beats the alternative.

We have, so far, mainly spoken of national orders. But when the focus shifts to international orders and institutions—terms that I use loosely and interchangeably throughout this Article to encompass everything from international organizations to treaties, and even customary international law itself—we find that many of the same principles are relevant here too. International orders and institutions apply rules and norms to states, adjudicate disputes and claims, and frequently impose and enforce obligations and duties. Their design and operation may be just or unjust, efficient or inefficient, fair or unfair, just like those at the national level. And, if we are interested, for whatever reason, in the situation of states in international institutions—a point we will bracket for later discussion, but not one that is a great stretch within liberal theory,[25] so long as we do not afford states "special moral primacy" over individuals[26]—then we see

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22. *See, e.g.*, Susan Moller Okin, *"Mistresses of Their Own Destiny": Group Rights, Gender, and Realistic Rights of Exit*, 112 ETHICS 205, 216 (2002); Ayelet Schachar, *On Citizenship and Multicultural Vulnerability*, 28 POL. THEORY 64, 79–80 (2000).

23. *See, e.g.*, Roderick M. Hills Jr., *Compared to What? Tiebout and the Comparative Merits of Congress and the States in Constitutional Federalism*, *in* THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES 248 (William Fischel ed., 2006).

24. *See, e.g.*, Richard Epstein, *Exit Rights Under Federalism*, 55 L. & CONTEMP. PROBS. 147, 154–65 (1992).

25. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 221 n.8 (Columbia 2005) (1993) ("It is incorrect to say that liberalism focuses solely on the rights of individuals; rather, the rights it recognizes are to protect associations, smaller groups, and individuals, all from one another in an appropriate balance specified by its guiding principles of justice.") [hereinafter POLITICAL LIBERALISM].

26. Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105, 112 (1992).

that the rights of exit and withdrawal for states, *as such*, in international orders and institutions might be important for many of the same reasons that they are important for individuals *in* states. To put it another way, if we think it meaningful not just to look through the state to the individuals beneath, but also to consider the state as a unified, reified entity that can be meaningfully analyzed in normative theory as a source and subject of claims, albeit only for some purposes, then we may find our eye drawn to exit rights for states.

Even a brief study of such "exit rights for states" reveals that the modern liberal practice of building an exit door into the wall of the state has not reliably filtered into the design of international institutions. To be sure, many international organizations and treaty systems *do* contain rights of withdrawal.[27] These provisions often incorporate a notice period, and occasionally further restrictions.[28] Moreover, the absence of an explicit withdrawal provision in a founding treaty does not always mean there is no such right under international law: the Vienna Convention on the Law of Treaties provides for a right of withdrawal (i.e., "denunciation") with at least one year's notice in the event that (1) a withdrawal right is implicit in the treaty or (2) the parties understood when negotiating the treaty that such a right was included.[29] The Convention also allows, in most but not all cases, withdrawal from a treaty in light of a fundamental change of essential circumstances (codifying the doctrine of *rebus sic stantibus*).[30] But these are rare cases; usually no exit provision means no exit right.

It is remarkable that many of the constructions of international law, including some of its proudest cathedrals, offer no exit right. This includes, most famously, the United Nations,[31] as well as the Association of South East Asian Nations,[32] the Caribbean

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27. *See, e.g.*, Rome Statute of the International Criminal Court art. 127, Jul. 17, 1998, 2187 U.N.T.S. 90; ECOWAS Revised Treaty art. 91, Jul. 24, 1993, 35 I.L.M. 660; United Nations Convention on the Law of the Sea art. 317, Dec. 10, 1982, 1833 U.N.T.S. 3; Charter of the Organization for African Unity art. XXXI, May 25, 1963, 479 U.N.T.S. 39; North Atlantic Treaty art. 13, Apr. 4, 1949, 34 U.N.T.S. 243; Articles of Agreement of the International Bank for Construction and Redevelopment art. VI, Dec. 27, 1945, 2 U.N.T.S. 20; Articles of Agreement of the IMF, art. XXVI, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39; European Convention on Human Rights, *supra* note 16, art. 58; American Convention on Human Rights, *supra* note 16, art. 78.

28. *See, e.g.*, Treaty on the Non-Proliferation of Nuclear Weapons art. X, Jul. 1, 1968, 729 U.N.T.S. 161.

29. Vienna Convention on the Law of Treaties art. 56, May 23, 1969, 1155 U.N.T.S. 331.

30. *Id.* art. 62.

31. Egon Schwelb, *Withdrawal from the United Nations: The Indonesian Intermezzo*, 61 AM. J. INT'L L. 661, 661 (1967).

32. *Cf.* Charter of the Association of Southeast Asian Nations, Nov. 20, 2007, 2624 U.N.T.S. 223.

Community,[33] the Organization of American States,[34] the World Health Organization,[35] and the International Covenant on Civil and Political Rights, to name but a few.[36] The European Union's single currency "Eurozone" also makes no provision for exit.[37] It is not even clear whether the most pervasive international institution of all—customary international law—allows for such a right: in fact, only recently has that question been seriously explored in modern scholarship.[38]

Perhaps the lack of exit rights in these and other international institutions has been of limited importance—and has escaped serious scrutiny in normative theory—to date because the design and operation of international institutions has been so much less determinative of political and social reality than has the design and operation of states.[39] Indeed, history has repeatedly shown that states are in many cases perfectly capable of "withdrawing" from, or at least suspending cooperation with, international institutions, even when no exit right is available *de jure*.[40] If we think of the structures of national political orders as buildings wrought in brick and stone—which firmly limit the movement of the governed entities within with solid, practically impenetrable walls—we would have to recognize that

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33. *Cf.* Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, May 07, 2001, 2259 U.N.T.S. 259.

34. *Cf.* Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3.

35. *Cf.* Constitution of the World Health Organization, Jul. 22, 1946, 14 U.N.T.S. 185.

36. *Cf.* International Covenant on Civil and Political Rights, *supra* note 16.

37. *See generally* Phoebus Athanassiou, *Withdrawal and Expulsion from the EU and EMU: Some Reflections* (Eur. Cent. Bank Legal, Working Paper Series No. 10, 2009).

38. *See* Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 205 (2010).

39. Daniel Bodansky makes a similar point, suggesting that "until recently international institutions have generally been so weak—they have exercised so little authority—that the issue of their legitimacy has barely arisen." Daniel Bodansky, *The Legitimacy Of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 597 (1999).

40. A handful of high-profile examples present themselves (ignoring withdrawals from institutions, like UNESCO, that offer an explicit withdrawal right): the Soviet Union purportedly withdrew from the WHO in the 1950s; Indonesia from the United Nations in 1965; North Korea from the International Covenant on Civil and Political Rights in 1997, and the United States from the Optional Protocol to the Vienna Convention on Consular Relations in 2005. In each case except the last, the relevant state returned to the order soon afterward, and the institution in question continued during and after the "withdrawal" to adhere to the view that the purported exiter never actually left, but merely suspended their activities of cooperation. *See, e.g.*, John Quigley, *The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences*, 19 DUKE J. COMP. & INT'L L. 263, 298–303 (2009); Elizabeth Evatt, *Democratic People's Republic of Korea and the ICCPR: Denunciation as an Exercise of the Right of Self-Defence?*, 5 AUSTL. J. HUM. RTS. 215 (1999); Nathan Feinberg, *Unilateral Withdrawal from an International Organization*, 39 BRIT. Y.B. INT'L L. 189, 190 (1964); Schwelb, *supra* note 31.

international organizations do nothing of the kind. We might think of them instead as gardens laid out in bushes and hedges, forming waist-height barriers that guide and channel state conduct, but through which states retain the ability to crash at points of genuine need. And perhaps so (though the argument looks a better fit for some cases than others). But the "exit question" will become much sharper as international organizations become more powerful, more intrusive, more responsible for distributing resources and regulating access to profitable activities, and more effective in enforcing their rules. So—to stick with our metaphor—it may be best to address the issue of exit before the foliage grows so high and dense that states can no longer simply push through in a pinch.

One final comment. It is possible, and may be advantageous, to empower some entity other than the order or institution itself to enforce and protect the right of exit, just as the state is called upon to protect the individual's right of exit from associations and organizations (and even family units) in much liberal theory.[41] And indeed, rights of exit from national orders may be protected not only by national instruments (national constitutions, laws, and so on) but also by international instruments and institutions like the International Covenant on Civil and Political Rights, regional human rights bodies, and integration projects like the European Union (which, in its system for the "free movement of persons," grants certain rights of internal exit—as well as entry rights—to natural persons and enforces them against EU Member States[42]). Nor is this wholly a modern innovation: the use of international institutions to guarantee rights of exit from national orders finds one intriguing early parallel in the 1555 Peace of Augsburg. As Benjamin Kaplan puts it,

> [t]he famous catchphrase *cuius regio, eius religio* was coined . . . by a Lutheran jurist to summarize the central clauses of this treaty. "Cuius regio" meant that "he whose territory" it was had the right to impose his faith (Catholic or Lutheran) on his subjects, free from outside interference. If subjects dissented from their ruler's choice, they had only the right to emigrate (*jus emigrandi*).[43]

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41. *See, e.g.*, Oonagh Reitman, *On Exit*, *in* MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY 189 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2005) (analyzing the role of secular and religious authorities in the context of divorce).

42. *See, e.g.*, Case C-249/11, Hristo Byankov v. Glaven sekretar na Ministerstvo na vatreshnite raboti, ECLI:EDU:C:2012:608; Case C-434/10, Petar Aladzhov v. Zamestnik direktor na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite raboti, 2011 E.C.R. I11659; Case C-430/10, Hristo Gaydarov v. Director na Glavna direktsia "Ohranitelna politsia" pri Ministerstvo na vatreshnite raboti, 2011 E.C.R. I-11637; Case C-33/07, Ministerul Administraţiei şi Internelor – Direcţia Generală de Paşapoarte Bucureşti v. Gheorge Jipa, 2008 E.C.R. I-05157. For a helpful discussion, see Adam Łazowski, *"Darling You Are Not Going Anywhere": The Right to Exit and Restrictions in EU Law*, 40 EUR. L. REV. 877 (2015).

43. BENJAMIN J. KAPLAN, DIVIDED BY FAITH: RELIGIOUS CONFLICT AND THE PRACTICE OF TOLERATION IN EARLY MODERN EUROPE 104 (2009).

Thus, two exit rights were enshrined in one international instrument: a right for states to exit from the jurisdiction of the Church (*cuius regio*) and a right for natural persons to exit from the jurisdiction of their state (*jus emigrandi*).

B. *The Neglected Relationship between Exit and Legitimacy*

Despite the evident salience of exit, the relationship between exit and legitimacy has not been satisfactorily developed in either political theory or legal scholarship, and the idea that exit rights make a distinctive contribution to legitimacy remains obscure and largely unexplored. I acknowledge at the outset, but will not attempt to summarize or discuss here, the tremendously illuminating body of work in positive political theory on the implications of exit rights, in which Albert Hirschman's sublime little book is of course preeminent.[44] We will discuss some of this work below, but it will suffice for now to simply acknowledge that this literature is not primarily concerned with normative questions.[45] This Section considers very briefly four other contexts in which political theorists and international lawyers have considered exit rights and their implications: (1) liberal rights theory, (2) social contract theory, (3) international legal scholarship, and (4) secession and self-determination. As we will see, a satisfactory account of the relationship between exit and legitimacy has yet to be offered.

1. Liberal Rights Theory

Most liberal rights theorists acknowledge the importance of the right to exit from organizations and institutions of all kinds, including the right to emigrate from a state or political order.[46] This is often

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44. *See generally* HIRSCHMAN, *supra* note 20.

45. *See infra* Section IV.C (discussing relationship between exit, incentives, and behavior in light of applicable positive theory).

46. I concentrate in the text on contemporary theorists and am not primarily concerned here with intellectual history, but thoughtful commentary on the implications and value of exit rights in early modern liberal thought can be discerned at least as far back as the work of Althusius, Montesquieu, Locke, and—perhaps above all—Vattel. *See* JOHANNES ALTHUSIUS, POLITICA 196–98 (Liberty Press 1995) (1614) (arguing that, in response to tyranny, citizens should "avoid obedience not by resisting, but by fleeing"); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 392–94 (Cambridge 1960) (1689) ("[W]henever the Owner [of land], who has given nothing but such a tacit Consent to the Government, will, by Donation, Sale, or otherwise, quit the said Possession, he is at liberty to go and incorporate himself into any other Commonwealth, or to agree with others to being a new one, *in vacuis locis*[.]");CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 212 (Cambridge 1989) (1748) ("The Persian custom that permits anyone to leave the kingdom who wants to, is very good; and though the opposite usage had its origin in despotism, where subjects were regarded as slaves . . . nevertheless, the Persian practice is very good in despotisms, where fear of

understood to flow from liberalism's central commitment to autonomy (i.e., the proposition that the individual should not be coerced into a particular way of living except to the extent necessary to guarantee the equal freedom of others).[47] But there are other resources in liberal theory to explain why exit rights may be desirable or appropriate. For example, William Galston has invoked considerations of diversity to argue that a right to exit from organizations and institutions may justify the tolerance, in a liberal order, of illiberal practices within those groups.[48] Perhaps the most vigorous account of liberalism's relationship to exit is found in the work of Chandran Kukathas, who has written that the right to exit "has to be the individual's fundamental right; it is also his only fundamental right, all other rights being either derivative of this right, or rights granted by the community [that he or she has chosen not to leave]."[49] As these and other writers show, the premises of liberalism furnish ample resources to support rights of exit from orders and institutions.

As noted above, however, this account has been sharply qualified by those who point out that exit does not cure violations of liberal rights, and that exit is seldom available on equal terms to all members. The essential point is that "[a] violation of civil liberties does not become tolerable just because citizens may emigrate, although it is true that, if they may not, then things are even worse."[50] One particularly powerful line of attack, as we have already seen, has come from feminist theory: Susan Moller Okin, for example, has compellingly demonstrated that exit rights are imperfectly available in practice, particularly to girls and women.[51] Moreover, she notes that exit rights offer scant consolation to "women or members of other oppressed groups who are deeply attached to their cultures but not to their oppressive aspects," and argues that a just liberal order must not only guarantee the right to exit from groups within it but must also

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the people's fleeing or departing with what they owe checks or moderates the persecution of pashas and extortioners.") (footnote omitted); EMER DE VATTEL, THE LAW OF NATIONS 220–33 (Liberty Press 2008) (1758) ("[T]he sovereign abuses his power, and reduces his subjects to an insupportable slavery, if he refuses them permission to travel for their own advantage, when he might grant it to them without inconvenience, and without danger to the state. Nay it will presently appear that, on certain occasions, he cannot, under any pretext, detain persons who wish to quit the country with the intention of abandoning it for ever.").

47. *See* Beran, *supra* note 19, at 26 ("Liberalism grants [the right to decide upon political relationships to] individual citizens by acknowledging their right to emigrate and to change their nationality"); Galston, *supra* note 18, at 517–18 ("The personal liberty the liberal state must defend is the liberty not to be coerced into, or trapped within, ways of life.").

48. *See* Galston, *supra* note 18, at 533.

49. Kukathas, *supra* note 26, at 116–17. *See* Chandran Kukathas, *Cultural Toleration*, 39 NOMOS 69, 95–97 (1997) [hereinafter Kukathas, *Cultural Toleration*].

50. Green, *supra* note 21, at 165.

51. *See* Okin, *supra* note 22, at 216–22.

take responsibility for correcting injustice within it.[52] Likewise, Ayelet Schachar has rejected crude accounts in which "an injured insider should be the one to abandon the very center of her life, family, and community," particularly as "traditionally less powerful group members, such as women, are precisely those members who commonly lack the economic stability, cultural 'know-how,' language skills, connections, and self-confidence needed to successfully exit from their minority communities."[53]

Thus, liberal rights theorists have done a great deal to articulate both the value and the limits of exit rights. But they have not been concerned with the distinctive role of exit rights in giving content-neutral reasons to acknowledge the claims of an order or institution to acceptance or compliance, that is, the relationship between exit and legitimacy. For this, we must look elsewhere.

2. Social Contract Theory

The most developed account of the relationship between exit and legitimacy can be found in social contract theory. Exit finds a role here in answering a basic but thorny question raised by the notion of the social contract: if we suppose that each citizen can enter into an agreement for himself or herself but cannot plausibly bind succeeding generations, how do subsequent generations join the compact?[54] (Hypothetical contractarians like John Rawls and Immanuel Kant face no such difficulties, of course.[55]) The role advanced by some theorists for exit in answering this question is the proposition that the failure to exit from a political order "counts," in some relevant sense, as assent to government, which in turn legitimates that government.

The *locus classicus* of this argument is widely supposed to be John Locke's *Second Treatise*. The most famous passage on this point reads as follows:

> [E]very Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *tacit Consent*, and is as far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it; whether this his Possession be of Land, to him and his Heirs for ever, or a Lodging only for a Week; or whether it be barely

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52. *Id.* at 226–27.

53. Schachar, *supra* note 22, at 79–80.

54. *See, e.g.*, DAVID HUME, *Of the Original Contract*, *in* ESSAYS, LITERARY, MORAL, AND POLITICAL 270, 273 (Ward, Lock, & Co. 1875) (1770) (noting that social contract theory "supposes the consent of the fathers to bind the children (which republican writers will never allow)").

55. *See, e.g.*, JOHN RAWLS, AS FAIRNESS: A RESTATEMENT 16 (2001); IMMANUEL KANT, *On the Proverb: That May Be True in Theory, But Is of No Practical Use*, *in* PERPETUAL PEACE AND OTHER ESSAYS 77–78 (Hackett 1983) (1793).

> travelling freely on the Highway; and in Effect, it reaches as far as the very being of any one within the Territories of that Government.[56]

This excerpt is customarily quoted in support of what I will call a caricature of Locke's position: that failure to exit "counts," in some sense, as a binding assent to the social contract.[57] But Locke is much subtler on this point than many accounts give him credit for, and this caricature is not his position at all. Locke does not claim that the use or enjoyment of property is enough to make the person a party to the social contract and thus a subject or member of the Commonwealth; indeed, "[n]othing can make any Man so, but his actually entering into it by positive Engagement, and express Promise and Compact."[58] For Locke, once that kind of express assent is given, the subject is "perpetually and indispensably obliged to be and remain unalterably a Subject."[59] By contrast, the enjoyment of property grounds only a kind of temporary or provisional second-class citizenship: "only a local Protection and Homage," which applies "only as he dwells upon, and enjoys [the property]," creating a relationship that is much like that between a person and "[a] Family [with which] he found it convenient to abide for some time; though, while he continued in it, he were obliged to comply with the Laws, and submit to the Government he found there."[60] And Locke indicates that this temporary or provisional second-class membership, *unlike* full membership, comes with an implicit exit right: "whenever the Owner [of land], who has given nothing but such a tacit Consent to the Government, will, by Donation, Sale, or otherwise, quit the said Possession, he is at liberty to go and incorporate himself into any other Commonwealth, or to agree with others to being a new one, *in vacuis locis*."[61] So, for Locke, exit rights are the preserve of the less-than-citizen—something like a resident alien—and a refusal to exit amounts only to consent, in a genuine if rather austere sense, to taking the order as one finds it, for as long as one happens to be there. Consent with promise creates citizenship, which is permanent; consent without promise grounds only a provisional kind of submission to the claims of the political order.

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56. LOCKE, *supra* note 46, at 392. *See also id.* at 393 ("Whoever . . . by Inheritance, Purchase, Permission, or otherways *enjoys any part of the Land*, so annext to, and under the Government *of that Commonwealth, must take it with the Condition* it is under; that is, *of submitting to the Government of the Commonwealth*, under whose Jurisdiction it is, as far forth, as any Subject of it.").

57. *See, e.g.*, A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 83–85 (1979); Karen Johnson, *Political Obligation and the Voluntary Association Model of the State*, 86 ETHICS 17, 22 (1975).

58. LOCKE, *supra* note 46, at 394.

59. *Id.*

60. *Id.* at 393–94.

61. *Id.*

This careful and intriguing account, however, seems to have attracted less attention than the caricature—a caricature that looks an awful lot like Jean-Jacques Rousseau's characteristically terser, less careful, and more vigorous account of the relationship between consent and residence:

> If . . . at the time of the social compact, there are opponents to it, their opposition does not invalidate the contract; it merely prevents them from being included in it. They are foreigners among citizens. *Once the state is instituted, residence implies consent. To inhabit the territory is to submit to sovereignty.*[62]

Unfortunately, it was this caricature that framed subsequent discussion in this tradition: David Hume's critical essay *Of the Original Contract* led the way in attacking the simplistic dictum that residence implies a promise of obedience, and even some modern scholars seem to have unfairly ascribed the view to Locke.[63] Hume himself has generally been regarded as having soundly unhorsed the caricature, ridiculing the notion "that, by living under the dominion of a prince, which one might leave, every individual has given a *tacit* consent to his authority, and promised him obedience," he pointed out that no one in fact takes the view "that the matter depends on his choice," and moreover that no one is meaningfully free to leave "when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires."[64]

Among the contemporary contractarians, Harry Beran has offered a noteworthy effort that takes exit seriously, and which attempts to respond to Hume, in *The Consent Theory of Political Obligation*.[65] Taking him as a suitable example of the modern consent theorists, I will try to summarize the structure of his argument. First, consent to government is equivalent to a promise to obey.[66] Second, promise has a pre-political normativity, specifically, "promises create (institutional or self-assumed) obligations and rights,"[67] so long as the promise is made to other persons.[68] Third, once citizens reach majority, voluntarily consenting to accept membership in the state amounts to assuming a current and future promissory obligation to obey the state

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62. JEAN-JACQUES ROUSSEAU, *On the Social Contract*, *in* JEAN-JACQUES ROUSSEAU, THE BASIC POLITICAL WRITINGS 227 (Hackett 2011) (1762) (emphasis added).

63. *See, e.g.*, SIMMONS, *supra* note 57, at 83–85; Johnson, *supra* note 57, at 22.

64. HUME, *supra* note 54, at 276.

65. *See* HARRY BERAN, THE CONSENT THEORY OF POLITICAL OBLIGATION 1–4 (1987).

66. *Id.* at 30.

67. *Id.* at 23. The institution of promise is, for Beran, grounded somehow in the right of personal self-determination. *See id.* at 27; *see also id.* at 52 ("My position assumes the existence of natural as well as self-assumed obligations . . . .").

68. *See id.* at 46–49.

and its current and future governments and laws,[69] so long as certain basic conditions amenable to the creation of a promissory obligation are met, including *voluntariness*, which can be promoted with the introduction of an exit right.[70] Thus, much like Rousseau, he argues that "continued residence in the state, when [persons] cease to be political minors and assume full political rights, counts as . . . tacit consent."[71] Fourth, despite the promissory, executory nature of the political obligation assumed by a consenting person, "it must be open to citizens, except under certain conditions, to abandon their membership of a particular state and, therefore, their political obligation to it."[72]

There are several deep difficulties with Beran's account. We may lose him at the first step (i.e., the equivalence of consent and promise), if we accord with everyday usage in thinking that consent and promise are different in important respects, and that, whatever the moral consequences of an actual promise to obey the state might be, simple consent does not amount to or "count as" such a promise.[73] We may lose him at the second step (i.e., the reliance upon a purportedly pre-political institution of promise) if we are inclined to join Hume in rejecting the idea that promise has some kind of pre-political normativity—"I say, you find yourself embarrassed, when it is asked, *why are we bound to keep our word?*"[74]—or if we do not accept Beran's version of it, including his particular account of the conditions under which acts give rise to promissory obligations. And we may lose him in the difficult interaction between the third and fourth steps, in the

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69. *See, e.g.*, *id.* at 127 ("[I]n accepting membership in a state a person agrees to comply not only with present law and the present government but also with law that will in the future be enacted and governments that will in future be (constitutionally) appointed.").

70. *See id.* at 59 (arguing that rights of emigration and secession "would go a very long way towards making membership in the state voluntary for adults").

71. *Id.* at 28–29.

72. *Id.* at 30; *see id.* at 46 ("[T]he fundamental political consent is, therefore, whether to (continue to) accept membership in this going concern.").

73. The core normative significance of the *promise* in everyday usage is that the promisor assumes an executory obligation to the promisee which is to be discharged in the future, with the scope and normativity of that obligation defined by necessary and non-obvious details of the relevant institution of promise itself (*e.g.*, criteria of reciprocity, absence of duress or undue influence, capacity, absence of unconscionable terms, absence of misrepresentation, and so on). The core normative significance of consent is that the consentor presently acquiesces in or permits some act of another, waiving or declining to exercise a power to preclude or prohibit the act in question. But consent, without more, does not ordinarily imply executory obligations, and consent ordinarily can be withdrawn at any time unless the consentor has made an express or implied *promise* not to do so. Indeed, the essence of promise is the giving of the power to make a claim upon my future behavior *regardless* of whether I consent at that time. As we shall see below, this distinction is enormously significant for the analysis of legitimacy. *See infra* Section III.B.

74. HUME, *supra* note 54, at 280.

peculiar tension between the citizen's assumption of a promissory, prospective obligation at the time of contracting and Beran's simultaneous insistence on a right to leave during the term of that obligation.

This tension can be seen starkly when Beran argues that exit should not be allowed when the state has imposed a penalty, or when the citizen has come under a "special obligation," of some kind, and the citizen wants to leave rather than pay the penalty or discharge the obligation.[75] In that situation—when the tension between consent and promise is perfectly clear, as there is plainly no current consent to remaining in the state as a subject of its laws, but only the fact of an earlier promise—Beran holds that the citizen "is under a self-assumed obligation to accept the penalty."[76] So on Beran's view, subsequent revocation of consent does not extinguish our promissory obligations if the state takes the view that there is something still for us to do. By now, of course, the position has ended up looking rather a lot like Rousseau's caricature: if you have once been an adult resident, there is no exit right unless and until the state takes the view that you owe it nothing further; your earlier consent, inferred from your earlier presence, creates a current obligation to obey, notwithstanding the fact that you do not actually and currently consent to anything. Promise, not consent, is doing all the heavy lifting here.

I have focused on Beran because his view is particularly detailed and because he is particularly attentive to exit rights, but a number of other thoughtful accounts might just as well have been chosen. The Rousseauian identification of consent with promise or contract, in particular, which purportedly grounds a consent-based claim on an individual who does not in fact here and now consent, is widely shared.[77]

To sum up, contractarian theorists have recognized that there is an important relationship between exit rights and legitimacy, but, from Rousseau (not Locke!) onward, they seem committed to an unconvincing jump from consent to promise, which leads to unsatisfactory analytical tangles. Locke's nuanced intimation that a provisional but genuine consent *without* promise might, at least in some cases, play an important role seems to have sat more or less where he left it. We will return to that view below.

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75. Beran shares this position with a great many other writers. *See infra* Section IV.D.

76. BERAN, *supra* note 65, at 112.

77. *See, e.g.*, JOSEPH TUSSMAN, OBLIGATION AND THE BODY POLITIC 7–10 (1960); SIMMONS, *supra* note 57, at 76–77.

3. International Legal Scholarship

Exit and withdrawal have received a great deal of attention from international lawyers. For many decades, scholars have conducted close analyses of particular orders and institutions to determine whether exit would be "lawful" under applicable rules of international law. In this vein, a body of careful scholarship has developed regarding the legality of exit from particular institutions (such as the United Nations and the pre-Lisbon European Union),[78] exploring the scope and structure of exit rights from treaties,[79] and applying the insights of positive political theory to illuminate the impact of exit rights on behavior.[80] One (superb) recent contribution has triggered a literature on rights of withdrawal from customary international law.[81] But the normative analysis of exit rights—and the relationship between exit and legitimacy in particular—has been neglected.

This neglect may be less than completely surprising for a number of reasons. First, given that so many of the analytical tools of political theory are forged at the level of the nation-state, the notion that exit

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78. *See, e.g.*, Hannes Hofmeister, *Should I Stay or Should I Go? – A Critical Analysis of the Right to Withdraw from the EU*, 16 EUR. L.J. 589, 602–03 (2010); Dovydas Vitkauskas, *Can a Member Secede from the United Nations?*, 3 INT'L J. BALTIC L. 47 (2007); K. Magliveras, *Withdrawal from the League of Nations Revisited*, 10 DICKINSON J. INT'L L. 25, 25–26 (1991); John A. Hill, *The European Economic Community: The Right of Member State Withdrawal*, 12 GA. J. INT'L & COMP. L. 335, 335–37 (1982); Michael Akehurst, *Withdrawal from International Organisations*, 32 CURRENT LEGAL PROBS. 143, 143–45 (1979); Nathan Feinberg, *Unilateral Withdrawal from an International Organization*, 39 BRIT. Y.B. INT'L L. 189, 218 (1964); P.J.N.B., *Termination of Membership of the League of Nations*, 16 BRIT. Y.B. INT'L L. 153 (1935); Athanassiou, *supra* note 37, at 5–8.

79. *See, e.g.*, Gino J. Naldi & Konstantinos D. Maglivera, *Human Rights and The Denunciation of Treaties and Withdrawal from International Organisations*, 33 POLISH Y.B. INT'L L. 95, 96 (2013); Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1585 (2005); Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2065–66 (2003); Kelvin Widdows, *The Denunciation of International Labour Conventions*, 33 INT'L & COMP. L.Q. 1052, 1052 (1984); Kelvin Widdows, *The Unilateral Denunciation of Treaties Containing No Denunciation Clause*, 53 BRIT. Y.B. INT'L L. 83 (1982).

80. *See, e.g.*, Anna T. Katselas, *Exit, Voice, and Loyalty in Investment Treaty Arbitration*, 93 NEB. L. REV. 313, 348 (2014); Phedon Nicolaides, *Withdrawal from the European Union: A Typology of Effects*, 20 MAASTRICHT J. 209 (2013); Susanne Lechner & Renate Ohr, *The Right of Withdrawal in the Treaty of Lisbon: A Game-Theoretic Reflection on Different Decision Processes in the EU*, 32 EUR. J. LAW & ECON. 357, 358 (2011); Jonathan Slapin, *Exit, Voice, and Cooperation: Bargaining Power in International Organizations and Federal Systems*, 21 J. THEORETICAL POL. 187, 189 (2009).

81. Bradley & Gulati, *supra* note 38, at 205. *See also, e.g.*, Rachel Brewster, *Withdrawing from Custom: Choosing Between Default Rules*, 22 DUKE J. COMP. & INT'L L. 47 (2010); Samuel Estreicher, *A Post-Formation Right of Withdrawal from Customary International Law: Some Cautionary Notes*, 21 DUKE J. COMP. & INT'L L. 57 (2010); Barbara Koremenos & Allison Nau, *Exit, No Exit*, 21 DUKE J. COMP. & INT'L L. 81, 81–120 (2010).

and legitimacy can be related in an important way may have suffered from Hume's emphatic declaration that one can seldom be said to be truly free to exit from a political order.[82] Second, it may form part of what some scholars describe as a general neglect of normative theory in international law. For example, Allen Buchanan commented in 2004 that "little has been done to connect positive theory with moral theory" in international law and, specifically, that much of the existing work "suffers from a lack of an institutional focus."[83] Thomas Franck likewise complained not so long ago that "[a]ny contemporary philosophy of international normativity . . . tends to appear in print as, at most, the scraggly tail on elegant, fully developed theories intended to explain the dynamics of *national* legal phenomena."[84] Third, the notion that international law makes direct moral claims upon states does not sit well with either most realist accounts (which see state interest as the dominant source of normativity in the international sphere) or most liberal accounts (which look "through" the state to the persons and interest groups beneath). Fourth, and finally, there may be something especially unwelcome about the topic of exit to the extent that it involves the abrogation or renunciation of norms of international law. Laurence Helfer puts it succinctly:

> To a profession anxious to prove that nations obey international legal obligations, a state's right to unilaterally abrogate its treaty obligations—often without substantive restraint or meaningful sanction—is not something to be advertised. In fact, major public international law treatises (and even most specialized studies of treaty law and practice) all but ignore exit or give the issue only passing attention.[85]

Exit aside, there is a rich literature on the legitimacy of international institutions. Some scholars—most prominently Thomas Franck, Allen Buchanan, and Mattias Kumm—have advanced theories of legitimacy to be applied to international law as such,[86] while others have focused on specific categories of orders and institutions.[87] And nowhere is this literature more developed than in the rich discourse surrounding the legitimacy of the European Union, with regard to which accounts have been advanced for input legitimacy, output

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82. *See* BERAN, *supra* note 65 and accompanying text.

83. ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 18 (2004) (emphasis omitted).

84. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 8 (1990) (emphasis in original). *See also, e.g.*, Bodansky, *supra* note 39, at 596 (noting that "the legitimacy of international governance has, until recently, received little attention").

85. Helfer, *supra* note 79, at 1592.

86. *See, e.g.*, Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 908 (2004); FRANCK, *supra* note 84, at 20; BUCHANAN, *supra* note 83, at 404.

87. *See, e.g.*, Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107 (2009); Bodansky, *supra* note 39, at 596.

legitimacy, mission legitimacy, functional legitimacy, delegated legitimacy, and so on.[88] But these accounts typically ignore or neglect exit. So our problem remains.

Thus, our inquiry falls squarely in an area where international lawyers appear to have been particularly, if oddly, reluctant to tread.

4. Secession and Self-Determination

The topic of secession and the related one of self-determination of peoples have, between them, spawned a considerable literature, including much deeply normative scholarship.[89] Secession is clearly a form of exit from a political order: when a governed entity secedes, it ceases to be within the normative sphere of a political order. But secession involves much more than "just" exit: it involves the taking of a portion of that order's territorial, institutional, and human fabric to create a new political entity—a plurality where formerly there was a unity in the relevant sense. As a result, I join the views of those who see secession as a deeply special case raising peculiar complexities and problems.[90] Accordingly, I will bracket the issue of secession for subsequent analysis: I will make no effort to address it, as such, in this

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88. *See, e.g.*, TURKULER ISIKSEL, EUROPE'S FUNCTIONAL CONSTITUTION: A THEORY OF CONSTITUTIONALISM BEYOND THE STATE (2016) ("functional" legitimacy); Gráinne de Búrca, *Europe's Raison d'Être*, *in* THE EUROPEAN UNION'S SHAPING OF THE INTERNATIONAL LEGAL ORDER 31–33 (Dimitry Kochenov & Fabian Amtenbrink eds., 2013) (mission legitimacy); PETER L. LINDSETH, POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE (2010) (delegated legitimacy); FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 6–28 (1999) (input and output legitimacy).

89. *See, e.g.*, SECESSION AND SELF-DETERMINATION (S. Macedo & A. Buchanan eds., 2003); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 473–76 (1996); ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 1–25 (1991); LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978); Lawrence M. Anderson, *The Institutional Basis of Secessionist Politics: Federalism and Secession in the United States*, 34 PUBLIUS 1, 1–2 (2004); Daniel Weinstock, *Constitutionalizing the Right to Secede*, 9 J. POL. PHIL. 182, 202–03 (2001); W. Norman, *The Ethics of Secession as The Regulation of Secessionist Politics*, *in* NATIONAL SELF-DETERMINATION AND SECESSION 34, 34–43 (M. Moore ed., 1998); Christopher Wellman, *A Defense of Secession and Political Self-Determination*, 24 PHIL. & PUB. AFFAIRS 142, 142–43 (1995); D. Gauthier, *Breaking Up: An Essay on Secession*, 24 CAN. J. PHIL. 357, 358 (1994); Michael Hechter, *The Dynamics of Secession*, 35 ACTA SOCIOLOGICA 280, 280 (1992); J. Buchanan & R. Faith, *Secession and the Limits of Taxation: Toward a Theory of Internal Exit*, 77 AM. ECON. REV. 1023, 1024 (1987) [hereinafter Buchanan, *Theory*]; Anthony H. Birch, *Another Liberal Theory of Secession*, 32 POL. STUD. 596, 596–97 (1984); Beran, *supra* note 19, at 21–23.

90. *See, e.g.*, Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 651 n.88 (1991) (noting the special considerations that generate "asymmetry between two seemingly parallel rights, that of emigration and that of secession"); Buchanan, *Theory*, *supra* note 89, at 328–30 (noting peculiar complexities of the secession question).

Article, although much of what I have to say will be applicable to secession.

III. EXIT LEGITIMACY

A. *The Claim*

This Article's central claim is very simple: the protection of exit rights makes a distinctive contribution to the legitimacy of an order or institution. I call this contribution "exit legitimacy."[91] The better the protection offered by an order or institution, the better its claim to exit legitimacy.[92] While the focus here is on the exit legitimacy of international institutions, the idea is, of course, of much broader application.

This Section will clarify some of the elements of this claim—including what I mean by "exit," "rights," and "legitimacy"—before offering two versions or accounts of the normative appeal of my position, which I call the "thin" and "thick" accounts of exit legitimacy. On the thin account, exit rights are normatively significant because they operationalize consent, and the normative power of consent is taken for granted. On the thick account, exit rights are normatively significant because they instantiate political autonomy. This Section will conclude with some reasons to think exit legitimacy is particularly suitable for the international sphere.

1. "Exit"

By "exit" I centrally mean the voluntary and complete renunciation of a role or status that bears rights and obligations within an order or institution.[93] To give three natural examples, consider (1) the exit of natural persons from a nation-state or other jurisdictional unit, (2) the exit of states from a federation (recognizing that this, as a form of secession, involves many additional complications that will not be considered here), and (3) the exit of states from an international institution (or other international legal order, such as customary international law or a treaty). This Article's primary focus will be on

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91. I find that I am preceded in my use of this phrase by Santiago Montt, who states briefly and without elaboration that under appropriate circumstances exit "may serve as a proper source of legitimacy" in his work on bilateral investment treaties, but offers no theoretical support, nor any evaluation or explanation, of the idea. SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION 145–46 (2012).

92. Accordingly, the availability of exit legitimacy is a matter of degree, not a matter of binary absolutes. I am grateful to Turkuler Isiskel for suggesting that I make this point explicit.

93. I thus set strictly involuntary exit aside here. *But see infra* Section IV.D. (discussing exile and banishment as forms of *ex post* exit option).

the third of these examples: the exit of states from international institutions. Importantly, while many exit rights in practice require physical movement or alterations in the material world—such as physical movement out of a state territory by an emigrating person—it is exit from membership, not from a physical space, that is central to my meaning.

Moreover, while complete exit is my primary focus, the concept of exit legitimacy has some application, *mutatis mutandis*, to temporary and partial exit. Temporary exit is self-explanatory; partial exit may be possible in an order or institution that recognizes different forms or categories of membership (each with its own set of rights and obligations) and allows exit from one form of membership to another. For example, international institutions commonly differentiate between full members and associate or observer members, with the latter given a thinner set of rights and obligations; this raises the prospect that one could choose to undertake partial exit from the status of full member to the status of associate member.[94] Likewise, national orders commonly differentiate, for example, between citizens, resident aliens, short-term visitors, and persons unlawfully present. Partial exit in my sense is the renunciation of one membership status (e.g., "full member" or "citizen") and the acceptance of another within the same order or institution (e.g., "associate member" or "resident alien"[95]). Something like partial exit may also be at work when one jurisdiction allows domestic corporations to reincorporate in another jurisdiction but continue to do business in the original one as a nonresident.[96] Obviously, temporary and partial exit raise some interesting implications for exit legitimacy, but we will leave those implications for another day and focus here on our core case.

What I call here "partial exit" should not be confused with what Joseph Weiler calls "selective" exit, which occurs when a governed entity, "while retaining membership, seeks to avoid the fulfilment of unpalatable obligations by simply disregarding them."[97] Exit in my sense is always the renunciation of some type of membership, including the corresponding rights and obligations, not the violation of those

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94. *See, e.g.*, LUISA BLANCHFIELD & MAJORIE BROWN, CONG. RESEARCH SERV., R43614, MEMBERSHIP IN THE UNITED NATIONS AND ITS SPECIALIZED AGENCIES (2014).

95. The idea that a citizen might be allowed to partially exit into the status of a resident alien might be thought fanciful, but Michael Walzer has suggested that "we must at least consider the possibility that [native born citizens] be allowed . . . to become *resident aliens at home*, acknowledging their obligation to defend society against destruction, but refusing to defend or aggrandize the state." MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 112–13 (1970) (emphasis in original).

96. *See, e.g.*, Epstein, *supra* note 24, at 152.

97. Joseph H. H. Weiler, *Alternatives to Withdrawal from an International Organization: The Case of the European Economic Community*, 20 ISR. L. REV. 282, 284 (1985).

obligations. Continuing to hold a status that makes one subject to an obligation, while disregarding or violating that obligation, is not "exit" on this account at all.[98]

2. "Rights"

Without getting anywhere near the complex definitional and taxonomic questions that swim into view when contemplating the word "rights," I want to state clearly that when I refer to a right of exit I mean minimally the legal entitlement to engage in what I am calling exit. In doing so, I recognize that a bare legal entitlement seldom amounts to much in isolation: it can be granted on such conditions that it is not much of a right at all (e.g., a right of access to the courts on the condition that you first capture a live unicorn—or even a live tiger—is not much of a right of access to the courts). Moreover, the right of exit, like a great many rights, requires a certain endowment of resources to use (e.g., the right of access to the courts is not much use without some combination of time, energy, money, and assistance of counsel sufficient to permit meaningful use of the judicial system). Thus, my definition of an exit right includes the specification of conditions for the exercise of that right, and the minimum endowment of necessary resources, that make it a realistic or genuine option. And just as when we talk about a right of access to courts we implicitly mean to exclude the unicorn and tiger examples, and just as we usually regard a system that does not offer some form of legal aid or public defense as offering less of a right of access to courts than one that does, so I intend to be understood here.[99] The presence or absence of an exit right is no more a crudely binary matter than is the presence or absence of legitimacy: the more realistic or genuine the exit option, the better the claim to exit legitimacy.

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98. Likewise, the invocation of purported reservations to the jurisdiction of an international institution do not, I think, constitute exit on my account. Governed entities routinely disagree with one another and with organs of governance about the scope and content of the obligations appurtenant to membership in a legal order, including the limits of those obligations and of the jurisdiction of the order in question. Denial of jurisdiction in a particular case or category of cases need not involve either the assertion or the exercise of a right of exit in the sense with which I am here concerned. I am grateful to Julian Arato for putting this issue to me, and for highlighting the *Loizidou* case in which Turkey pressed objections to the jurisdiction of the European Court of Human Rights based on a purported territorial reservation to the jurisdiction of that court. *See* Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE J. INT'L L. 288, 338–43 (2013).

99. *Compare, e.g.*, JEFF SPINNER-HALEV, SURVIVING DIVERSITY: RELIGION AND DEMOCRATIC CITIZENSHIP (2000) 77–78 (arguing, among other things, for an "exit fund" in certain circumstances to make exit realistically possible).

3. "Legitimacy"

It is especially important to be clear about what I mean by "legitimacy," as my meaning may be thought a little idiosyncratic. In the account I offer here, the project of legitimacy is the offering of reasons to governed entities within an order or institution to accept and comply with the relevant order or institution and its outputs.[100] Such reasons are appeals to the capacity of governed agents to *choose* voluntarily to accept or comply; they are no more than that.

Importantly, unlike many theories of legitimacy, mine includes no account of objective sufficiency, or adequacy in the abstract, that is, of a threshold that, once reached, marks the order as having crossed a line that makes it "legitimate."[101] The weight given to exit legitimacy as a reason for acceptance or compliance is entirely a matter for the governed entities to whom the case is made, and, in my view, there is no sensible way to prescribe from outside what should be "enough." Furthermore, whether the agent "ought," here and now and all things considered, to actually accept or comply with the political order or its outputs is another question entirely, one with which I am wholly unconcerned. My claim is that the presence of exit rights offers *a reason*—not necessarily the best reason, an overriding reason, or even a particularly good reason in every circumstance—for accepting or complying with the order in question and its outputs.

Thus, rather than speaking in terms of a binary distinction between "legitimate" and "illegitimate" orders, I will speak in terms of legitimating *resources*. The better the resources, the better the case that can be made to the governed for acceptance and compliance. And, in that light, the issue here is whether exit rights might make a *contribution*, that is, furnish additional resources for making such

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100. My use of the term "acceptance" here does not imply abandonment of projects of reform. An entity to whom a legitimacy claim is addressed may, on reflection, regard the relevant political order as meeting a standard of acceptability but regard some change—perhaps profound change—as desirable or necessary, and pursue reform accordingly. More generally, acceptance and compliance are distinct: it is possible to comply with something without accepting that it makes a moral claim (as in the case of compliance that arises solely from fear of consequences or pursuit of benefits). Similarly, it is possible to accept something as normative without complying, as Chesterton notes: "Thieves respect property. They merely wish the property to become their property that they may more perfectly respect it." G.K. CHESTERTON, THE MAN WHO WAS THURSDAY: A NIGHTMARE 47 (1935).

101. *Compare, e.g.*, BUCHANAN, *supra* note 83, at 237 (A wielder of political power (the supremacist making, application, and enforcement of laws in a territory) is legitimate (i.e., is morally justified in wielding political power) if and only if it (1) does a credible job of protecting at least the most basic human rights of all those over whom it wields power and (2) provides this protection through processes, policies, and actions that themselves respect the most basic human rights.).

cases.[102] To borrow the apt language of Joseph Tussman in another context, I aim to move legitimacy discussions "from the assertive to the claiming mood."[103]

Relatedly, I make no claim here about the interaction between and among reasons, and no claim about the extent to which it is desirable to pursue exit legitimacy in institutional design rather than, or at the cost of, other types of legitimacy (or even other things that have nothing to do with legitimacy) when there is a conflict. We may in principle decide to limit and restrict exit rights in order to achieve other things that we think valuable—just as we may decide to restrict, for example, democratic involvement in government to achieve other things that we think valuable. (Lest I be thought unduly faint-hearted for declining to single-mindedly insist on exit rights in all circumstances, consider a genuinely hard case: the *ius cogens* peremptory norms of international custom.)[104] My argument here is simply that something profoundly important is lost when we restrict exit, and that, in most cases, we can achieve our collective aims without restricting exit.[105]

B. *The "Thin" Account*

On the thin account, exit rights are significant because they "operationalize" the consent of governed entities. By this slightly ungainly verb I mean that they provide an institutional mechanism that makes consent more normatively salient in practice: consent is more genuine, more ascertainable, and more closely related to the relevant act (or relationship) of governance. Crucially, exit rights provide a direct and legitimating connection between consent and governance that does not rely on promise or contract.

This account takes as its starting point the traditional—though not uncontroversial[106]—consensus that state consent is the foundational source of the normativity of international law, and of the

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102. For an interesting account of the rational advantages of the use of moral reasons to coordinate support for political institutions, see Allen Buchanan & Robert Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405, 410 (2006).

103. TUSSMAN, *supra* note 77, at 78.

104. Even Bradley and Gulati, in their brilliant and provocative attack on the "mandatory view" of customary international law, take the view that rules like "*jus cogens* norms of human rights" may be "prime candidates" for a mandatory approach. Bradley & Gulati, *supra* note 38, at 273. Single-currency arrangements also present a deeply difficult case for exit rights. *See, e.g.*, Athanassiou, *supra* note 37, at 40–41.

105. *See infra* Sections IV.C., IV.D.

106. *See, e.g.*, Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1, 2 (2014).

normative legitimacy of its institutions.[107] And while its focus is the international sphere, consent has of course been the preeminent source of legitimacy for national orders in liberal theory for centuries.[108]

Exit rights make consent more genuine by increasing the extent to which states make a real choice to bear the rights and obligations of an order or institution and to be bound by it and by its outputs. John Simmons has articulated the central point that, in order for consent to be politically salient, it is necessary to point to a "clearly presented choice situation";[109] exit rights create exactly such a situation by granting governed entities the power to disclaim the role on which their institutional obligations are contingent. And it is clear that a choice to remain is at least *more* genuine with an exit right than without one.[110]

Exit rights also make consent more ascertainable. Consent theorists are frequently bedeviled by problems of determining whether and when states have consented to particular elements of an order or institution, including changes in the rules of an international institution or specific putative norms of customary international law. A standard example is the issue of "subsequent practice": if the operation of an institution in practice diverges from the terms to which the state members initially agreed, it is not obvious what should "count as" consent to the new terms.[111] But the ability to withdraw from the institution means that remaining in the institution has much more meaning as a manifestation of consent—as a *real choice* to bear the

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107. *See, e.g.*, Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 141 n.14 (2005) (quoting Louis Henkin, *General Course on Public International Law*, *in* IV RECUEIL DES COURS 46 (1989)) ("State consent is the foundation of international law."); Buchanan & Keohane, *supra* note 102, at 412; BUCHANAN, *supra* note 83, at 302; Helfer, *supra* note 79, at 1593 n.33; Bodansky, *supra* note 39, at 597. *See also, e.g.*, S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7) ("The rules of law binding upon States . . . emanate from their own free will.").

108. *See, e.g.*, THOMAS HOBBES, LEVIATHAN 484 (Cambridge 1996) (1651) ("[T]he point of time, wherein a man becomes subject of a Conquerour, is that point, wherein having liberty to submit to him, he consenteth, either by expresse words, or by other sufficient sign, to be his Subject."); SIMMONS, *supra* note 57, at 57 ("Consent theory has provided us with a more intuitively appealing account of political obligation than any other tradition in modern political theory."); HUME, *supra* note 54, at 275 (acknowledging that consent of the people "is surely the best and most sacred" basis of government); LOCKE, *supra* note 46, at 374 ("[N]o one can be . . . subjected to the Political Power of another, without his own *Consent.*") (emphasis in original).

109. SIMMONS, *supra* note 57, at 95 (internal quotation marks omitted).

110. *See, e.g.*, Frederick G. Whelan, *Citizenship and the Right to Leave*, 75 AM. POL. SCI. REV. 636, 639 (1981); BERAN, *supra* note 65, at 112.

111. *See, e.g.*, Christopher Peters, *Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?*, 3 GÖTTINGEN J. INT'L L. 617 (2011); Bodansky, *supra* note 39, at 606 (reporting a criticism of the International Whaling Convention that states "signed on to play cricket, but now find themselves pressured to play a game of chess instead").

status of membership with its appurtenant obligations—than it would have in the absence of such rights. Another prominent example is the difficult case of "invalid reservations": the problem presented when purported reservations to accession to a treaty or an institution are later determined to be impermissible. Here, also, exit rights help to ascertain whether the state has consented to accession without the reservations.[112]

The point can be illustrated with one of David Hume's images. In *Of the Original Contract* Hume writes that "[w]e may as well assert, that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her."[113] This is true enough, on its own terms: if there is no real way to exit, it is hard to read much into staying onboard. And that is certainly Hume's point. But *my* point is that, if the vessel were moored in home port, with the doors opened wide and the sailor free to leave and go home (and his right to do so proclaimed and displayed), and the sailor remained onboard anyway, then we would have much firmer grounds to suppose that he consented to be there. Consent, in other words, would be more readily ascertainable from his behavior. Exit rights move us from the ship at sea to something closer to the ship in dock.

Finally, and most importantly, exit rights make consent more closely related to the act or relation of governance whose legitimacy is in question, and, in so doing, they help to relieve the unease around the contractarian idea that earlier agreement or promise creates a pre-political ground for the normativity of later acts and relations of governance. Consider the core of the standard contractarian account of obligation: a state has a political obligation here and now because it assumed it by agreement in the past. But, a basic difficulty for pre-political accounts of contract and promise is that the relevant act of consent in the past may be removed—perhaps *far* removed—in time, object, and sometimes even identity of the subject, from the situation of governance here and now. Specifically, the relevant act of consent may have been given a long time ago, may have been given to something that looks quite unlike the governance situation or institution that is actually at hand here and now, and may have been given by a state that looks very much unlike the state that is currently being governed here and now. If the state does not consent here and now to the situation of governance, and if consent is the dominant principle of normativity, it is not obvious why the absence of consent

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112. *See* Helfer, *supra* note 79, at 1642–43 (noting that exit rights help to solve this problem). A real-world example seems to have taken place involving the First Optional Protocol to the International Covenant on Civil and Political Rights. *See* Timothy Meyer, *Power, Exit Costs, and Renegotiation in International Law*, 51 HARV. INTL L. J. 379, 398 (2010) (discussing Trinidad & Tobago's withdrawal from the Protocol and its unsuccessful attempt to re-accede with reservations).

113. HUME, *supra* note 54, at 276.

here and now should give way to the fact that another entity gave consent at a time that is not now, to something that was not this. Promise theories can leave us a long way from consent when we need it most.

A basic problem here—as Hume pointed out two hundred years ago—is that, however much we might recognize the value of consent, the pre-political normativity of the institution of promise is not at all obvious.[114] Many of the key early modern theorists typically resolved this problem by invoking divine will as the ultimate source of the claim of a promise upon promisors,[115] but we might think this argument unavailable today, at least within the liberal tradition. The reliance on earlier promise to infuse governance here and now with the legitimating tincture of consent, even if actual consent is entirely lacking here and now, continues to beg the question.

But exit rights lift some of the burden from the shoulders of promise by closing the gap between consent and governance. In the presence of exit rights, an entity governed by an international institution consents to governance at the very moment of governance itself: consent theory no longer looks to the past but looks to the present. The governed entity also consents to governance by the institution as it then stands, not as it was contemplated by the (perhaps vague and ambiguous) text of an originating treaty. And the entity doing the consenting is not a distant forbear of the governed entity, connected only by the fiction of the continuing identity of states: it is the very same combination of state, government, and persons that is now subject to governance. In other words, it is consent here and now, not antecedent promise, that does the work, and we need not invoke a pre-political institution of dubious appeal to tap into the legitimating normative power of consent.[116] The resonance with Locke's "tacit consent"—a provisional, legitimating consent-without-promise, rooted in the free choice to presently hold a role to which rights and obligations pertain—should be now be quite clear.[117]

The appeal and plausibility of consent as a source of normativity when "operationalized" by an ongoing exit right is perfectly illustrated by the account given by Socrates in Plato's *Crito*. Entreated by his

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114. *Id.* at 279–80.

115. For example, I think it is fair to characterize Grotius' view of the normativity of contract in this way. While human persons are naturally inclined to seek a well-regulated communal life—from which follow the universally beneficial principles of natural right, including "the fulfilling of Covenants"—the obligatory force of the duty to do so is grounded in the fact that God clearly wills us to follow this inclination, as "it was his Pleasure that these Principles should be in us." HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 89–93 (Liberty Press 2005) (1625). *See also id.* at 147–48 (indicating that reasonable counsels do not of themselves have obligatory force).

116. *See, e.g.*, Hollis, *supra* note 107, at 171 (noting that "states prefer to rely not only on the original grant of authority to an extra-national actor but also seek to establish contemporaneous consent to the exercise of that authority").

117. *See supra* subsection II.B.2 (discussion social contract theory).

friend to escape before his execution, Socrates responds by giving voice to the spirit of the Athenian laws:

> We, the laws, have bestowed many benefits upon you. Even so, by giving every Athenian the opportunity, once arrived at voting age and having observed the affairs of the city and us the laws, we proclaim that if we do not please him, he can take his possessions and go wherever he pleases. Not one of our laws raises any obstacle or forbids him, if he is not satisfied with us or the city, if one of you wants to go and live in a colony or wants to go anywhere else, and keep his property. We say, however, that whoever of you remains, when he sees how we conduct our trials and manage the city in other ways, has in fact come to an agreement with us to obey our instructions. . . . [A]t your trial you could have assessed your penalty at exile if you wished, and you are now attempting to do against the city's wishes what you could then have done with her consent. . . . [Y]ou act like the meanest type of slave by trying to run away, contrary to your commitments and your agreement to live as a citizen under us.[118]

The richness and depth of this passage is remarkable—particularly compared to the Rousseauian quip that "residency implies consent."[119] Socrates' point is that he has in fact made a real choice to live in Athens "as a citizen," and that moreover it was a sober and informed choice, taken in full knowledge of the laws and institutions of the Athenian state and the alternatives. Even at trial—after his obligation to submit to judgment had "accrued" under Athenian law[120]—he had been offered an opportunity to exit, to accept exile, instead of receiving the appointed punishment under Athenian law. But again, he chose voluntarily and soberly to submit to the normativity of the law: he consented to honor his "agreement to live *as a citizen* under [the laws]."[121] That obligation, assumed voluntarily-in-fact by Socrates (as he is, here and now), toward Athens (as it is, here and now), is normative for Socrates, not because he is clasped by the dead hand of a past promise but because he voluntarily acknowledges its normativity. He will not dishonor his own choice, and the normativity to which he has submitted, by turning from it now.

Before leaving this line of argument, I want to acknowledge the narrow scope of the consent that I have in mind here. I take it to be quite clear that a governed entity that chooses to remain in an order, declining to exercise an exit right, does not thereby consent to the fact that the political order is structured, operated, or led in any particular way. The relevant consent pertains only to the fact of membership. It is perfectly possible to consent to be a member of an order or institution without at the same time consenting to any particular aspect of the structure or operation of that order or institution. Exit rights typically give us an up-or-down, in-or-out choice about membership, which we

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118. PLATO, *Crito*, *in* PLATO: COMPLETE WORKS 45–46 (John M. Cooper ed., 1997).
119. *See* ROUSSEAU, *supra* note 62 and accompanying text.
120. *See infra* Section IV.D (discussing *ex post* exit of this kind).
121. PLATO, *supra* note 118, at 46 (emphasis added).

make in light of the nature and operation of the institution and the terms of the offer of membership that is being put to us—we have a choice to accept or reject what we might call the "political proposition" we are offered. But the content of the political proposition, including the structure of the order or institution, the content of its norms, the identity of its leaders, and so on, is wholly outside the domain of choice created by an exit right. As such, it is not right to say of my account that "those who have not used the exit option have implicitly agreed to their own subordination."[122] What they have consented to is holding the role to which the relevant obligations pertain. (I prefer "consented" to "agreed," as it better captures the fact that the significance of the act is rooted in current acquiescence, not executory promise.)

C. *The "Thick" Account*

1. Political Autonomy

On the thick account, exit rights are significant because they instantiate what I call political autonomy. Political autonomy, as I use that phrase, is a quality of an order or institution that is satisfied to the extent that the governed entities are—strictly and literally—*free*, *equal*, and *independent* with respect to that order or institution. This subsection does no more than sketch what this view implies and requires, and I do not pretend to have worked out its many difficult implications. But on the view I offer here, an order or institution, or its outputs, stands in a position to make a moral claim on governed entities—that is, to give those entities a well-founded reason for compliance or acceptance that is not, itself, institutionally contingent—to the extent that those governed entities are in a condition of political autonomy with respect to that order or institution, or its outputs.

Freedom, as I use the term here, means that the basis for a moral claim upon a governed entity is its own capacity for choice. The criterion of freedom is satisfied by an order or institution to the extent that the status of submission to the duties and obligations of membership is voluntary and may be renounced at any time, for any reason or for no reason. This is obviously a very strong application of the liberal commitment to the "freedom of self-governing choosers to live in societies that approach as closely as possible to voluntary schemes."[123] It is in the tradition that William Galston identifies as the "Enlightenment Project" (i.e., reason-valorizing and autonomy-promoting), rather than the "Reformation Project" (i.e., difference- and diversity-protecting), strand of liberal thought.[124] Freedom in this

122. Schachar, *supra* note 22, at 80.
123. Beran, *supra* note 19, at 25.
124. Galston, *supra* note 18, at 525.

account lies not in not having obligations but in the freedom to accept and reject one's obligations for oneself—in having all claims on oneself grounded in one's own present faculty of voluntary normative commitment.[125] It involves consent without the intermediation of promise or contract.

But freedom does not extend to having other entities act in a particular way.[126] This fact reflects the proposition that freedom implies no right to the participation of others in a joint endeavor; rather, to enlist others in a common endeavor, we must appeal to their own faculty of choice. They are—to accept the phrase that presses upon us here—ends in themselves. Among other things, this means that freedom does not require that others offer positive alternatives (such as rights of entry into alternative orders and institutions),[127] and that freedom implies no right to dictate or constrain what we called above the political proposition (i.e., the design of an order or institution and the rights and obligations of membership). This view, with its very strong emphasis on actual contemporaneous consent, is, of course, at odds with many normative accounts of exit, from national and international orders alike.[128]

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125. I therefore join Hobbes' famous and controversial dictum that "he is free, that can be free when he will." HOBBES, *supra* note 108, at 184.

126. This has some difficult but not fatal implications. My view seems to imply that no norm of political autonomy is offended when a governed entity is subject to an unjust or arbitrary act of the political order (for example, if a natural person is unjustly imprisoned by a court or if a state in a federal system is unjustly invaded and occupied by its sister states), so long as the relevant entities continue to accept the normativity of claim made upon them. I think it is right that my view implies such a conclusion: there is no objective substantive norm of rightness or justice in my account of political autonomy. If the unjustly imprisoned person, or occupied state, continues to accept the normativity of the political order, its political autonomy is unimpaired even if it is subject to the most extreme deprivations, including ultimately torture and death. I think this view accords with that of Socrates in the *Crito* that I quoted above: even supposing that Socrates was condemned unjustly, his acceptance of the normative claim made by the Athenian order gives the act of unjust condemnation a moral claim upon him. That is not to say that there is nothing *wrong* with the order in such a situation.

127. *See, e.g.*, Christopher Wellman, *Freedom of Movement and the Rights to Enter and Exit*, *in* MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP 81 (Sarah Fine & Lea Ypi eds., 2016); Whelan, *supra* note 110, at 638.

128. *See, e.g.*, Anna Stilz, *Is There An Unqualified Right to Leave?*, *in* MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP, *supra* note 127, at 69 ("If distributive schemes of social justice can bind individuals without their consent, then they ought to bind those individuals whether they seek to exit the state's territory or not. If this is correct, then a legitimate state can enforce distributive obligations even against those citizens who decide to relocate."); Feinberg, *supra* note 40, at 217 ("It would seem that there is no reason to consider a treaty establishing an international organization as one permitting withdrawal *ex natura*."); *see also id.* at 212–13 ("Sovereignty is . . . given full expression in the right of any State to join a particular organization, or not. But once a State decides to enter an organization it is no longer free, and its own wishes are no longer decisive.").

Equality, as I use the term here, means that governed entities are treated alike for the purposes of joint governance within the order or institution. The closer that an institution approaches to joint governance by its members on equal terms, the more equal in this sense it is. It means that what we are calling the terms of the political proposition are set jointly by governed entities within the order or institution on equal terms, with that proposition then available for acceptance or rejection by each governed entity.[129] This criterion has an obvious relationship with democratic principles of institutional design. As I use the term, it has nothing to do with distribution of resources, except to the extent that this affects the ability to exercise rights of joint governance on equal terms.[130]

Independence, as I use the term here, means that governed entities enjoy freedom and equality themselves, rather than through the intermediation of other entities whose choices are ascribed to the governed entities by theories of representation or agency.[131] This does not mean that governed entities "may not" or "should not," in any relevant sense, appoint agents, representatives, or delegates to perform functions of governance; it just means that the choices and powers of agents, representatives, and delegates are not to be ascribed to the governed entities themselves for the purposes of determining whether and to what extent the criteria of freedom and equality are satisfied. All that the independence criterion requires is that we look to the governed entities themselves, rather than to their agents or representatives, to determine the extent to which they are free and equal.

Political autonomy, as I use the term here, thus takes the capacity of a governed entity for choice—specifically, the choice to bear particular obligations and duties—as the ultimate source of all moral claims on that entity. It is premised on the view (which could fairly be called Kantian) that governed entities that we take to be capable of rational choice can set normative ends for themselves, and that normative ends for such governed entities can be set only by the

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129. The criterion of equality has a range of important and difficult implications—including what counts as a right of "governance" and what exactly "treated alike" might mean—which I do not develop here.

130. *See, e.g.*, RAWLS, *supra* note 55, at 148–50 (discussing the fair value of political liberties).

131. There is a resonance here with Rousseau's view that citizens in a representative democracy are "free only during the election of the members of parliament." ROUSSEAU, *supra* note 62, at 219. *See also, e.g.*, ISAIAH BERLIN, LIBERTY 180–81 (2002) (criticizing unwarranted ascription of freedom of choice); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 247–49 (1950) (criticizing invocation of theories of delegation and representation as applied to individual governed entities).

entities themselves.[132] It reflects the view that "[t]he capacity for self-conscious reflection about our own actions confers on us a kind of authority over ourselves, and it is this authority which gives normativity to moral claims."[133] I offer no account here of how governed entities come to exercise this authority to select and submit to normative commitments and claims, but there is an interesting resonance with Harold Koh's account of "transnational legal process":

> One or more transnational actors provokes an *interaction* (or series of interactions) with another, which forces an *interpretation* or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to *internalize* the new interpretation of the international norm into the other party's internal normative system. The aim is to "bind" that other party to obey the interpretation as part of its internal value set.[134]

In its account of freedom and independence in particular, political autonomy takes seriously and literally the problem that Rousseau purported to solve, but could be said more candidly to have avoided: the project of political association without loss of freedom.[135]

It will be clear that my account draws on resources from Kant's moral theory and, to a more limited extent, his political philosophy, while remaining utterly at odds with central elements of his own views. I share Kant's foundational commitment to the status of governed persons as free, equal, and independent,[136] and his view, with its roots in Rousseau, that moral normativity must be discerned by moral agents individually through reflection and submitted to voluntarily, rather than identified and imposed externally.[137] The value of political autonomy, in the form that I offer it, is reflected in commitments that resonate with Kant's account of moral duty: a commitment to a

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132. *Compare, e.g.*, CHRISTINE M. KORSGAARD ET AL., THE SOURCES OF NORMATIVITY 19 (Onora O'Neill ed., 1996) ("Kantians believe that the source of the normativity of moral claims must be found in the agent's own will, in particular in the fact that the laws of morality are the laws of the agent's own will and that its claims are ones she is prepared to make on herself."), *with* IMMANUEL KANT, METAPHYSICS OF MORALS 21–22 (Cambridge Univ. Press 1991) (1797) (arguing that moral duties cannot be externally prescribed: all ethical lawgiving must be internal in nature) [hereinafter MORALS], *and* IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 40 (Hackett Classics 1981) (1785) (referring to "the dignity of a rational being who obeys no law except what he *at the same time* enacts himself") (emphasis added) [hereinafter GROUNDING].

133. KORSGAARD, *supra* note 132, at 19–20.

134. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646 (1997) (emphasis in original).

135. ROUSSEAU, *supra* note 62, at 164.

136. KANT, *supra* note 55, at 72–77.

137. *See, e.g.*, MORALS, *supra* note 132, at 21–22; GROUNDING, *supra* note 132, at 44–48. *See also, e.g.*, ROUSSEAU, *supra* note 62, at 167 ("[T]o be driven by appetite alone is slavery, and obedience to the law one has prescribed for oneself is liberty.").

universalizable normative framework that can be applied to and accepted by each moral agent on equal terms, reflecting their essentially equal status as subjects and sources of moral claims; a commitment to respect the capacity and right of each moral agent to set ends for itself; and, a commitment to structure collective life in a way that allows each moral agent to pursue its own ends compatibly with the pursuit of ends by others.[138]

But, in other and perhaps deeper respects, my view is solidly and profoundly opposed to Kant's. Kant himself would of course be horrified by it. There is no space in my account for Kant's utterly central concept of the universal moral law, or for the proposition that the authority of its dictates is grounded in reason as such.[139] Kant would also criticize my failure to differentiate between persons and states. Nor does my account accommodate the triune assumption (God, free will, and immortality) that provides the normative engine for Kant's moral law.[140] To borrow from Philippa Foot, my view of normativity in political orders can be summarized with perfect accuracy as a system of hypothetical imperatives.[141] And I share even less in common with Kant's political philosophy of the state.[142]

At the risk of overplaying the Kantian connection, my conception of political autonomy has a partial counterpart in Christine Korsgaard's account in her marvelous book *The Sources of Normativity*.[143] In her analysis, rational entities come to submit themselves to sets of normative commitments—which she calls "practical identities"—that govern the normative landscape of their choices and help to define their moral personhood.[144] A conception of one's own practical identity—of one's own normative commitments and the things that one is prepared to regard as offering reasons for action—is, practically speaking, necessary: "for without it [one] cannot have reasons to act."[145] The account of political autonomy I offer here does not rest on a concept of "identity," but clearly something similar is being done. The appeal of political autonomy rests on the idea that there is a sense in which a state in an international institution—or a natural person in a national order, for that matter—is a rational actor in a sphere of normativity, an entity capable of accepting norms and

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138. *See, e.g.*, GROUNDING, *supra* note 132, at 19–44.

139. IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 107 (Hackett Classics 1981) (1788).

140. GROUNDING, *supra* note 132, at 49–62.

141. *See* Philippa Foot, *Morality as a System of Hypothetical Imperatives*, 81 PHIL. REV. 305 (1972).

142. To give an easy example, I cannot join Kant's account of independence. KANT, *supra* note 55, at 75–77.

143. *See generally* KORSGAARD, *supra* note 132.

144. *Id.* at 103–05.

145. *Id.* at 120.

rules and orders as normative for itself, with normativity to be found in that very acceptance. Thus, in my account, just as in Korsgaard's, there is a sense in which "self-conceptions are essential to the normativity of reasons."[146]

This comparison turns the spotlight on an objection—which the reader may by now have been nursing for some time—to the whole idea of political autonomy as an approach to normativity in the international sphere. The objection could be formulated in something like the following terms: A model premised on the inherent value of autonomy may be fine for natural persons, but it is quite inapposite for states. States do not experience the phenomenon of choice, nor do they need practical identities: they do not have moral identities or moral lives of the kind on which political autonomy must rely to generate normativity. In fact, states do not exist at all for the purposes of moral analysis; they are just imaginary constructs that we use for heuristic purposes, and for convenience, as part of ordering political life. To ascribe moral identity or moral significance to them is a serious mistake. Persons, and only persons, constitute the substance of the moral universe.[147]

This is an important objection that touches the deep literature on what political theorists call the "domestic analogy,"[148] and it requires a much deeper and more thoughtful reply than I shall give it here. But it does not convince. Of course, the primary units of moral action and moral experience are human persons. But we are capable of cognizing something that we perceive, for some purposes, as a single but composite entity called the state, the actions and choices of which—themselves the output of the actions and choices of many individual natural persons[149]—are susceptible of moral analysis. Schools, churches, and corporations are not natural persons, but they recognizably engage in acts and "behavior" that we regard, in both everyday moral life and in moral theory, as having a moral character, reflecting in part compliance with and violations of legal and moral norms. So it is with states: states as states (although obviously as a function of the behavior of human persons) make things that are recognizable as commitments and choices, give and withhold consent that we regard as having normative significance, appear to our moral

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146. *Id.* at 247.

147. *See, e.g.*, CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 71–83 (1979); BUCHANAN, *supra* note 83, at 304.

148. *See generally* David Singh Grewal, *The Domestic Analogy Revisited: Hobbes on International Order*, 125 YALE L.J. 618 (2016); Maximilian Terhalle, *The Sociological Turn: Bringing the Domestic Analogy Back In*, 48 INT'L STUD. 165 (2011); Philip Lawrence, *The Domestic Analogy and the Liberal State*, 10 POL. 20 (1990).

149. It is impossible here not to recall the title page of *Leviathan*, depicting an entity that is both many individual persons and also one entity. HOBBES, *supra* note 108, at 2.

sight, and are the subject of moral and legal claims. In countless ways, state action, as such, engages our moral intuitions.

International law and international orders address themselves to states as states, and we speak of "state consent," "state responsibility," and "state action" as meaningful concepts in international legal theory. Recognizing that atoms and only atoms constitute the substance of the physical universe does not prevent us from talking helpfully about molecules, trees, rocks, and star clusters. In sum, there is a meaningful perspective that we can (and routinely do) adopt in which the state is reified for the purposes of moral analysis. States, like corporations and churches, bear a kind of ascriptive moral personhood. Nor need one think that this proposition of ascriptive moral personhood is incompatible with the commitments of liberal normative theory, particularly when it is applied, as it is applied here, to the "upwards" relationships of states as governed entities (i.e., to the relationship between states and institutions that govern states) rather than "downwards" relationships of states as governing entities (i.e., to the relationship between states and their citizens).[150] As John Rawls put it, "[i]t is incorrect to say that liberalism focuses solely on the rights of individuals; rather, the rights it recognizes are to protect associations, smaller groups, and individuals, all from one another in an appropriate balance specified by its guiding principles of justice."[151]

Returning to Korsgaard then, I think there are excellent reasons to think that the moral life of the state—meaning the life of the state, viewed morally—is structured by a series of overlapping identities and commitments in a way that has something relevant in common with the moral life of persons. A state may be conceived of as a liberal democratic state, as a secular or Muslim or Christian or Buddhist state, as a member of the community of nations, as a participant in a project of regional or international peace or prosperity, as a partner in a project of international integration, as a member of the trading community of nations, as a champion of particular values, and so on. It seems immensely difficult to deny that states are not charged, colored, and partly constituted by such identities, which, of course, change and develop over time, sometimes rapidly and often profoundly. And it is far from implausible to suggest that we find, in the fabric of those identities, commitments to the normativity of particular obligations or to the moral claims of the structures of international political life—something very much like Korsgaard's practical

150. There is of course a great deal more to say about this complex question, which I will take up in detail elsewhere. It should be evident that my view shares some important features with that of Ronald Dworkin. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 168-75 (Hart 1986). For a different view, see for example Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT'L L. 315, 337–43 (2011).

151. POLITICAL LIBERALISM, *supra* note 25, at 221 n.8.

identities. There is also a resonance here with Thomas Franck's elegant speculation that "one might hypothesize that nations obey rules of the community of states because they thereby manifest their membership in that community, which, in turn, validates their statehood."[152]

2. Exit Rights as an Instantiation of Political Autonomy

In light of the foregoing, it should be clear that exit rights make an important but partial contribution to political autonomy. They contribute partially but importantly to the freedom of governed entities: that is, the voluntariness of the role or status to which the claims of an order or institution are appurtenant. Exit rights do not directly promote equality or independence as I have defined them.

For any individual governed entity, there are three principal ways in which the strong version of freedom can be reflected in a legal order or institution: the entity can be given the power to make norms by unilateral fiat, the power to exercise a unilateral veto, or the power to exit the order or institution at will. The first power (fiat) is inconsistent with political autonomy's commandment of equality. The second power (veto) is fine from the point of view of freedom (and from the point of view of equality, so long as everyone else has a veto as well) but is unlikely to lead to very much getting done.[153] But the third power (exit) offers a much broader space in which joint governance can operate within the order or institution to determine the terms of what I have called the "political proposition," while protecting the freedom of every governed entity to accept or decline it at will. Accordingly, this third option—exit rights—will very commonly be the most appealing way, all things considered, to institutionalize the command that political autonomy makes: that all governed entities shall remain free.

Exit rights, of course, only partly instantiate political autonomy. They do nothing to further the demands of equality, and they must be held by the governed entity itself if the criterion of independence is to be satisfied. But, in conferring the right to set aside the status to which content-neutral claims of acceptance and compliance attach, exit lays the foundation for political autonomy's version of freedom.

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152. FRANCK, *supra* note 84, at 8.

153. As Richard Epstein puts it, "[l]et every political actor have a veto right, and political paralysis will follow." RICHARD EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 22 (2014) [hereinafter EPSTEIN, CLASSICAL LIBERAL]. However, the threat of inaction is not always or necessarily troubling: in such circumstances a veto right may be perfectly acceptable. My thanks to Thomas Streinz for pointing this out to me.

D. *Exit Legitimacy and the International Sphere*

In closing the affirmative case for exit legitimacy, I want to argue that, while it is applicable to a great many orders and institutions of all kinds, it may be a particularly appropriate device for the analysis of international institutions. In this Section, I give four reasons for this claim, drawing freely on the thin and thick accounts.

First, the maximization of exit legitimacy in particular and political autonomy in general is an appropriate response to the view—prominently articulated by Jeremy Waldron, among others[154]—that deep disagreement about value is a fundamental and ineluctable fact of political life. And nowhere is this more true than in *international* political life. Ensuring that international institutions respect the freedom, equality, and independence of participant states allows states to participate in the international order without sacrificing their character as the ultimate arbiters of the normativity of their own political lives, or the right of each to chart a course that is its own. So, if we consider it desirable to structure international institutions that can accommodate states that have, or believe they may in the future have, radical disagreements about values—including the place of democracy, religion, individual rights, and so on in public life—political autonomy may offer a promising normative foundation for the design of those institutions. Taking political autonomy seriously would allow states to pursue common projects not only with those states with which they already agree, but also with those with which they profoundly disagree about the foundations of social order, or even the purpose of the common projects that they desire to pursue together.[155] It allows for the construction of liberal institutions with illiberal members and agreement about action despite disagreement about value.[156]

Second, maximizing exit legitimacy in particular and political autonomy in general allows for the institutional preconditions of whatever epistemic and axiological convergence might ultimately be possible in international political life. By this I mean that, to the extent that governed entities can be expected to approach a consensus on

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154. *See generally* JEREMY WALDRON, LAW AND DISAGREEMENT (1999); *see also, e.g.*, AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 11–51 (1996) (discussing "the persistence of moral disagreement").

155. I want to raise, but will not develop, the point that the foundational role in my account of voluntary submission to a norm as the source of its moral claims on governed entities chimes suggestively with the requirement of *opinio juris* in customary international law, and even helps to explain its apparent circularity: under that doctrine, too, the acceptance of and submission to a rule or principle as normative becomes the very source of its normativity.

156. Of course, political autonomy remains an avowedly liberal model: it will not appeal to those whose own normative commitments are inconsistent with the freedom, equality, and independence of other governed entities. This does not unduly trouble me.

what is good, valuable, and rightful—however gradually, painfully, and imperfectly they may do so—they are likely to do so by engaging with one another within institutions and orders, even institutions and orders that are institutionally thin and/or functionally limited.[157] The protection of political autonomy in institutional design may therefore be particularly apt in spheres like the international one where there is, so to speak, a great deal of value-convergence work to be done. By suggesting an approach to political order that enables states, societies, and persons to engage with one another before strong value convergence has been achieved, political autonomy facilitates the gradual formation of a community of knowledge and values, and thus the emergence of agreements around value that provide the premise for more integrated institutional arrangements. Amanda Perreau-Sassine expresses something similar when she comments that, for Kant, "juridical law allows for (although certainly does not necessitate) international publicity for enlightened thought and the emergence of an ever growing ethical cosmopolitan community."[158] Quite so.

Third, exit legitimacy may be easier to achieve, practically speaking, in international orders and institutions than in many national orders. A natural person seeking to exit from a state must, in almost all circumstances, physically relocate; this may be expensive, time consuming, difficult, and dangerous. Such a natural person will also need to find "entry" elsewhere in order to avoid the unwelcome prospect of statelessness. By contrast, the withdrawal of states from international institutions typically involves fewer issues of physicality; more of it can be resolved, so to speak, on the papers, and the exiting state need not "enter" another institution in the same way that a natural person must urgently find another state of citizenship. Thus, there is a sense in which exit choices may be more easily recognized as "free" in the relevant sense for states at the international level than for natural persons at the national level. But all this is not to deny that there are immense practical problems (many of which may have a physical dimension) involved in withdrawal from an international institution, nor to deny that the prospect of exit may be immensely unappetizing (these objections to exit legitimacy will be discussed in the next Part).[159] It is simply to point out that concerns of this kind may be softer for states in international institutions than for natural persons in nation-states.

Fourth, there may be a sharper need for exit legitimacy in international institutions, where many of the usual sources of legitimacy of various kinds—democratic, social-contractarian,

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157. The work of the deliberative democrats is obviously apposite here.

158. Amanda Perreau-Saussine, *Immanuel Kant on International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 69 (Samantha Besson & John Tasioulas eds., 2010) (emphasis omitted).

159. *See infra* Section IV.A (discussing cost of exit).

traditional, and so forth—may be weaker or absent. The legitimacy of international institutions is a relatively new problem in the field of political thought, and it does not seem that much in the way of a deep consensus has been achieved. But it is well established, to the point of triteness, that democracy is a slender reed at the international level, both because international orders are connected weakly to national democratic processes and because there are very few international democratic processes to speak of at all.[160] Instead, international institutions are frequently dominated by what Allen Buchanan and Robert Keohane have called "bureaucratic discretion."[161] Other accounts of institutional legitimacy in the international sphere—functional or rational accounts, for example—bring their own problems, but this is hardly the place for a full examination; it is enough to observe that the problem of the legitimacy of international institutions remains a particularly thorny one and that the need for additional and supplementary sources of legitimacy may be particularly sharp in the international space.

IV. SOME OBJECTIONS AND RESPONSES

This Part considers what may be the four most important objections to exit legitimacy. I will argue that none of these is fatal but that each offers useful insights into the ways in which exit rights can be effectively instantiated in practice.

A. *Cost, Burden, and Attachment*

The first objection to exit rights as a source of legitimacy is that exit is just too difficult to do much normative work. This objection was advanced seminally by David Hume in his essay *Of the Original Contract*, in which he took the view that "it would be absurd to infer a consent or choice" from failure to exit from a political order.[162] He continued in language already quoted above:

> Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wage which he acquires? We may as well assert, that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her.[163]

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160. *See, e.g.*, Buchanan & Keohane, *supra* note 102, at 406; HANNUM, *supra* note 89, at 10; Kumm, *supra* note 86, at 915–16; Bodansky, *supra* note 39, at 600.

161. Buchanan & Keohane, *supra* note 102, at 414.

162. HUME, *supra* note 54, at 276.

163. *Id.*

John Simmons managed to improve on this fine illustration: "[a]nyone with an objection to my proposal will kindly so indicate by lopping off his arm at the elbow."[164] The point is well taken.

But I have never thought this argument is quite as good as it looks, and not just because my claim is limited to the modest position that exit rights contribute to legitimating resources, that is, they make things better than they otherwise would be. The Hume-Simmons objection actually comes in at least three forms: *first*, exit may be practically unavailable for many governed entities because they lack the resources to undertake it;[165] *second*, even when it is practically possible, exit from a political order or institution strains the bonds of attachment, culture, and identity so much that it cannot usefully be thought of as a "free" option for governed entities;[166] and, *third*, even when exit is practically possible, exit from a political order or institution often causes so much economic and political harm that it should be disregarded.[167] While distinct, these formulations are closely related to one another and will be considered together here. Not all of the responses below apply to each form of the objection, but the meaning should be clear.

First, note that the thrust of the objection is that, whatever the normative value of an exit right in principle, in practice it is so hard or requires the surrender of so much that it is not fit to do much useful work. In other words, exit rights are of limited normative significance because they are often hard to use. But this puts the cart of institutional implementation before the horse of normative inquiry. *First* we should ask whether and how exit rights can be normatively significant, specifically, whether they are capable of conferring an important form of legitimacy upon an order or institution. If so, *then* we should address our minds to the question of how to institutionalize those rights appropriately, and to identifying the orders and institutions in which this can feasibly be done. The aim of this Article is to show that the first, normative, question should be answered in the affirmative. If I have succeeded in doing so, this objection (at least in its first and third forms) simply prompts the institutional project of

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164. SIMMONS, *supra* note 57, at 81.

165. Hume's point falls into this category. *See also, e.g.*, Okin, *supra* note 22, at 216–22 (identifying barriers to the exit of girls and women from many political orders).

166. *See, e.g.*, Reitman, *supra* note 41, at 195 ("One may fear the loss of moral support and the sense of belonging and rootedness derived from community. Or one may simply fear change and the unknown. The idea of rupture with one's family and the people with whom one is closest is pretty hard to conceive in any situation. On top of these difficulties, one can add obstacles which stem from the fact that cultural membership can be pervasively defining of one's sense of self.").

167. *See, e.g.*, Buchanan & Keohane, *supra* note 102, at 414 ("From the standpoint of a particular weak democratic state, participation in global governance institutions such as the WTO is hardly voluntary, since the state would suffer serious costs by not participating.").

figuring out how to confer exit rights in a way that fits our all-things-considered preferences.

Second, the strong form of this objection relies on a proposition about circumstances in the world: exit is *de facto* impossible because it is prohibitively costly, burdensome, traumatic, and so on. But this begs an important empirical question, on which the objection does not seem to have the facts all its own way. And the objection is least convincing in the sphere that is our primary focus here: state withdrawal from international institutions. There is virtually no situation in which a state's withdrawal from an international institution would really be so harmful as to be virtually impossible; the analogy with an impoverished citizen contemplating emigration simply does not survive cursory inspection. (We will consider below the argument from serious harm that does not rise to the level of *de facto* impossibility.)

As noted above, *de facto* exit from an international institution seems to be practically possible even in the absence of an exit right,[168] so there is reason to doubt the idea that exit is *de facto* impossible in the presence of such a right. Indeed, Laurence Helfer's crucial recent work has demonstrated that exit is not at all a vanishingly rare phenomenon, merely an infrequent one.[169] Timothy Meyer agrees, highlighting "the importance of exit as an empirical phenomenon," and noting moreover that "we should only observe an exit when the threat of exit has failed to spur renegotiation."[170] In other words, the practical significance of exit is not exhausted by occasions on which exit actually takes place.

Moreover, the fact that most states tend not to abandon their roles as duty-bearing actors in international life at the first sign of burden does not at all suggest that the option is "unrealistic"; it is equally consistent with the proposition that most states, most of the time, find the tangible and intangible benefits from international institutional life to be worth reaping (and the costs of isolation worth avoiding), and that most states, most of the time, take their international roles seriously even when the balance of material benefits tips unhelpfully.[171] So the empirical basis for this objection seems absent in the sphere on which we are focused here.

Even with regard to national orders, note that migration and emigration appear to be practically possible for a great many

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168. *See supra* Section II.A.

169. Helfer, *supra* note 79, at 1602.

170. Meyer, *supra* note 112, at 389.

171. *See, e.g.*, Koh, *supra* note 134, at 2599 (quoting Louis Henkin's comment that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time," and noting that "empirical work since then seems largely to have confirmed this hedged but optimistic description"); FRANCK, *supra* note 84, at 92 (noting "that there is a demonstrable historical pattern of prevalent state compliance" with international law).

individuals, including those in unpromising circumstances.[172] To take an example at the very sharpest end of the stick, consider what might be the most difficult exit to accomplish in the contemporary political world: the exit of a natural person from North Korea. But between 10,000 and 300,000 persons have accomplished such an exit to China alone, and that is in the absence of a legal exit right.[173] Natural persons with the fewest resources (in a broad sense) may be precisely those who are most likely to be willing to give up their stakes in the domestic order and take their chances with exit, and they may also be those persons for whom an exit right, as a resource of last resort, is most important. Conversely, natural persons with more resources are likely to be better able to exit. So, without ignoring the fact that exit often comes with great costs (especially for natural persons, with whom we are not primarily concerned here), it is not at all clear that exit is an unrealistic or illusory prospect in most cases.

Third, it is not obvious that we should be deeply concerned that exit is often so costly and difficult as to be a remedy of absolute last resort. In some sense, perhaps, it *should* be so. Joint endeavor with others, in a shared political and institutional life, is deeply imperfect, frustrating, and costly. When exit is troubling and unappetizing, and when we are bound to a relevant order or institution by ties of identification, attachment, and perhaps even love, then we are more likely to commit resources and energy to pursuing a solution together rather than jumping ship at the first sign of bad weather. This is closely related to the phenomenon that Albert Hirschman describes as loyalty—a "special attachment to an organization"[174]—and, as he points out, loyalty is a powerful factor in discouraging overly rapid exit, in encouraging participation within the organization, and in facilitating organizational improvement and recovery.[175] So the very bonds of identity, culture, and cost that are urged as an objection to exit are exactly those things that make it possible to confer and protect exit rights—what I have called the freedom aspect of political autonomy—without fatally undermining the basis for collective life.[176]

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172. *See, e.g.*, DOWTY, *supra* note 2, at 22 ("[E]ven traditional agricultural societies, made up of stolid peasants supposedly rooted to the soil, seem to have been highly mobile.").

173. *See* Jiyoung Song, *Twenty Years' Evolution of North Korean Migration, 1994–2014: A Human Security Perspective*, 2 ASIA & THE PAC. POL. STUDS. 399, 401 (2015) ("No official data is available on how many North Koreans live in the Republic of China (PRC). In the early 2000s, the PRC government's estimation is around 10,000–50,000; the [Republic of South Korea] at 30,000–50,000; the US State Department at 75,000–125,000; the United Nations High Commissioner for Refugees (UNHCR) at 50,000–100,000; and NGOs at 100,000–300,000.") (citations omitted).

174. HIRSCHMAN, *supra* note 20, at 77.

175. *Id.* at 77–79.

176. Karen Johnson is therefore quite wrong to suggest that laying emphasis on exit "suggests that the commitment of the citizen is or ought to be like that of the

In other words, we may *want* exit to be difficult, even traumatic, in light of the great value that we place on collective political enterprise.

Fourth—and I have saved the most important response for last—note that exit legitimacy, in both its thin and thick accounts, is a normativity of choice. And the thrust of this objection, except in cases of *de facto* impossibility, is that a choice is less free to the extent that it is costly or difficult or unpleasant to do otherwise.[177] Buchanan and Keohane exemplify this criticism when they say that, "[f]rom the standpoint of a particular weak democratic state, participation in global governance institutions such as the WTO is hardly voluntary, since the state would suffer serious costs by not participating."[178] Well, if this is right—if "serious costs" implies that exit is not meaningfully available, and that remaining is not meaningfully consensual—then I am wrong. But I am not wrong. Start with the easy case in which an order or institution X becomes more profitable for its governed entities (e.g., it raises its daily cash disbursements to all members from $500,000 to $1,000,000); it is wholly unconvincing to say that the governed entities are now less "free" to leave it than they were before (because the cost of leaving has risen from $500,000/day to $1,000,000/day). Such reasoning fails to impress our moral intuitions. So it cannot be right that I am less free to leave X just because leaving X would make me a good deal worse off than I am within X.

Perhaps I am ducking the problem here by choosing a rosy, abstract example and sticking to cold currency, when the real problem here is that the "exit choice" may be between an unjust or exploitative order or institution and an equally (or more) unappealing world outside the order or institution. So let me generalize the point. It is true that sometimes the choices that entities face are very unappetizing. But that does not without more vitiate their character as free choices over whatever alternatives they do face. Our moral reaction to such "devil or the deep blue sea" situations is not that we lose our free agency in such situations but that we deplore exceedingly the terms that have been offered; the problem is not that we are not in a meaningful sense free, but that we find none of the available choices to be appealing. Suppose that I am standing in a field with an open hay barn in it. The owner of the barn has told me that I am quite free, if I would like, to go

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satisfied customer: superficial and evanescent, dependent upon the immediate satisfaction of his needs and wants." Johnson, *supra* note 57, at 21.

177. *See, e.g.*, TUSSMAN, *supra* note 77, at 38 ("[I]f we have come to the point at which we find the inconvenient really impossible then we are beyond the help of political or moral theory."). I want to set aside, for lack of expertise and space alike, the different and important question of the impact of socialization on freedom. As Leslie Green recognizes, this is immensely difficult to figure out. Green, *supra* note 21, at 173. *See also, e.g.*, Okin, *supra* note 22, at 224 (noting that "girls are often successfully socialized in the acceptance of practices that they would be likely to come to regard as oppressive if they were living in a less sexist cultural context").

178. Buchanan & Keohane, supra note 102, at 414.

into the barn. I am, we can agree, free in the ordinary moral sense of that word to stand in the barn or out in the field. Now, suppose that the sky darkens, a thundercloud appears, and shafts of lightning start to strike the ground. I face the same choice as before, except that now if I stand in the field I may be struck and killed by lightning (and I will surely get wet in any event), but if I stand in the barn I may be burned alive if it is struck by lightning. My situation is now of course exceedingly bad. But have I become less free just because my options are now pretty miserable?

I think the answer is obviously no. Our intuitive reaction to the badness of a situation like this is not that I am not free to go into the barn: it is that I should not, in whatever sense might be relevant, be made to choose between a risk of being baked in a barn and a risk of being flash-fried in a field. And that objection is perfectly good on its own terms, as a criticism of the adequacy of my options.[179] But I am not less *free* to choose as between the options. The choice—field or barn—is exactly as free as it was before it started to rain. If I have a right to be free from torture and I am given the choice between being tortured with water or being tortured with fire (each identically cruel, painful, and degrading), the problem is not lack of free choice but the invasion of my right to be free from torture. Harry Beran seems to agree with me on this point and gives two further examples that I like enough to share in full:

> Green has an illness which is fatal unless dealt with in hospital. Hospitals require that patients agree to observe their rules while there. Green not only dislikes being in hospital as such but also objects to being bound by rules in whose making he had no say. Does Green's (reluctant) agreement to observe the hospital rules not come off because the alternative to agreeing is certain death? [That is, certain death *unless*, we might add to Beran's example to make the analogy more perfect, he can get himself admitted to another hospital, although the rules in those other hospitals may be even worse.] Brown, who is wealthy and detests lawyers, has been arrested on a charge of murder but is innocent. She has so little knowledge of the law and court procedures that she is likely to be convicted unless she hires an attorney. Does her agreement to pay standard legal fees to the attorney not come off because the likely cost of not agreeing to this is conviction of murder? [Again, *unless* she can find another lawyer, recognizing that other lawyers may be even more expensive, less able, or both.] According to received moral opinion, the answer in both cases is no. Moreover, received opinion probably has wisdom on its side here.[180]

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179. *See, e.g.*, David Miller, *Immigration: The Case for Limits*, in CONTEMPORARY DEBATES IN APPLIED ETHICS 196 (Andrew Cohen & Christopher Wellman eds., 2004) ("[W]hat a person can legitimately demand access to is an *adequate* range of options to choose between – a reasonable choice of occupation, religion, cultural activities, marriage partners, and so forth.") (emphasis in original); EPSTEIN, CLASSICAL LIBERAL, *supra* note 153, at 202 (discussing the classic highwayman's challenge and commenting that "the coercion becomes clear, because each person is entitled to both his money *and* his life, and thus should not be forced to choose between them").

180. BERAN, *supra* note 65, at 105.

Thus, ultimately, this objection boils down to two observations: first, that exit rights can be expensive, difficult, and even painful to use, particularly at the national level; and second, that exit legitimacy is no substitute for justice, fairness, and the protection of rights. These observations can be accepted without difficulty. But, even granting that the exercise of exit rights is often impractical except in pretty tough circumstances—though this does not really seem to be the situation for states in the international order—it does not follow that exit rights are meaningless when they are in fact practical, nor that they are meaningless under tough circumstances (when, in fact, they may be most important). What remains is the proposition of institutional design that—assuming the normative core of my argument is accepted—it would be desirable to structure exit rights in a way that makes them practically available, that is, they must be realistic and not merely formal. And we have already acknowledged—indeed, emphasized—this point above.[181]

B. *Insufficiency*

The second objection is that exit rights are too weak to confer much legitimacy on an order or institution. In a political order that is unfair, unjust, or exploitative, "love it or leave it" seems a glib and inadequate response. This point has been widely made. Leslie Green, for example, has noted that "[a] violation of civil liberties does not become tolerable just because citizens may emigrate, although it is true that, if they may not, then things are even worse."[182] Ayelet Schachar makes a similar point when she criticizes the inadequacy of a "right of exit 'solution' [that] throws on the already beleaguered individual the responsibility to either miraculously transform the legal-institutional conditions that keep her vulnerable or find the resources to leave her whole world behind."[183] And Allen Buchanan attacks the normative force not just of exit but of consent itself:

> The fact that I have consented to government cannot itself show that I am obligated to comply with its demands, because there are some things that no government should require of anyone (namely, acts that are grossly immoral), and the fact that I have consented to government cannot change this. But once we hedge our consent-based obligations by appeal to independent moral principles, especially principles of justice, the question arises as to whether we can dispense with consent and simply argue that we ought to comply with a system of laws if it promotes justice and does so in ways that are themselves just.[184]

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181. *See supra* subsection III.A.2.
182. Green, *supra* note 21, at 165.
183. Schachar, *supra* note 22, at 80.
184. BUCHANAN, *supra* note 83, at 246.

The best response to this set of objections is that they prompt the wrong answer because they ask the wrong question. The question—or at least *my* question—is not whether rights of exit convert an order from an abstractly illegitimate one to an abstractly legitimate one, nor is it whether exit rights can be a substitute for justice, fairness, and so on. The question is rather whether rights of exit can make a *contribution* to the legitimacy of an order—that is, whether they can contribute to the set of well-founded reasons that can be offered to governed entities to accept or comply with an order.

The answer is that of course exit rights make a contribution, for the reasons given in the thin and thick accounts above: they operationalize consent and they partly instantiate political autonomy. Under virtually any set of circumstances, the conferral of rights to exit on citizens can add to the store of reasons to accept or comply with the order and its outputs. Whether this is enough, all things considered, for acceptance or compliance, is a matter for each governed entity to determine independently: it seems unlikely that, in most cases, it would be sufficient without much more. And what more, exactly, is needed will probably depend on the type of order or institution at issue.

More generally, the criticism that rights of exit are never sufficient seems not quite in order. Surely no single type of right is enough, alone, to legitimate an order, in the sense that it would establish a legitimacy claim that almost everyone would recognize as adequate under most circumstances.[185] Take what may be the two foundational political rights (though we might argue about their relative priority): the right to vote and the right to free expression. A society that protected only one of these rights, or even both of them and no others, could fail to satisfy even rudimentary standards of legitimacy in any of a dozen ways. The truth is that we care about a great many things, and we demand much of our political institutions. Exit legitimacy is a small but important piece of a very complicated puzzle; it is nothing more, but also nothing less, than that.

Thus, in Schachar's terms, this Article does not purport to offer a "solution": exit rights are not a panacea to cure all ills, nor should they justify "turning a blind eye," as she puts it, to problems and injustices within political orders.[186] But, if a house is on fire, we can agree both that the fire should be put out and that it would be a good thing if the people inside can get out. And that is the extent of my claim.

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185. Chandran Kukathas seems to come perilously close, at times, to making this argument, but if I understand his thought correctly he does so for institutions (like cultural groups) within a liberal state order that satisfies our broader criteria for rightness and legitimacy. *See* Kukathas, *Cultural Toleration*, *supra* note 49, at 86; Kukathas, *supra* note 26, at 119.

186. Schachar, *supra* note 22, at 80.

C. *Incentives, Behavior, and the Atrophy of Voice*

The third objection is that, even if exit rights can make a contribution to legitimacy, they have unsalutary consequences for behavior and incentives within the order or institution. An excellent example of this attack comes from a well-known contribution of Cass Sunstein to the secession literature:

> [W]hether or not secession might be justified as a matter of politics or morality, constitutions ought not to include a right to secede. To place such a right in a founding document would increase the risks of ethnic and factional struggle; reduce the prospects for compromise and deliberation in government; raise dramatically the stakes of day-to-day political decisions; introduce irrelevant and illegitimate considerations into those decisions; create dangers of blackmail, strategic behavior, and exploitation; and, most generally, endanger the prospects for long-term self-governance.[187]

Generalizing away from secession—which, as noted above, raises a whole host of special difficulties apart from our core concerns[188]—and focusing on the primary case of states in international institutions (and keeping in the background the secondary case of natural persons in a national order), the broader point is that, when exit rights exist, they affect behavior inside the institution. Members of a political order may be able to threaten to exit (perhaps creating "holdup" problems[189]), internal political decisions may be distorted and even dominated by "exit dynamics," and members may polarize into "exiters" and "remainers"[190] who are less willing and able to share political life. We may kill our community in trying to make it free.

This argument goes on to claim that exit restrictions may facilitate productive and effective collective life. To stay with Sunstein for a moment, he gives the example of marriage and argues that "[a] decision to stigmatize divorce or to make it available only under certain conditions—as virtually every state in the United States has done—may lead to happier as well as more stable marriages, by providing an incentive for spouses to adapt their behavior and even their desires to promote long-term harmony."[191] Likewise, Hirschman argued

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187. Sunstein, *supra* note 90, at 634.

188. *See id.* at 651 n.88 (noting the special considerations that generate "asymmetry between two seemingly parallel rights, that of emigration and that of secession").

189. *See, e.g.*, Julia Gray & Jonathan B. Slapin, *Exit Options and the Effectiveness of Regional Economic Organizations*, 1 POL. SCI. RES. & METHODS 281, 285 (2013) ("Large states with good alternatives for trade beyond a potential REO can make demands on the other potential members. These other members must comply with the demands of the state with outside options to prevent it from exiting the agreement.").

190. *Cf., e.g.*, Hirschman, *supra* note 10, at 197 (describing the "high-loyalty" *Bleibers* and the "low-loyalty" *Ausreisers* in East Germany).

191. Sunstein, *supra* note 90, at 649.

famously that the availability of exit makes members of an institution less willing to exercise powers of constructive criticism (or "voice") within the organization. As he put it, "[t]he presence of the exit alternative can . . . tend to atrophy the development of the art of voice."[192] In his account, when a "ready and satisfactory substitute" for an institution is available, the very same members who might have been most likely to criticize decline and drive recovery may jump ship, depriving the institution "of a precious feedback mechanism that operates at its best when the customers are securely locked in."[193] Others have also prominently and effectively made similar points about the unwelcome consequences of exit rights for behavior.[194]

This is an important objection, but at least four responses present themselves.[195] First, Sunstein and Hirschman are focused on one part of the story but are missing another, equally important, part. The availability of an exit option surely affects members' decisions about responses to decline and difficulty, as they note. But it also affects decisions about whether to become a member and how much to commit and invest in the order or institution in the first place. An entity that knows it has the freedom to exit from an institution if things go sour will be able to participate more fully than an entity troubled by a risk of "lock-in": the latter is forced to discount its participation *ex ante* against that possibility or to stay out altogether. So, although the introduction of exit rights may encourage, at least to some extent, exit at the expense of voice, if and when an order or institution declines or starts to fail, it is also true that the introduction of exit may encourage entry, investment, and participation in the order or institution, and that this additional entry, investment, and participation may make the crucial contribution to avoiding decline and failure in the first place. Helfer has made a similar point:

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192. HIRSCHMAN, *supra* note 20, at 43 (emphasis omitted).

193. *Id.* at 44.

194. *See, e.g.*, Dwight G. Newman, *Exit, Voice, and 'Exile': Rights to Exit and Rights to Eject*, 57 U. TORONTO L.J. 43, 65 (2007) (noting "the reality that extensive exit and/or voice options may undermine, in some respect, the integrity of some groups in a manner destroying or negatively affecting valuable collective interests. . . . [E]xit and voice options may give rise to free-rider problems that undermine the integral pursuit of collective interests."); Gray & Slapin, *supra* note 189, at 285 (noting that the presence of alternative outset options can impede institutional development); Stilz, *supra* note 128, at 66–67; Meyer, *supra* note 112, at 382 ("A credible threat to exit an international agreement confers power on a state by allowing the state to demand a greater share of the gains from cooperation in exchange for participating."); Shorten, *supra* note 21, at 102 (defining "cynical" and "exploitative" exit threats).

195. In addition to the points I make in the text, I will also add that it is not clear to me that the survival of an order or institution is necessarily or always a good, or that the threat of institutional failure is automatically or always a good reason for limiting freedom. While we very often hope that orders or institutions will survive, there is no reason to presume *ex ante* that this is a desirable outcome.

> Denunciation clauses reduce uncertainty by giving states a low cost exit option if an agreement turns out badly. All other things being equal, such clauses encourage the ratification of a treaty by a larger number of states than would be prepared to ratify in the absence of such a clause. They may also enable states to negotiate deeper or broader commitments than would be attainable for treaties without unilateral exit.[196]

Second, recall that exit legitimacy comes with no meta-normative theory of how it should be traded off against, or for, other things. It is true, of course, that, in many cases, governed entities may want to tie themselves and others to the mast and commit to collective action.[197] But in many, and perhaps most cases, this kind of commitment is perfectly compatible with a right of exit: the tangible and intangible costs and harms of exit, including the reputational costs of "walking out" on one's co-venturers and the positive ties of loyalty, identity, culture, and commitment to a mission will suffice to keep members committed and to preclude or deter credible threats of exit, making collective action perfectly possible.[198] Indeed, despite the widespread existence of rights of exit from national and international orders,[199] in the great majority of cases, governed entities—natural persons as well as states—continue to participate in joint action rather than exercising their withdrawal rights at the first sign of trouble.[200] Empirically, "people do not disrupt the unity of an existing state lightly, especially if it is not in their self-interest and if the grievances which make secession appealing to them are dealt with fairly and sympathetically."[201] But, in cases where exit rights and some shared objective are really not compatible, then I make here no strong claim that exit legitimacy must never be traded away to get other things that we think important or valuable. As noted above, the *ius cogens* peremptory norms of international customary law present a hard case of this kind.

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196. Helfer, *supra* note 79, at 1599.

197. *See, e.g.*, JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 88–167 (2000); Aziz Z. Huq, *Does The Logic of Collective Action Explain Federalism Doctrine?* 66 STAN. L. REV. 217, 226 (2014); Robert Cooter & Neil Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010).

198. *See, e.g.*, Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 267 (2004) ("In the contemporary WTO context, the threat of unilateral exit has limited credibility because it would be costly."); Slapin, *supra* note 80, at 191 (collecting literature on non-credible exit threats).

199. *See supra* Section II.A.

200. *See, e.g.*, Cesare Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT'L L. & POL. 791, 864 (2007) (noting that state seldom withdraw from the jurisdiction of international adjudicative bodies).

201. BERAN, *supra* note 65, at 41.

Third, it is simply not true that exit always undermines voice; exit sometimes augments voice.[202] The threat of exit can help to underscore particular demands and to make sure that members take one another's concerns seriously; it can "effectively amplify" voice, as Dwight Newman puts it.[203] And, as Oonagh Reitman writes of divorce, "exit can help cure a group of the oppressive elements of its distinct practices by exerting pressure to bring about their reform."[204] Reitman shows that exit can be vital if fair bargaining outcomes are to be secured within the institution. For example, in systems of divorce that deny women formal exit rights, "women are blackmailed into striking patriarchal bargains: in exchange for the husband's consent, they strike unfair deals in respect of matters ancillary to the divorce – as regards the distribution of income and capital and even arrangements in respect of children."[205]

One prominent strand of scholarship, building on Charles Tiebout's seminal work, has elaborated the consequences in positive theory of the ability of mobile citizens to "vote with their feet" and to engender desirable regulatory outcomes by facilitating regulatory competition among jurisdictions (although some have raised concerns regarding a "race to the bottom").[206] Sunstein himself points out that

> the fact of interstate mobility in the United States [that is, the right of citizens to exit from one state into another] is probably a far more powerful check against many forms of state tyranny than the existence of judicial review . . . . [T]here

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202. *See, e.g.*, Hirschman, *supra* note 10, at 186 (describing the combination of exit and voice as a "joint grave-digging act" in East Germany in 1989).

203. Newman, *supra* note 194, at 49–50; *see also* Green, *supra* note 21, at 171 ("[I]t would be wrong to suppose that the protective function is effective only when exit is actually exercised. The possibility of exit may itself make the group responsive to the interests of its members."); Shorten, *supra* note 21, at 100 ("Providing a group with the right to exit the federation might, paradoxically, be another way to ensure the stability and longevity of the union, by discouraging exploitative political (or economic) arrangements."). Susan Moller Okin reminds us that this effect has limits: groups and individuals that are unable to exercise or threaten to exercise their exit rights will not be in a position to exert such discipline, and their concerns may be systematically neglected. *See* Okin, *supra* note 22, at 215.

204. Reitman, *supra* note 41, at 189.

205. *Id.* at 192.

206. The literature is voluminous. *See, e.g.*, Daniel C. Esty and Damien Geradin, *Regulatory Co-Opetition*, *in* REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES 30 (Daniel C. Esty and Damien Geradin eds., 2001); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 625 (2001); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1211 (1992); Wallace E. Oates & Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, 35 J. PUB. ECON. 333, 336 (1988); William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416 (1956).

> can be no doubt that the right of exit operates as a powerful check on tyranny of various sorts.[207]

This role of exit threats can be enhanced through coordination: in the international sphere, this points toward the prospect of what Julia Morse and Robert Keohane call "contested multilateralism," as groups of states within international orders and institutions jointly develop alternative, competing forms of multilateralism that exert competitive pressure on the original ones.[208] And ultimately, as Green and Hirschman both observe, exit itself can be an expressive act—one that is sometimes more expressive and constructive than traditional methods of voice.[209]

Fourth, and finally, the alleged evils of exit rights should be considered in light of the alternatives.[210] Susanne Lechner and Renate Ohr have demonstrated that, under appropriate circumstances, the "holdup" threat from an exit right is less than that offered by a veto, which may be the realistic counterfactual in many international institutions.[211] And, as Joseph Weiler has noted, if the choice is between grudging, reluctant, obstructive participation and graceful withdrawal, it is clear which should be preferred under many circumstances:

> [The European Union's] fundamental objectives would be irreparably compromised[] if Member States could systematically avoid their many, often day-to-day obligations while retaining their membership. Clearly, given these circumstances, a Member State . . . should not be allowed to practice the alternative techniques for avoiding obligations. If a Member State cannot accept these obligations, better that it be allowed to withdraw, even unilaterally.[212]

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207. Sunstein, *supra* note 90, at 658. *See also* Epstein, *supra* note 24, at 150 ("[E]xit rights under federalism offer an important, indeed indispensable, safeguard against government abuse.").

208. *See* Julia C. Morse & Robert O. Keohane, *Contested Multilateralism*, 9 REV. OF INT'L ORG. 385, 386 (2014). Note that the two need not always be related: one need not exit, or threaten to exit, from the original order or institution in order to develop, or threaten to develop, a competing alternative. Consider, for example, the emergence of "megaregional" trade agreements against the backdrop of the failure of the Doha Round of WTO negotiations. I am grateful to Thomas Streinz for suggesting this example.

209. Green, *supra* note 21, at 171 ("[E]xit may also have an expressive function, for it is commonly held that leaving is in a way to criticize the group, while remaining is to support it."); HIRSCHMAN, *supra* note 20, at 126 ("By exiting one renders his arguments unanswerable. The remarkable influence wielded by martyrs throughout history can be understood in those terms, for the martyr's death is exit at its most irreversible and argument at its most irrefutable.").

210. *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 6 (1994) (criticizing "single institutionalist" analysis that condemns an institutional design without also assessing the adequacy of the relevant alternative).

211. *See* Lechner & Ohr, *supra* note 80, at 361.

212. Weiler, *supra* note 97, at 298.

In conclusion, we may think of the third objection much as we came to think of the first: as framing an institutional design project. It should remind us to design exit rights in a way that is sensitive to the other things that we care about in addition to exit legitimacy (e.g., the solution of collective action problems), and it should encourage us to think, in particular, about ways to ensure that exit does not come unnecessarily at the cost of voice. Depending on the nature of the order or institution, it may be natural to do this by creating exit rights that require the use of voice: a mechanism for a "voicey exit" that avoids or minimizes the atrophy effect. But we can see that exit rights are by no means incompatible with such solutions, nor with the difficult, messy, and costly business of living together with others under conditions of persistent and often profound disagreement. As always, general rules will not do, but the notion that exit rights are inherently undesirable or destructive of political life simply does not withstand scrutiny.

D. *Exit* Ex Post

The final objection is that, even if exit rights are capable of doing the normative task I assign them here, exit should at least be prohibited when some kind of an executory obligation is pending and has not been discharged (e.g., debts unpaid, or penalties or punishments unexacted). Beran gives two examples of this for natural persons in states: an imposed-but-not-served jail sentence and an unperformed promise to work as a doctor for five years.[213] Beran takes the view—on the basis of his contractarian approach, criticized above—that, in these cases, the consensual basis of legitimacy is unimpaired when a state "prevent[s] . . . departure by force in order to be able to enforce the penalty in question."[214] This idea, or something like it, is widely shared: it has been articulated by Joseph Tussman, in the course of an account that otherwise prizes voluntariness,[215] by Richard Epstein in his work on federalism,[216] and even by Hugo Grotius, who wrote that

> it is no Ways for the Benefit of a Civil Society, if there be any great publick Debt contracted, for an Inhabitant to leave it, unless he be ready to pay down his Proportion towards it: Or if a War be undertaken upon a Confidence in the Number of Subjects to support it, and especially if a Siege be apprehended, no Body ought to quit the Service of his Country, unless he substitutes another in his Room, equally qualified to defend the State.[217]

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213. BERAN, *supra* note 65, at 111–12.
214. *Id.*
215. TUSSMAN, *supra* note 77, at 39–40.
216. *See* Epstein, *supra* note 24, at 164.
217. GROTIUS, supra note 115, at 554–55.

In international institutions, this concern finds expression in the rule that withdrawal does not relieve a state of obligations accruing before the date of withdrawal, including those accruing between the tender of notice of intent to withdraw and withdrawal itself. Such a rule can be found in the central treaties of a number of major international organizations.[218] In national orders, it amounts to the rule that one cannot invoke rights of exit or emigration to leave the state in order to avoid a pending criminal (or sometimes civil) obligation. The idea carries genuine normative force: you have to settle the check before you will be allowed to leave the restaurant.

In response to this, I want to suggest briefly that, while a restriction of this kind has obvious intuitive appeal, it may not be as necessary as it looks. It has already been noted that the combination of benefits from membership, costs of exit (including reputational costs), and attachment to the order or institution will make exit unlikely in most circumstances and that this will be enough to ensure that, in many cases, states and natural persons alike will stay in the order or institution and take their medicine—even quite unpleasant medicine—rather than turn their backs on the order. In practice, states routinely accept unfavorable outcomes in international institutions rather than storm for the exit door. So, it is not clear that it is always, or even often necessary to prohibit *ex post* exit to get the members of an order or institution to keep their promises, obey the rules, and pay the penalties if they break the rules. It may be enough that exit is costly, difficult, and may very well leave the (former) member much worse off.

But, to answer the objection head-on, it is not quite clear that there is a relevant difference between an obligation that has "accrued" and any other obligation incident to membership in an order or institution. The content-neutral claims of both types of obligation rest on the fact of membership in the order or institution: the claims have some measure of normative force *for me* because of the fact of my membership in the order or institution (my citizenship, club membership, my employee status, etc.). And, if I can—consistently with the demand of what we have called the freedom aspect of political autonomy—renounce the status in virtue of which I am subject to the claims of the rules and norms of the order, it seems that that renunciation drains the force from both types of obligation in much the

218. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 58(2), Nov. 4, 1950, E.T.S. 5, 213 U.N.T.S. 221 ("[A] denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.").

same way.[219] To give an easy example, suppose that I have for some years been subject to the obligation, as a senior employee of Normativity, Inc., to prepare and present a weekly report to the Board of Directors every Monday morning, on pain of disciplinary action. But today is Tuesday and I inexcusably failed to give my report yesterday. I am now under (at least) two types of obligations: the accrued obligation to submit to disciplinary action for my failure to give the weekly report yesterday, and the executory obligation to prepare and submit next Monday's report. If I now resign from the company rather than submit to disciplinary action, *both* the executory obligation to give next Monday's report *and* the accrued obligation to submit to the penalty for missing the previous one fall away in the same way and for the same reason. It is not clear to me that exit from a political order or institution demands to be treated in a fundamentally different way.

Of course, there may be independent reasons, based for example in considerations of fairness or justice, and having nothing to do with the mantle of institutional membership, to discharge the relevant accrued obligation—to pay a debt, serve jail time, pay back taxes, and so on. If there is an adequate moral basis for a claim of this kind, then such a claim may be normative, even *strongly* normative, for us, however much we may wish to exit (and even if we do exit). For example, suppose that, before my resignation from Normativity, Inc., I had promised to help out at a local charity fundraiser, and I had done so as part of the corporation's community relations and public service program. (Perhaps the corporation requires every employee to perform one act of public service a year, and this was to be mine for the year.) Now, when I resign, the part of the obligation that is contingent on the mantle of obligation that I formerly wore as an employee of Normativity, Inc., falls away. But it is perfectly possible that some *other* ground of obligation would remain and would still be normative for me: for example, an obligation grounded in my promise to the organizer of the event that I will show up and help out at the fundraiser. And I might continue to accept the basis for *that* kind of obligation even after setting aside the role of institutional membership. The broader point should be clear: even from the perspective of political autonomy, exit from an order or institution does not free us from the

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219. The leading allusions to this point that I can find in the work of others include Socrates' observation in the *Crito* that exile had been offered to him at trial—implicitly invoking the availability of *ex post* exit as support for the legitimacy of the Athenian order for him—and the observation of Charles Cassinelli in the context of democratic government that "[a]n association is truly voluntary only when one can take himself beyond its control at any time whatever. . . . There is no withdrawal from the government's control when one has broken the rules; therefore, there can be no consent to governmental regulation by those who have not consciously accepted it by means of voluntary immigration." C.W. CASSINELLI, THE POLITICS OF FREEDOM: AN ANALYSIS OF THE MODERN DEMOCRATIC STATE 92 (1961). *But see* BERAN, *supra* note 65, at 111 (discussing that exit limitations are consistent with voluntary membership).

outstanding moral claims upon us when we freely continue to accept an independent basis for those claims, whatever that basis might be.

Finally, it may be worth noting that exit often accomplishes or renders unnecessary many of the purposes for which penalties and punishments are often imposed. The details will depend, of course, on the kind of order and the nature of the penalty or punishment. But it is probably true that exit is usually unappetizing, burdensome, and unpleasant enough that its availability need not diminish, or diminish much, the *ex ante* deterrent effect of a penalty. And the option of exit may also serve the function of protecting other members from the effect of future violations. So, in at least some cases, and perhaps many cases, exit may be just as effective as the penalty or punishment itself at achieving the ends for which the penalty or punishment was instituted.

This point is aptly illustrated by the fact that a number of different cultures have made exit rights—exile, banishment, transportation, and so on—available as an alternative to the performance of criminal obligations, even those which have accrued. We have already seen that Socrates mentions in *Crito* that he was given, even at trial, the option of exile as an alternative to death.[220] In republican Rome, at certain periods, condemned persons could accept exile in place of punishment.[221] The English penal system, at times, offered various forms of exit as an alternative to traditional punishments.[222] And, in feudal Japan, warriors facing the dishonor of execution were afforded the alternative to "exit," after a fashion, by committing suicide instead.[223] In each of these systems, the exit option did not appear to undermine the effectiveness of the punishment mechanism from which the violator was accorded the opportunity of exiting. In these respects at least, those orders managed to preserve what I have called "freedom"—and to protect what I have called the political autonomy of their members—even when the tension between the order and a member was at its most acute.

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220. *See* PLATO, *supra* note 118 and accompanying text.

221. *See, e.g.*, J.A. CROOK, LAW AND LIFE OF ROME 272–73 (1967) (describing different forms of exile as an alternative to punishment and as outright penalty); *see also* MARCUS TULLIUS CICERO, *Pro Balbo*, *in* CICERO: ORATIONS–PRO CAELIO; DE PROVINCIIS CONSULARIBUS; PRO BALBO 657–61 (Harvard 1958).

222. *See, e.g.*, FREDERICK POLLOCK & F.W. MAITLAND, II THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 619–20 (Liberty Press 2010) (1898) ("The coroner came and parleyed with the refugee [criminal taking sanctuary in a church], who had his choice between submitting to trial and abjuring the realm. If he chose the latter course, he hurried dressed in pilgrim's guise to the port that was assigned to him, and left England, being bound by his oath never to return."); BAKER, *supra* note 3, at 516 (noting the practice of granting a pardon on condition of transportation to a "wild and uninviting territory" as an alternative to a death sentence).

223. *See* Lafcadio Hearn, *The Call to Vengeance and the Code of Self-Sacrifice in Japan*, 28 NEW ENG. REV. 195, 197 (2007) (discussing the background of Japanese military suicide).

V. CONCLUSION

The basic claims of this Article can be summarized briefly. Exit legitimacy is the contribution that a right of exit makes to the legitimating resources available to an order or institution; that is, to the reasons to accept or comply with the order or institution and with its outputs (its rules, decisions, etc.). The normative force of exit legitimacy is derived from the way in which exit rights help to operationalize consent (on the "thin" account) and from the way in which exit rights help to instantiate the freedom aspect of a value that I have called political autonomy (on the "thick" account). And while exit legitimacy can be discerned in many types of orders and institutions, there are reasons to think that it is particularly important in the international realm.

There are some important objections to exit legitimacy, but, of the four considered here, none seems to be fatal. The first objection centers on the cost and burden of exit: I argue that we need not worry unduly that exit is often difficult, so long as it is a realistic possibility. The second objection focuses on the insufficiency of exit rights: I emphasize that exit alone is not enough to render an order or institution rightful or just, and that exit cannot be a "solution" to problems of justice and fairness, but insist that the presence of an exit right nevertheless improves the legitimating resources available to the order or institution in question. The third objection pertains to the incentive problems created by exit rights: I suggest that exit should be institutionalized thoughtfully in light of its effects on incentives and behavior, and that it may be desirable in particular to design exit rights that require (or at least facilitate) the use of voice before and during exit. The fourth objection relates to the apparent need to foreclose *ex post* exit: I give reasons to think that such foreclosure may not be as necessary as it seems, and that we may be able to keep exit available even for those who have broken the rules of our order or institution and have not yet made restitution or submitted to punishment.

The claims at the heart of this Article have been framed in highly general terms: they apply to international organizations, states, corporations, and voluntary associations of individuals in much the same way. One cost of this approach is a high level of abstraction: a great deal of work remains to be done before the foregoing analysis can be translated into concrete doctrinal prescriptions. But the ground is now prepared for such work, and a number of the principal objectives and difficulties have been identified. An exit right designed with these lessons in mind promises to harness a source of legitimacy that, despite its vital importance, has hitherto remained largely in the dark.

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