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Returning to Vattel: A Gentlemen's Agreement for the Twenty-First Century

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Returning to Vattel: A Gentlemen's Agreement for the Twenty-First Century

Cover Page Footnote

International Law; Commercial Law; Law

Returning to Vattel:¹ A “Gentlemen’s Agreement” for the Twenty-first Century

Stacey Marlise Gahagan†

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I. Introduction

How different is Emmerich de Vattel’s eighteenth century

¹ EMMERICH DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (Joseph Chitty ed., T. & J.W. Johnson & Co. 1859) (1758).

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“Family of Nations” from modern global society? Those nations also shared a common space, depended on a limited supply of natural resources, and relied on the comity and grace of neighbors to resolve potential conflicts and handle diplomatic issues. Similarly, they were forced to contend with rogue, dishonest sovereigns occasionally wreaking havoc. Vattel’s 1758 treatise outlined the principles of mutual respect and equal dignity of sovereigns relied on by his Family of Nations to address these issues.² In the twenty-first century, modern customary international law (“CIL”)³ likewise embodies the uncoded, guiding principles undergirding international law.

Broadly applied principles like CIL raise not only procedural questions but also substantive ones. How does a global society, comprised of hundreds of autonomous sovereigns, agree on the rules to which it will be bound? Is CIL still relevant or has it become superfluous, or perhaps even obsolete, in modern international society? What happens when one of these sovereigns decides it no longer wishes to abide by a rule of CIL? Can it merely “opt out”? As CIL establishes the parameters for actions ranging from sovereign immunity to contracts to principles of war, “opting out” potentially has dramatic implications.⁴

Recently, Curtis Bradley and Mitu Gulati initiated an ongoing academic discourse in the *Yale Law Journal* with their article *Withdrawing from International Custom* (“*Withdrawing*”).⁵ *Withdrawing* proposed a revision of CIL protocol, which would allow a country to opt out of a particular aspect of CIL

² See *id.* ch. III § 47.

³ See Curtis A. Bradley & G. Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L. J. 202, 209 n.22 (2010) [hereinafter *Withdrawing*] (citing two definitions of CIL: “the law of the international community that ‘results from a general and consistent practice of states followed by them from a sense of legal obligation’” (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987)) and “international custom, as evidence of a general practice accepted as law” (citing STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38(1), June 26, 1945, 59 Stat. 1031)).

⁴ See generally David Luban, *Opting Out of the Law of War: Comments on Withdrawing from International Custom*, 120 YALE L.J. ONLINE 151 (2010) (providing specific examples of the negative implications of the adoption of the proposed “Default View” to the Law of War).

⁵ *Withdrawing*, *supra* note 3, at 423.

unilaterally, upon giving notice to the international community.⁶ Bradley and Gulati argued this revision, the “Default View,” was merely a return to the model of international law espoused by treatise authors and jurists of the eighteenth and nineteenth centuries.⁷ They questioned the wisdom of the compulsory implementation of CIL, the “Mandatory View,”⁸ in the twenty-first century.⁹ Their initial, broad proposal accomplished its objective to “begin a discussion about why the Mandatory View developed and whether, for some categories of CIL, a Default View might be more appropriate.”¹⁰ Other authors responded by challenging this proposal on a myriad of topics such as the law of war, contracts, treaties, and historical accuracy.¹¹ Emphasizing the

⁶ See *Withdrawing*, *supra* note 3, at 207.

⁷ See *id.* at 206 (“[A] number of prominent international law publicists of the eighteenth and nineteenth centuries thought that CIL rules were at least sometimes subject to unilateral withdrawal. This was also the view of the early U.S. Supreme Court in some of its most famous CIL decisions.”). *But see* William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 YALE L.J. ONLINE 169, 170 (2010) (“[T]he Default View has never been the predominant understanding of customary international law.”).

⁸ *Withdrawing*, *supra* note 3, at 202. Bradley and Gulati define the “Mandatory View” as “the conventional wisdom . . . that nations never have the legal right to withdraw unilaterally from the unwritten rules of customary international law . . .” *Id.* See also MICHAEL BARKUN, LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY 68 (1968) (discussing the origins of the “prevalent belief that international law must be *globally* valid—the sharing of norms across state boundaries is not enough.”).

⁹ See *Withdrawing*, *supra* note 3, at 207-08. Bradley & Gulati contend that despite the lack of clarity in the manner of CIL formation, once a rule has ‘formed’ all nations are thus bound to adhere to the rule unless they fall under the persistent objector doctrine. *Id.* at 210-11; see also Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT’L L. 1, 3-4 (2010) [hereinafter *Age of Treaties*] (claiming CIL is “riddled with uncertainty” and questioning the wisdom of legally obligating nations to comply with CIL if it is unclear how the “belief arise[s] in the first place”). *But see* Samuel Estreicher, *A Post-formation Right of Withdrawal from Customary International Law?: Some Cautionary Notes*, 21 DUKE J. COMP. & INT’L L. 57, 58 (2010) (noting the stability of CIL).

¹⁰ *Withdrawing*, *supra* note 3, at 275.

¹¹ See generally Lea Brilmayer & Isaias Yemane Tesfalidet, *Treaty Denunciation and “Withdrawal” from Customary International Law: An Erroneous Analogy with Dangerous Consequences*, 120 YALE L.J. ONLINE 217 (2011) (claiming a “serious distortion” in *Withdrawing* of the law surrounding international agreements “which does not in fact grant a right of unilateral withdrawal”); Dodge, *supra* note 7 (arguing the

purpose of their original article and answering the issues raised by their colleagues, Bradley and Gulati subsequently published *Mandatory Versus Default Rules: How Can Customary International Law Be Improved?* (“Mandatory”).¹²

After considering the arguments of several respondents, this article continues to question the wisdom of Bradley and Gulati’s proposed opt out rule. Adding to the ongoing discourse, this article offers a more expansive view of the historical foundation of CIL, revisits Supreme Court decisions applying CIL, and advances the normative argument of returning to the principles and model of CIL espoused by Vattel.

Part II examines theories of CIL prior to Vattel, followed by an in-depth review of his multi-faceted conception of CIL. As Bradley and Gulati recognized, the history of CIL is the appropriate starting point for evaluating any proposition for change.¹³ Bradley and Gulati continue to argue the Mandatory View “was not always the canonical understanding of CIL.”¹⁴ Nonetheless, others challenge this arguably erroneous depiction of Vattel’s endorsement of the Default View.¹⁵

history of CIL is incorrectly portrayed in *Withdrawing*); Luban, *supra* note 4 (discussing the implications of Bradley and Gulati’s proposal to the Law of War); Christina Ochoa, *Disintegrating Customary International Law: Reactions to Withdrawing from International Custom*, 21 DUKE J. COMP. & INT’L L. 157 (2010) (responding to the analogies in *Withdrawing* to contracts); Anthea Roberts, *Who Killed Article 38(1)(B)? A Reply to Bradley & Gulati*, 21 DUKE J. COMP. & INT’L L. 173 (2010) (criticizing Bradley & Gulati’s interpretation of the law surrounding treaties).

¹² Curtis A. Bradley & Mitu Gulati, *Mandatory Versus Default Rules: How Can Customary International Law Be Improved?*, 120 YALE L.J. ONLINE 421, 423 (2011) [hereinafter *Mandatory*].

¹³ See *Withdrawing*, *supra* note 3, at 208-09. Bradley and Gulati began *Withdrawing* by recounting the early history of CIL and introducing the Law of Nations, designed to regulate both public and private international law, as the precursor to the modern CIL and regulator of “[the] rights of the seas, conduct during wartime, and diplomatic immunity.” *Id.* at 208.

¹⁴ *Mandatory*, *supra* note 12, at 422.

¹⁵ See Luban, *supra* note 4, at 153 (arguing “Bradley and Gulati’s principal historical source for the Default View, Emer de Vattel, never accepted that states can opt out of the law of war.”); see also Dodge, *supra* note 7, at 172 (“[Bradley and Gulati’s] account [of Vattel’s model of international law] paints an incomplete picture”); Edward T. Swaine, *Bespoke Custom*, 21 DUKE J. COMP. & INT’L LAW 207, 209-10 (2010) (stating “Bradley and Gulati . . . understate [the] significance [of voluntary law]” from which countries could not opt out).

Although Vattel recognized four manners in which CIL could be formed, Bradley and Gulati's proposal minimized the importance of the two methods inimical to their analysis.¹⁶ Instead, they emphasized custom to garner greater support for their proposed Default View.¹⁷ CIL formed by custom allowed greater flexibility to sovereigns, contrary to the alternative, more binding manners used to form most international law.¹⁸ This narrow focus on CIL created by custom, results in a historical analysis that is overly restricted and ultimately flawed.

Part III of this article more extensively explores the integrated components of history and philosophy that shaped international law over the two centuries following Vattel's work. Similar to their historical presentation of Vattel's treatise, Bradley and Gulati's selected quotes from subsequent international law treatises that do not adequately represent the overarching sentiments or the historical context of the excerpted pieces.¹⁹ It is from this limited vantage point that Bradley and Gulati frame their analysis of CIL history and its "functional desirability."²⁰ Part III concludes by analyzing the impact of the integration of "uncivilized" countries into the "civilized" Family of Nations and the perceived shift from the Default View to the Mandatory View of CIL.²¹

¹⁶ See *Withdrawing*, *supra* note 3, at 217-18. Although Bradley and Gulati explain that natural and voluntary law are only briefly recognized as alternate categories of international law, the paragraph that follows the perfunctory reference begins, "[t]he key point for present purposes is that Vattel and other classic publicists thought that nations could withdraw from at least some CIL rules." *Id.* at 218.

¹⁷ See discussion *infra* Part IV.B-D (recognizing treaties and voluntary law as alternate categories of international law).

¹⁸ See *Withdrawing*, *supra* note 3, at 216-17; see also Dodge, *supra* note 7, at 173; Luban, *supra* note 4, at 158 ("The only rules of customary international law to which Vattel applies the Default View are those that are 'indifferent in themselves'—customs where the need for some default rule is evident but it does not much matter which of several alternatives custom settles on.").

¹⁹ See *Withdrawing*, *supra* note 3, at 218-19.

²⁰ See *id.* at 215-26, 241-45. Dodge challenges the historical analysis presented in *Withdrawing* contending the Old Mandatory View, based on natural law, was followed by the Modern Mandatory View, which was also accepted by positivist scholars. See Dodge, *supra* note 7, at 180-83.

²¹ See discussion *infra* Part II; see also BARKUN, *supra* note 8, at 68-69 ("[A]s long as the tide of European power ran strong . . . [t]here was no boundary problem for international law . . . except, perhaps, the dubious boundary between 'civilized' and

Relying on the work of legal historians to paint the changing landscape of intellectual and moral thought, Part IV revisits several U.S. Supreme Court decisions interpreting and applying CIL.²² In *Withdrawing*, Bradley and Gulati cited a myriad of dicta as “evidence” of the Court upholding a view contrary to the modern understanding of CIL.²³ In an attempt to provide a panoramic vista, this response cites alternate portions of the same opinions implying a view contrary to Bradley and Gulati’s proposal for unilateral withdrawal. Furthermore, Part IV includes an analysis of *Johnson v. M’Intosh*²⁴ to elucidate the disparity of the Supreme Court’s application of CIL between civilized nations and between a civilized nation and an uncivilized nation.²⁵

In light of this more comprehensive historical analysis, Part V ultimately rejects the proposal to allow unilateral withdrawal from CIL and advocates a return to Vattel’s perspective of CIL. Because CIL forms the “floor, not the ceiling”²⁶ of international law, a “floor” comprised of guiding principles—grounded in commonly shared human values—is essential. As our global society returns to a Family of Nations, this article upholds these guiding principles and rejects any myopic proposal that contradicts the principles of mutual respect and the equal dignity of sovereigns espoused by Vattel.²⁷

‘barbarism.’ Now that the old colonial empires have shattered, *non-Western* cultural influences have come to the fore . . . [and] there are very real boundaries to be considered.”).

²² See discussion *infra* Part IV.

²³ See *Withdrawing*, *supra* note 3, at 219-26.

²⁴ 21 U.S. (8 Wheaton) 543 (1823).

²⁵ See discussion *infra* Part IV.C.

²⁶ Compare Chief Justice Marshall’s reasoning in *The Antelope*, 23 U.S. (10 Wheat.) 66, 120-122 (1825) (finding slavery legal under the Law of Nations even though contrary to U.S. notions of morality), with President Woodrow Wilson, The Fourteen Points, Address to a Joint Session of Congress (Jan. 8, 1918) (expressing the importance of forming an international association to “afford[] mutual guarantees of political independence and territorial integrity to great and small states alike.”).

²⁷ See Luban, *supra* note 4, at 163-66 (lamenting the possible ramifications of the application of the Default View in the Law of War and concluding that “a system of law in which you can divest yourself of legal obligations simply by announcing that henceforth you are no longer bound is not really a system of law at all.”); see also Roberts, *supra* note 11, at 174 (stating that Bradley and Gulati’s proposal is “problematic given custom’s function of protecting key structural and substantive norms in order to best serve the interests of the international community.”).

II. Evolution of the Intellectual and Moral Conception of CIL

*“Observe good faith and justice toward all nations. Cultivate peace and harmony with all.”*²⁸

A. Conceptions of Customary International Law: Pre-Vattel

In the seventeenth century, two strains of thought dominated the writings of scholars seeking to understand the sources of natural law: Christianity and humanity.²⁹ Samuel Pufendorf relied on his Christian beliefs, emphasized the Golden Rule, and advocated the equality of and freedom from subordination of men.³⁰ Committed to the superiority of a natural law derived solely from God, Pufendorf rejected any form of positive law as inferior and subordinate to the law of nature.³¹

A contemporary of Pufendorf, Hugo Grotius is considered “the father of natural law.”³² Whereas Pufendorf credited God as the sole source of international law, Grotius also looked to the human nature of man.³³ He believed the two interactive properties that govern human nature—“the desire for self-preservation and the need for society”—also govern societies of men living together.³⁴

²⁸ George Washington, U.S. President, Farewell Address in *THE INDEPENDENT CHRONICLE*, Sept. 26, 1796.

²⁹ See Charles I. Reid, *Originalism and Precedent: Judicial Precedent in the Late Eighteenth and Early Nineteenth Centuries: A Commentary on Chancellor Kent's Commentaries*, 5 *AVE MARIA L. REV.* 47, 58-60 (2007).

³⁰ See GEORGE A. FINCH, *THE SOURCES OF MODERN INTERNATIONAL LAW* 17 (1937). “The natural state of man was one of peace rather than war” is the premise of Samuel Pufendorf's treatise published in 1672, *De Jure Naturae et Gentium*. *Id.* at 18 (quoting SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM* (1688)).

³¹ See *id.* at 18; see also Dodge, *supra* note 7, at 180 (discussing Robert Phillimore, who also credited “Divine Law” as the source of natural law).

³² Jon Miller, *Hugo Grotius*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (July 28, 2011), <http://plato.stanford.edu/entries/grotius/#NatLaw> (last visited Jan. 13, 2012) (citing HAMILTON VREELAND, JR., *HUGO GROTIUS: THE FATHER OF THE MODERN SCIENCE OF INTERNATIONAL LAW* (1917)); see also MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 1 (3d ed. 1999) (“Grotius’ classic of 1625, *The Law of War and Peace*, is widely acknowledged, more than any other work, as founding the modern discipline of the law of nations . . .”).

³³ WILLIAM FRANCIS ROEMER, *THE ETHICAL BASIS OF INTERNATIONAL LAW* 86 (Lawbook Exchange 2008) (1929).

³⁴ See *id.*; see also HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 4 (1866). Wheaton relates Grotius's sentiments that natural law was equivalent to the law of God

Grotius wrote *De Jure Belli ac Pacis*³⁵ in an effort to contain “the brutal passions which inflame nations in war” finding such “lack of restraint” to be something “even barbarous races should be ashamed”³⁶

Despite Pufendorf and Grotius, positivism began to take hold in Europe at the beginning of the eighteenth century under the leadership of Dutch jurist, Cornelius van Bynkershoek.³⁷ Bynkershoek wrote three books at the turn of the century claiming that “the true basis of the law of nations [is] . . . the common consent of the nations expressed either in international custom or in treaties.”³⁸ Already, the on-going debate about the origin of international law was raging in the civilized world with many theorists finding it necessary to choose between the naturalist and positivist theories.³⁹

In the midst of the cacophony of ideas and cultures that defined Europe (“civilized nations”) in the 1700s, Vattel, a Swiss author, emerged as one of the most prominent writers on the topic of international law.⁴⁰ Rather than align directly with the naturalists or the positivists, Vattel’s influential treatise divided the formation of international law into two branches—the “necessary” law of Nations and the “positive” law of Nations.⁴¹ The necessary law of Nations was grounded in the theoretically

“being the rule of conduct prescribed by Him to his rational creatures, and revealed by the light of reasons, or the sacred scriptures.” WHEATON, *supra*, at 4; *see also* ROEMER, *supra* note 33, at 82 (“[Grotius] sought to construct a law of nations based upon an authority which would not be subject to religion or morals—the human reason—which should command the respect of all people in all time.”).

³⁵ HUGO GROTIUS, *DE JURE BELLI AC PACIS* (1625). Grotius wrote *De Jure Belli Pacis* while exiled during the Thirty Years’ War. *Id.*

³⁶ FINCH, *supra* note 30, at 16 (quoting the prologue to HUGO GROTIUS, *DE JURE BELLI AC PACIS* § 28 (1625)); *see also* ROEMER, *supra* note 33, at 95 (“Grotius’ work concludes with the proposition: ‘In the very heat of war, the greatest security, and expectation of divine support, must be the unabated desire and invariable prospect of peace’”).

³⁷ *See* FINCH, *supra* note 30, at 20.

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ *See id.* at 25; *see also* *Withdrawing*, *supra* note 3, at 219 n.68.

⁴¹ *See* VATTEL, *supra* note 1, at prelim. §§ 7, 27; *see also* Dodge, *supra* note 7, at 172.

irrefutable principles of the “law of nature,”⁴² whereas, the positive law of Nations required some form of consent for the Sovereign to be bound.⁴³ Vattel theorized that the enforcement and binding nature of the law depended on the manner of formation.⁴⁴

B. Vattel's Necessary Law of Nations

Like Grotius, Vattel derived necessary law from the natural law principles that define the very essence of the human race: edicts from which one cannot escape anymore than one can escape one's own humanity.⁴⁵ Vattel upheld these as normative values to guide sovereigns and bind them in their interactions with other nations.⁴⁶ Believing natural law to be “immutable,” he saw the “obligations . . . aris[ing] from it [to be] necessary and indispensable, [to which] nations can neither make any changes . . . by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it.”⁴⁷ Vattel viewed any treaties or agreements made between sovereigns, or internal customs or policies that violated this natural law, as inherently unlawful because a society cannot refute these duties to mankind.⁴⁸

According to Vattel, natural law required every state to meet its own internal needs first.⁴⁹ Nonetheless, Vattel immediately followed this counsel of self-preservation with the moral and physical obligation to contribute to general welfare of other states

⁴² See VATTEL, *supra* note 1, at prelim. §§ 7, 8.

⁴³ See *id.* at prelim. § 27.

⁴⁴ See *id.* at prelim. §§ 7, 27, 28.

⁴⁵ See generally Miller, *supra* note 32 (discussing the principles of natural law); see also *supra* notes 33-35 and corresponding text discussing Hugo Grotius.

⁴⁶ See VATTEL, *supra* note 1, at prelim. § 5. In the introduction to his treatise, Vattel reasoned that the simple act of joining a “civilized” society does not cause men to cease to be men; therefore, as men are bound by the law of nature so too are the societies formed by the compilation of such men. *Id.* “We must therefore apply to nations the rules of the law of nature, in order to discover what their obligations are, and what their rights [sic]: consequently, the *law of Nations* is originally no other than the *law of Nature applied to Nations.*” *Id.* at prelim. § 6 (emphasis in original).

⁴⁷ *Id.* at prelim. § 9.

⁴⁸ See *id.*; see also Luban, *supra* note 4, at 156.

⁴⁹ See VATTEL, *supra* note 1, at prelim. §§ 5-6.

“lawfully, and consistently with justice and honour.”⁵⁰ Similarly, out of respect for the freedom and sovereign dignity of fellow states, each state was duly obligated to leave its fellow states in peace.⁵¹ Vattel viewed natural law as giving each state the right to be free from the imposition of the will of another state—even though the only true enforcer of these natural laws was the conscience of each nation.⁵² Vattel labeled these as “imperfect” rights because such internal obligations did not inherently give another nation the right to demand compliance.⁵³ Only through mutual agreement could nations bind each other, compel compliance, and change an imperfect right into a “perfect” right.⁵⁴

Human rights norms, *jus cogens*⁵⁵ or preemptory norms, are a modern example of the necessary law of nations. The *Restatement* follows Vattel’s logic, finding any “international law which violates [human rights norms] . . . void.”⁵⁶ Human rights abuses contradict the law of nature; thus, “nations can neither make any changes in [human rights norms] by their conventions, dispense with [them] in their own conduct, nor reciprocally release each other from the observance of [them].”⁵⁷ Like all natural law,

⁵⁰ *Id.* at prelim. §§ 13-14 (emphasis in original).

⁵¹ *Id.* at prelim. §§ 15-16.

⁵² *Id.* at prelim. § 17; see also FINCH, *supra* note 30, at 26. Per Chancellor Kent, Vattel’s necessary law of nations “is termed by others the internal law of nations, because it is obligatory upon them in point of conscience.” FINCH, *supra* note 30, at 26.

⁵³ See VATTEL, *supra* note 1, at prelim. § 17 (stating imperfect rights only give one the right to request compliance); see also Swaine, *supra* note 15, at 209 (“imperfect rules, from which states could withdraw, might also be thought of as customary . . . perhaps labeled as traditional, soft law . . .”).

⁵⁴ See VATTEL, *supra* note 1, at prelim. § 17 (stating perfect rights give one state the right to compel another to fulfill an obligation); see also Swaine, *supra* note 15, at 209 (“Perfect obligations are the type of rights that give other states rights to demand observance.”).

⁵⁵ JANIS, *supra* note 32, at 62. “*Jus cogens* is a norm thought to be so fundamental that it even invalidates rules drawn from treaty or custom.” *Id.* *Jus cogens* is translated to English as “peremptory norm.” *Id.*

⁵⁶ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987), cmt. (a)-(f) ([T]he recognized human rights norms that violate international law include: “practic[ing], encourag[ing], or condon[ing] (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading punishment, (e) prolonged arbitrary detention, [or] (f) systematic racial discrimination . . .”).

⁵⁷ VATTEL, *supra* note 1, at prelim. § 17.

however, it is only the conscience of each nation that prevents it from doing so.⁵⁸

Because one sovereign has no authority over another to prevent internal human rights abuses, provisions for the treatment of wounded and sick soldiers and for the humanization of warfare were necessarily codified by the four Geneva Conventions and subsequently ratified by independent sovereigns.⁵⁹ The Geneva Conventions exemplify the process needed to convert an imperfect right, the *jus cogens* norm to treat prisoners and victims of war humanely, into a perfect right.⁶⁰ Ratification binds all signatories henceforth from violating this natural law and allows the obligation to be lawfully compelled by other nations.

Vattel viewed the most constructive foreign policy as having a foundation based in natural law.⁶¹ Nevertheless, he recognized that a foreign policy built solely on natural law would be rejected and scorned by the politicians of the eighteenth century.⁶² Pragmatically, he included positive law as another manner in which international law could be created.⁶³ Unlike natural law, which looked to God or human nature as its source, the source of all positive law was man. Positive law also allowed nations to purposefully, through action or inaction, create laws that were

⁵⁸ See *supra* notes 51, 53, and accompanying text.

⁵⁹ INTERNATIONAL COMMITTEE OF THE RED CROSS, *The Geneva Conventions of 1949 and Their Additional Protocols*, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> (last visited Jan. 13, 2012). The four Geneva Conventions form “the core of International Humanitarian Law” *Id.* The original version adopted in 1864, was revised in 1906, 1929, and 1949. *Id.* The current version, adopted in the wake of World War II, has achieved universal ratification. *Id.* The First Geneva Convention of 1949 covers the protection and care for the wounded and sick of armed conflict on land. *Id.* The Second Geneva Convention concerns the protection and care for “the wounded, sick and shipwrecked” of armed conflict at sea. *Id.* The Third Geneva Convention relates to the treatment of prisoners of war. *Id.* The Fourth Geneva Convention concerns the protection of civilians in time of war. *Id.*

⁶⁰ See Luban, *supra* note 4, at 163.

⁶¹ See Vattel, *supra* note 1, at bk. II §§ 1, 3 (believing a foundation in natural law would innately guide sovereigns to enact laws that were mutually beneficial and designed to promote the common good of all nations).

⁶² See *id.* at bk. II § 1. “The following maxims will appear very strange to cabinet politicians . . . the doctrine of this chapter will be a subject of ridicule.” *Id.*

⁶³ See Dodge, *supra* note 7, at 172-75 (discussing Vattel’s theory of natural and positive law).

equally and mutually compelling on fellow sovereigns.⁶⁴ The “Law of Nations,” frequently quoted by Chief Justice John Marshall and later known as Customary International Law, was formed by both Vattel’s positive law of nations and necessary law of nations.⁶⁵

C. *Vattel’s Positive Law of Nations*

According to Vattel, the positive law of Nations was created in one of three ways: universal voluntary law, conventional law, or customary law.⁶⁶ Universal voluntary law was “presumed . . . [to be] so fundamental as to be more or less automatically a part of international law.”⁶⁷ Conventional law was formed by “explicit, usually written, agreements that states made among themselves.”⁶⁸ Finally, customary law was created by the repeated and relied upon practices of the individual sovereigns that composed the Family of Nations and the sense of obligation felt by those nations to follow it.⁶⁹

While each of these methods required some form of consent on

⁶⁴ See VATTEL, *supra* note 1, at prelim. § 27.

⁶⁵ See, e.g., *The Antelope* 23 U.S. (10 Wheat.) 66 (1825); see also Dodge, *supra* note 7, at 175-79 (examining the Supreme Court’s application of CIL in “Early American Cases”).

⁶⁶ VATTEL, *supra* note 1, prelim. § 27. *But see* Dodge, *supra* note 7, at 172-75. Dodge recognizes the confusion of the word “voluntary” “because it suggested an optional character that Vattel expressly denied.” *Id.* at 172. Nevertheless, Dodge ultimately categorizes voluntary law under Bradley and Gulati’s perception of mandatory law. *Id.* at 173.

⁶⁷ JANIS, *supra* note 32, at 5. Universal voluntary law is the functional equivalent of what modern international law deems “general principles of law.” *Id.* These are “nontreaty, noncustomary source[s] of international law. . . . The basic notion is that a general principle of law is some proposition of law so fundamental that it will be found in virtually every legal system.” *Id.* at 55.

⁶⁸ *Id.* at 5.

⁶⁹ See *id.* This customary practice “has municipal analogies in commercial law notions such as ‘the course of dealing’ and ‘the usage of trade’ where practice creates justifiable expectations of future observance.” *Id.* Another important element of modern customary law is the “psychological” aspect of *opinio juris* that “transforms the nitty-gritty of a historical rendition of examples of state practice into . . . a rule of customary international law.” *Id.* at 46. “Without *opinio juris* there may exist only a history lesson more or less devoid of any significance.” *Id.*; see also Luban, *supra* note 4, at 166 (citing Gerald Postema’s description of customs as “commons” which Luban expounds upon as being “maintained by participation . . . [which] carries normative force.”).

the part of the sovereign, focusing on the word “voluntary” in universal voluntary law is misleading because it was the one form of positive law for which consent was already presumed.⁷⁰ Rather, focusing on the word “universal” allows Vattel’s meaning to become evident—as it was the consistent, uniform practice of all nations, or the general utility of the rule itself, on which the presumption of consent was based.⁷¹ For example, the commitment of all sovereign states to the safety and welfare of its citizens created the universal voluntary law that gave a sovereign state the right to repress any conduct that threatened this commitment.⁷² Vattel wisely cautioned that universal voluntary law must be necessarily circumscribed and carefully monitored to avoid any extension that threatened the freedom or independence of another sovereign nation.⁷³

Conventional law, formed by express agreement through treaties, bound only those parties that expressly consented to be bound.⁷⁴ Emphasizing the distinction between universal laws (naturally governing all nations) and conventional laws (particular to the nations that expressly adopted them) Vattel wrote: “As it is evident that a treaty binds none but the contracting parties, the conventional law of nations is not a universal law but a particular law.”⁷⁵ Vattel viewed the role of the Law of Nations as very confined with regard to conventional law because the sovereigns that constructed the treaties also stipulated the parameters for entrance, exit, observance, and violation.⁷⁶

Customary law evolved from “the tacit consent of, or . . . the

⁷⁰ See VATTEL, *supra* note 1, at prelim. § 21; see also Dodge, *supra* note 7, at 172-73.

⁷¹ See VATTEL, *supra* note 1 at prelim. § 21 n.7.

⁷² See *id.* at prelim. § 22.

⁷³ See *id.* at prelim. §23.

⁷⁴ See *id.* at prelim. § 24; see also JANIS, *supra* note 32, at 9. Conventional law remains the “first and plainest source of international law.” JANIS, *supra* note 32, at 9. Generally, these express agreements are often referred to as treaties, but conventions, pacts, protocols, and accords are also forms of conventional law. *Id.* The written agreements “create legal rights and duties” and “the phrase *pacta sunt servanda* . . . express[es] the fundamental principle that agreements, even between sovereign states, are to be respected.” *Id.*

⁷⁵ VATTEL, *supra* note 1, at prelim. § 24.

⁷⁶ See *id.*

tacit convention of the nations *that observe it towards each other . . .*”⁷⁷ Vattel viewed customary law as limited to those nations whose geographic proximity or frequent interactions adequately exposed them to the custom and provided ample opportunity to object to being bound.⁷⁸ This distinction was important because, once established, nations that “ha[d] not expressly declared their resolution of not observing it in the future” were “considered as having given their consent to it, and [were] bound to observe it . . .”⁷⁹ Although customary law continues to be the most enigmatic mode of formation, it must conform with natural law’s principles of justice, honor, and lawfulness.⁸⁰

D. *Bradley and Gulati on Vattel*

In *Withdrawing*, Bradley and Gulati quickly dispensed with Vattel’s three initial methods of formation (natural, universal voluntary, and conventional) and instead chose to ground the historical premise of their thesis solely in the final manner, custom.⁸¹ While it is uncontested that Vattel viewed customary law as one manner for creating CIL, the importance Vattel placed on the foundational role of natural law and voluntary law is utterly lost in their analysis.⁸² Furthermore, deemphasizing Vattel’s

⁷⁷ *Id.* at prelim. § 25 (emphasis added). Vattel defined customary law as “certain maxim and customs consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law.” *Id.*

⁷⁸ *See id.* at prelim. § 26.

⁷⁹ *See* VATTEL, *supra* note 1, at prelim. § 26

⁸⁰ *Id.*; *see also*, JANIS, *supra* note 32, at 46. The uniform practice of states should be consistent, but there are no specific requirements that it also be unanimous or ancient. *Id.* at 46. The essential element that must be present is the “sense of legal obligation.” *Id.* This sense of legal obligation, *opinio juris*, was documented in the North Sea Continental Shelf Cases heard before the International Court of Justice (ICJ) in 1969. *Id.* The ICJ held: “The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not itself enough.” *Id.* (quoting North Sea Continental Shelf Cases (Ger. v. Neth.) 1968 I.C.J. 3, 44 (Apr. 26)).

⁸¹ *See Withdrawing*, *supra* note 3, at 217-18; *see also supra* text accompanying note 17.

⁸² *See* VATTEL, *supra* note 1, at prelim. § 6, n.2 (touting necessary law as “immutable [and that which] ought to be the basis of the positive law of nations”); *see also* Swaine, *supra* note 15, at 209 (claiming that Vattel “states were not free to opt out” of voluntary law).

conventional law as a vehicle used to create CIL and depicting treaties solely as a means to escape the Mandatory View results in a skewed perspective of Vattel's theory.⁸³ Responding to criticism of this analysis, Bradley and Gulati clarified the "principal goal [of their historical analysis] . . . was to establish that the Mandatory View was not always the exclusive understanding of how CIL operates."⁸⁴ Nonetheless, since Bradley and Gulati chose Vattel's work as a model of the Default View, an accurate understanding of his conceptualization of international law formation is arguably necessary before considering his impact on the development of international law jurisprudence.⁸⁵

This unbalanced perspective merits clarification, as *Mandatory* (Bradley and Gulati's response) repeats the arguments advanced in *Withdrawing* and uses the same quote as evidence of Vattel's endorsement of the Default View:

However, if any of them happens to find *at a later time* that the custom is disadvantageous, it is *free to declare that it is unwilling to abide by such a custom*; and once it has clearly made known its intention there is no room for complaint on the part of others if it does not observe the custom.⁸⁶

Based on this quotation, they suggest that "according to Vattel . . . these nations nevertheless had an ability to opt out of the [customary] rule if they later found it disadvantageous, as long

⁸³ See *Withdrawing*, *supra* note 3, at 242-45, 251-52. Of the five paragraphs devoted to the "Process of CIL Formation," treaties are only referenced as evidence of the "influence of multilateral treaties" when discussing how quickly CIL can form. *Id.* at 242-43. The brief reference to treaties in the section discussing the formation of CIL is contraposed with two-thirds of the paragraphs in "Adaptability to Change," devoted to withdrawal rights from treaties and how these rights may affect CIL. *Id.* at 251-52.

⁸⁴ *Mandatory*, *supra* note 12, at 433. *But see* Dodge, *supra* note 7, at 173 (contending that while default rules may have existed, they were "completely overshadowed by the mandatory rules of international law both in scope and importance").

⁸⁵ See *Mandatory*, *supra* note 12, at 427-28 ("Vattel's endorsement of the Default View was influential in both international law commentary in the eighteenth and nineteenth centuries as well as in early decisions of the U.S. Supreme Court.").

⁸⁶ *Withdrawing*, *supra* note 3, at 217 (citing VATTEL, *supra* note 1, at bk. IV, § 106) (emphasis added); *see also Mandatory*, *supra* note 12, at 427.

as they gave advance notice of their intention.”⁸⁷ When viewed in context, however, it is clear that Bradley and Gulati are mistaken in continuing to claim that Vattel endorses their proposal for unrestricted unilateral withdrawal.⁸⁸

This quotation, taken from Book IV, is not an isolated commentary on the sovereign’s right to withdraw from international law.⁸⁹ It is a response to a purported query from the (European) Family of Nations regarding a sovereign’s right to deny diplomatic privileges or immunity to a particular dignitary in the face of fraud or abuse.⁹⁰ In all likelihood, Vattel’s response was written in light of lessons gleaned from England’s experience earlier that century when it denied sovereign immunity to an ambassador of Peter the Great.⁹¹ Ultimately in response to pressure from the Family of Nations, the British Parliament dismissed all charges against the ambassador and then passed a statute that “provided for severe penalties for future violations of diplomatic immunities.”⁹²

Evidence of these lessons is apparent in the passage following the referenced quotation. Vattel’s explanation incorporated the mandates of natural law: the sovereign must meet its own internal needs and contribute to the general welfare of other states “lawfully, and consistently with justice and honour [sic].”⁹³ Rather than offering the right to withdraw from established custom *carte blanche* simply by giving notice, Vattel instead defined the parameters of withdrawal and reiterated the mutual dependence of

⁸⁷ *Withdrawing*, *supra* note 3, at 217 (referencing Vattel’s quote on the privileges and immunities generally afforded to ambassadors).

⁸⁸ *See infra* note 104 and accompanying text (noting this same quote attracted the attention of Henry W. Halleck in his treatise as a statement with the potential to be easily misunderstood).

⁸⁹ VATTEL, *supra* note 1, at bk. IV, § 106.

⁹⁰ *See id.* Vattel offers a specific example in the empress of St. Petersburg who was forced to abolish the custom of exempting foreign ministers from duties on importation due to the “frequency of its abuse.” *Id.* at bk. IV, § 105.

⁹¹ *See* FINCH, *supra* note 30, at 49. Britain “arrested [the Ambassador] in an action for debt and compelled [him] to give bail.” *Id.* The response of the Czar, as well as dignitaries of many other nations, was that of indignation. *Id.*

⁹² *Id.* The provisions of this statute were adopted “in substantially the same terms by the United States Congress in 1790,” and in 1764, Lord Mansfield described the statute as “merely declaratory of the law of nations.” *Id.*

⁹³ VATTEL, *supra* note 1, at prelim. § 14 (emphasis in original).

other sovereigns on established custom.⁹⁴

The limitations of such a narrow perspective of CIL creation are more evident when the effect of the unilateral “opt out” is applied to *jus cogens* norms.⁹⁵ In *Withdrawing*, Bradley and Gulati initially identified *jus cogens* norms as a synonym to CIL rules.⁹⁶ In an apparent attempt to clarify this use, in *Mandatory* they identified *jus cogens* norms as “[a] limited subset of CIL” for which “there are strong arguments for treating . . . as mandatory.”⁹⁷ This understanding of *jus cogens* norms and the manner in which these norms become a part of CIL merits clarification. *Jus cogens* norms, such as the freedom from torture by other sovereigns, do not become CIL by custom because they are imperfect rights. They only become perfect, and thus enforceable, rights, by mutual agreement. A fortiori, opting out of *jus cogens* norms has consequences weightier than breach of contract claims, and unilaterally opting out, even with notice, may be antithetical to other desirable qualities of a global society.⁹⁸

⁹⁴ See *id.* at bk. IV, § 106. Vattel reiterated the necessity of a state making its declaration to break from an established custom to do so prior to any actual event in which another state may have depended on it. *Id.* He argued that, in the case before him, a state could not withhold any of the ambassadorial privileges normally extended by established custom if such privileges were “essential to the nature of the embassy, and necessary to ensure its legitimate success . . . [because to do so] is an expression of contempt, and an actual injury.” *Id.*; see also Dodge, *supra* note 7, at 174-75 (challenging Bradley and Gulati’s interpretation of the same quote and finding Vattel expressly limited a state from withdrawing from any rules “essential to an embassy and necessary to its proper success.”) (citation omitted).

⁹⁵ See Joel P. Trachtman, *Persistent Objectors, Cooperation, and the Utility of Customary International Law*, 21 DUKE J. COMP. & INT’L L. 221, 222 (2010) (viewing as a “fundamental flaw in their proposal” the failure to explain how it would be decided which rules are subject to the Mandatory View and which the Default View); see also Ochoa, *supra* note 11, at 167 (arguing that the lack of clarity in their proposal regarding which CIL rules would be subject to opt out introduces “confusion and a lack of predictability”).

⁹⁶ See *Withdrawing*, *supra* note 3, at 213-14. “There is significant debate about the materials that are relevant in discerning the existence of a CIL (or *jus cogens*) rule.” *Id.* at 213. “Whatever the proper role of consent in international law, CIL (as it is currently conceived) is less consensual than treaty-based law *Jus cogens* norms are even less consensual.” *Id.* at 214.

⁹⁷ *Mandatory*, *supra* note 12, at 443, 451.

⁹⁸ See Luban, *supra* note 4, at 164-66 (noting the potential weakening of the law of war and the “unraveling of the fragile International Humanitarian Law”); see also Ochoa, *supra* note 11, at 167; Roberts, *supra* note 11, at 174 (noting the “hazardous”

In *Mandatory*, Bradley and Gulati acknowledged the “tentative nature of the [their] historical analysis” and the necessity of a more comprehensive “examination of the intellectual origins of the Mandatory View.”⁹⁹ This recognition is encouraging, as their historical analysis did not accurately convey Vattel’s theory of CIL formation nor the fundamental principles—equal dignity of sovereigns, interdependency of nations, and maintaining trusting, respectful relations—on which it was based. Arguably, these considerations are equally important in evaluating “the normative underpinnings of the Mandatory View and . . . the extent to which that View is consistent with contemporary normative commitments.”¹⁰⁰

III. History’s Effect on the Legacy of Vattel

For centuries, international philosophers have debated the origin, methods of formation, and obligatory force of international law.¹⁰¹ The absence of a formal legislative process led some to deny the existence of international law altogether;¹⁰² nevertheless, most treatise writers adopted either a naturalist¹⁰³ or positivist

implications of the withdrawal proposal outside of academia). Bradley and Gulati agree that there may be some limits on opting out, but who sets the limits and how that will be determined is another question. See *Withdrawing*, *supra* note 3, at 45-62.

⁹⁹ *Mandatory*, *supra* note 12, at 438.

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., WHEATON, *supra* note 34, at 6-8.

¹⁰² See JANIS, *supra* note 32, at 5. “The trouble with such a simplistic assertion is that it contradicts centuries of practice during which governments, courts, and others have, for one reason or another, found and applied rules of international law.” *Id.* A notorious critic of international jurisprudence, John Austin, asserted in 1832 that, without an international sovereign to enforce it, it was “improper” to refer to it as law as it was really “a form of mere ‘morality.’” *Id.* at 2-3.

¹⁰³ See discussion *supra* Part II.A. and Part II.C.; see also FINCH, *supra* note 30, at 19-21. Pufendorf, a naturalist, outright “rejected [custom] . . . as unsuited to serve as the source of the universal law of nations because of its inconsistencies and differences among many people . . .” FINCH, *supra* note 30, at 19. In 1883, Scotchman James Lorimer, “defined international law as ‘the law of nature realized in the relations of separate nations’ . . . [he believed it necessary] to place international law on deeper and more stable foundations than comity or convention . . .” *Id.* at 20-21. His views were largely adopted by Sir Henry Sumner Maine who lectured on natural law at Cambridge University in 1887. *Id.* Maine disagreed with Pufendorf’s contention that the natural state of man was at peace, believing instead that “mankind started from a condition of innocent peace which was . . . transformed by man’s depravity into virtually universal and unceasing war.” *Id.* at 21.

view¹⁰⁴ of the law or, like Vattel, viewed international law as a compilation of both.¹⁰⁵ Even those who adopted both natural law and positive law did so with varying emphasis and interpretation.¹⁰⁶

Theorists adopting a “positivist” view placed different weights on the role of the three types of positive international law (conventional, customary, and voluntary) identified by Vattel.¹⁰⁷ Conventional law, requiring actors take deliberate, express actions to form CIL, was the most common and accepted form of international law.¹⁰⁸ Usually manifested in the form of treaties, conventional law was embraced by jurists and treatise writers as a means of establishing, defining, revising, or avoiding international law.¹⁰⁹

¹⁰⁴ See discussion *supra* Part II.A, D; see also FINCH, *supra* note 30, at 20. In 1849, Englishman Richard Wildman “denied categorically that the law of nature forms any part of international law.” FINCH, *supra* note 30, at 20. He believed the rules imposed under natural law “are fit to inform the conscience of statesmen, but not to define international rights.” *Id.* (quoting 1 RICHARD WILDMAN, INSTITUTES OF INTERNATIONAL LAW 4 (London, William Benning & Co. 1849)).

¹⁰⁵ See 1 H.W. HALLECK, INTERNATIONAL LAW; OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR (H. H. Bancroft & Co. 1861) (referencing the works of Grotius, Phillemore, and Vattel); see, e.g., WHEATON, *supra* note 34, at 9-18. Wheaton cites the works of Bynkershoek, Grotius, James Madison, Puffendorf, Christian Wolff and Wilhem Heffter and notes both Vattel and Wolff saw natural law as something “immutable . . . [that is both] necessary and indispensable, [and] nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it.” *Id.* at 12. Whereas, another theorist, Leibniz, claimed that “[t]he basis of international law is natural law, which has been modified according to times and local circumstances.” *Id.* at 16; FINCH, *supra* note 30, at 23. There is common agreement amongst modern scholars that the natural law is a product of Roman civil law, *jus feziale* or *jus gentium*, and the canons of the Catholic Church; nevertheless, the sacrosanct nature of natural law is often disputed. *Id.*

¹⁰⁶ See HALLECK, *supra* note 105, at 42-62; see also FINCH, *supra* note 30, at 23-25 (noting that Grotius did not adopt natural law to the exclusion of positive law, and Wolff, a follower of Grotius, identified the same four types of international law and manners of creation identified by Vattel); WHEATON, *supra* note 34, at 3-20.

¹⁰⁷ See WHEATON, *supra* note 34, at 7-21.

¹⁰⁸ See *infra* notes 122-24 and accompanying text; see also Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter I.C.J. Statute] (ranking international agreements, such as treaties, first in the accepted listing of the sources of international law).

¹⁰⁹ See WHEATON, *supra* note 34, at 20-21. Wheaton includes treaties as one of his six sources of international law. He also cites: (1) text-writers of authority, (2)

Theorists agreed that international customary law was created by the implied consent of “civilized” nations;¹¹⁰ rationalizing the close geographic proximity of the affected nations provided actual or constructive notice of the custom.¹¹¹ This implicit consent accorded customary law the same weight in the international community as common law held in municipalities.¹¹² Henry Wheaton, a noted American international law theorist, contended that written decisions “drawn from the usages and practices of the people, and from reason and policy . . . [are] the highest evidence of what the law is.”¹¹³

A contemporary of Wheaton, Henry Halleck emphasized the importance of the reliability of customary law.¹¹⁴ He also recognized the scholarly confusion created by Vattel’s use of the term “voluntary.”¹¹⁵ Throughout his 1861 treatise, Halleck attempted to clarify Vattel’s meaning and preempt scholarly mischaracterization of voluntary law as one to which a country *may* voluntarily submit instead of one where its consent was *presumed*.¹¹⁶ Halleck noted evidence of such mischaracterization

ordinances of particular States (regarding admiralty rules), (3) adjudications of international tribunals, (4) written opinions of official jurists (given in confidence to their own governments) and (5) history (of wars, negotiations, and public transactions/treaties). *Id.* at 20-23. *But see* FINCH *supra* note 30, at 19 (“[B]ut if any custom is based upon the natural law, it has far more dignity than if its origin is based upon the simple agreement of nations” (citing PUFENDORF, *supra* note 30)).

¹¹⁰ *See generally* HALLECK, *supra* note 105 (articulating this conception of customary law); VATTEL, *supra* note 1; WHEATON, *supra* note 34.

¹¹¹ *See* WHEATON, *supra* note 34, at 12. The majority of theorists, such as Vattel, originally wrote about the international law between the nations of Europe. The United States, as a colony and eventually as a sovereign nation, adopted these same customs, thus becoming one of the “civilized” nations. *See* FINCH, *supra* note 30, at 43 (referencing the dicta from the ICJ in the *Asylum* case in 1950 acknowledging that “some customary international law may be determined to be merely regional . . .”).

¹¹² *See* WHEATON, *supra* note 34, at 13.

¹¹³ *Id.* at 23; *see also* Dodge, *supra* note 7, at 180-82.

¹¹⁴ *See* HALLECK, *supra* note 105.

¹¹⁵ *See id.* at 49. Halleck notes that Vattel’s terminology “has been objected to by some as improper, and calculated to confuse rather than to elucidate the subject.” FINCH, *supra* note 30, at 37. Henry W. Halleck was trained as an army commander at West Point. *Id.* This training and his “distinguished career in the United States Army” prior to becoming chief of staff to President Lincoln, offered a valuable perspective to his 1861 treatise on *International Law*. *Id.*

¹¹⁶ *See* HALLECK, *supra* note 105, at 50. In one such attempt, Halleck identified one

between the first edition of Wheaton's treatise published in 1836 and later editions.¹¹⁷ Wheaton's choice to quote seventeenth century positivist Bynkershoek exemplified his evolving positivist view of international law: "The law of nations is only a presumption founded upon usage, and every such presumption ceases the moment the will of the party is declared to the contrary."¹¹⁸

Many academics and courts adopted this change in perception throughout the nineteenth century as nations struggled with which, if any, sources of international law were "binding."¹¹⁹ The Christian and humanitarian principles of natural law—the foundation of international law for treatise writers of the seventeenth and eighteenth centuries—dissipated during the nineteenth century as the expansion of colonialism and its inherent notions of moral supremacy took hold.

A. Customary Law and Colonialism

Bradley and Gulati contend that a shift from the Default View

of the same Vattel quotations cited by Bradley and Gulati. *See supra* note 82 and accompanying text. Paradoxically, whereas Bradley and Gulati interpret Vattel's writing as support for a unilateral withdrawal, Halleck interpreted it to reiterate the necessary limits that must be imposed on nations who want to unilaterally withdraw from international custom. *Compare* HALLECK, *supra* note 105, at 49 ("The foregoing remark of Vattel, that the customary law of nations may be varied or abandoned at pleasure, such variation or abandonment being previously notified, must be limited to the peculiar customs of particular states in their intercourse with other nations, and cannot be applied to general law, or what he calls the voluntary law of nations, which is founded on general usage or implied consent"), with *Withdrawing*, *supra* note 3, at 217 ("Thus, according to Vattel, a customary rule of international law was bidding on nations that had tacitly accepted it, but these nations nevertheless had an ability to opt out of the rule if they later found it to be disadvantageous, so long as they gave advance notice of their intention."); *see also* William S. Dodge, *Customary International Law, Congress, and the Courts: Origins of the Later-in-Time Rule* 4 (Sept. 15, 2009), available at <http://ssrn.com/abstract=1474037> [hereinafter *Later-in-Time Rule*]

¹¹⁷ HALLECK, *supra* note 105, at 49. Wheaton adopted Vattel's trilogy of positive international law in his first edition, he later characterized "voluntary law" as equivalent to what Vattel deemed "positive law." *See* WHEATON, *supra* note 34, at 13; *see also* Dodge, *supra* note 7, at 181 (noting Wheaton's increasing criticism of Vattel in subsequent editions).

¹¹⁸ WHEATON, *supra* note 34, at 10. Wheaton designates "voluntary law" as the *genus* of all positive international law and customary law and conventional law, both of which require an affirming action on the part of the sovereign, as the *species*. *Id.* at 13.

¹¹⁹ *See Later-in-Time Rule*, *supra* note 116, at 14.

to the Mandatory View occurred in the implementation of CIL between the publishing of Vattel's treatise and the turn of the twentieth century.¹²⁰ In *Withdrawing*, Bradley and Gulati attempted to identify the underlying forces causing this perceived shift by briefly exploring two theories: the philosophical shift from natural law to positivism and the effect of colonialism on CIL.¹²¹ By examining these theories in their historical context, it becomes apparent that elements of both theories form the pilings of the bridge spanning from eighteenth century to modern understandings of CIL.

Bradley and Gulati effectively dismissed the first theory—the philosophical shift from natural law to positivism—for two reasons: (1) the presence of positivist sentiments in court opinions prior to the end of the nineteenth century; (2) and the inherent nature of positivism that requires every law be posited by a society with a governing authority to enforce the law.¹²² As previously noted, however, philosophers were already debating the merits of positivism and naturalism when considering the origin of international law in the eighteenth century.¹²³ Furthermore, evidence of previous recognition of positivism should not discount the deliberate choice by treatise writers of the nineteenth century to embrace Bynkershoek and the positivist aspects of Vattel's treatise rather than the naturalist writings of Grotius and Pufendorf.¹²⁴

As academics and jurists wrestled with applying the Law of Nations, especially when it conflicted with their own social, political, or cultural values, a dualist approach to international law

¹²⁰ See *Withdrawing*, *supra* note 3, at 226-28 (“It is difficult to know precisely when the shift to the Mandatory View occurred. . . . Absent other evidence, the date of the publication of Oppenheim's treatise—1905—might seem like a reasonable date for making the shift in the literature towards the Mandatory View.”). *But see* Dodge, *supra* note 7, at 184 (discounting the evidence advanced by Bradley and Gulati documenting a shift to the Mandatory View).

¹²¹ See *Withdrawing*, *supra* note 3, at 229-32 (stating they find one theory “implausible” and the other “plausible but normatively unattractive.”).

¹²² See *id.* at 229-30; see also *Later-in-Time Rule*, *supra* note 116, at 19 (“The shift from natural law to positivism during the nineteenth century might well have undermined the idea that there could be any binding rules of customary international law at all.”).

¹²³ See *supra* note 100 and accompanying text.

¹²⁴ See WHEATON, *supra* note 34, at 8-10.

emerged.¹²⁵ Acceptance of this dualist perspective allowed the Law of Nations to be viewed as a “floor, rather than a ceiling,”¹²⁶ encompassing only those rules to which all nations agree to be bound.¹²⁷ Combining natural and positive law in various fashions provided substantial arguments to justify the imposition of CIL on the colonies of the imperialists.¹²⁸

In *Mandatory*, Bradley and Gulati placed greater weight on the role of colonialism as a factor causing a perceived shift from the Default View to the Mandatory View and related the gradual shift in perception to the explosion of colonialism at the end of the century.¹²⁹ If *civilized* nations altered their conceptualization of CIL during the height of colonial expansion, then the political realities and philosophical beliefs of those nations are relevant. Arguably, they are not germane to understanding the past, but they are material to evaluating a proposal allowing unilateral withdrawal in the twenty-first century.¹³⁰

¹²⁵ See FINCH, *supra* note 30, at 26-27. In conflicts between “concepts based upon the law of nature and principles flowing from the theory of the consent of nations . . . natural law theories usually are subordinated to the more pressing demands of material considerations.” *Id.* at 26. To exemplify this point the author references Chief Justice Marshall’s words in *The Antelope*, “proclaiming the equality of states and the legal corollary that no nation can make law except for itself” as justifying the return rather than freeing of captured slaves to Spain. *Id.* at 27; see also discussion *infra* Part IV.B.

¹²⁶ See *supra* note 27 and accompanying text.

¹²⁷ See JANIS, *supra* note 32, at 85. “Dualism” pervades modern legal theory viewing municipal and international legal systems “as separate and discrete entities, each with its own power to settle the effect any rule of law might have within it.” *Id.* Contrary to dualism is the “monist” approach, which “views the international legal order and all national legal orders as component parts of a single ‘universal legal order’ in which international law has a certain supremacy.” *Id.* at 85-86 (referencing H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW*, 553-588 (2d ed. Tucker 1966)); see also *Later-in-Time Rule*, *supra* note 116, at 19.

¹²⁸ See Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 2-3 (1999).

¹²⁹ Compare *Mandatory*, *supra* note 12, at 436 (declining to advance the argument that “the desire of the Western nations to further their imperial agendas provides the only explanation” but recognizing “there are strong reasons to believe that . . . it suited the [interests of] colonial purposes . . . to have the uncivilized world included.”), with *Withdrawing*, *supra* note 3, at 231 (denying that colonialism provided any “normative justification for adhering to the Mandatory View . . . in a postcolonial world made up of nearly two hundred heterogeneous nations”).

¹³⁰ See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 100-05* (2004). Prior to the nineteenth century, treatise writers

B. *The Law of Civilized Nations*

Given that the origins of the Law of Nations were Roman law and the canons of the Catholic Church, it is not surprising that classicists distinguished between civilized and uncivilized nations when determining to whom the Law of Nations applied.¹³¹ The civilized nations referenced by Vattel and his predecessors were those comprising the European community.¹³² Other, uncivilized nations, were outside the confines of this community and were recognized as having their own sets of governing laws.¹³³ Another essential element of international law recognized in every treatise is the absence of an international sovereign to enforce the laws governing the interactions between states.¹³⁴ Thus, CIL was “enforced not by the use of the axe or the scimitar, the knout or the bayonet, but by the public opinion of the community.”¹³⁵ If the only sanctions inflicted by the civilized European community of the eighteenth century on violators were social ostracism or war, then logically mutual respect for one’s neighbors must have been intrinsic to the Law of Nations prior to the 1870s.¹³⁶

used the term “sovereign” to refer exclusively to European nations. When the European nations began to colonize other nations, it became necessary to differentiate between these other nations and the colonizing “sovereign” nations. In order to do so, the colonizing nations used terms such as “uncivilized,” “barbaric,” and “savages,” however, the sovereignty of these colonized or conquered nations was of importance when there was a need “to transfer title, to grant rights – whether trading, to territory, or to sovereignty itself.” *Id.* at 105.

¹³¹ See FINCH, *supra* note 30, at 23 (“The Roman *jus gentium* was called the law of nations, not in the sense in which the term international law is now used to denote the principles governing the relations between nations, but as being based upon the principles of good faith and equity which underlay and were recognized in the particular law of each community.”); see also WHEATON, *supra* note 34, at 9-19.

¹³² See JANIS, *supra* note 32, at 55.

¹³³ See also *infra* note 137 and accompanying text (referencing Wheaton’s quote of Charles-Louis de Secondat, baron de la Bréde et de Montesquieu).

¹³⁴ WHEATON, *supra* note 34, at 3 (“[N]o legislative or judicial authority . . . [exists to] regulate the reciprocal relations of States.”); see, e.g., VATTEL, *supra* note 1; HALLECK, *supra* note 105.

¹³⁵ FINCH, *supra* note 30, at 45 (referencing the writings of Dr. Thomas A. Walker, author of the *Science of International Law* published in 1893); see also WHEATON, *supra* note 34, at 8. Any *civilized* nation that chooses to violate the Law of Nations also “chooses to incur the risk of retaliation or hostility, these being the only sanctions by which the duties of international law can be enforced.” WHEATON, *supra* note 34, at 8.

¹³⁶ See generally FINCH, *supra* note 30, at 46 (“In pointing out the need of popular

A contemporary of Vattel, French philosopher Charles-Louis de Secondat, baron de la Brède et de Montesquieu (“Montesquieu”), clearly stipulated that the Law of Nations was particular to a subset of civilized nations, while other uncivilized nations had their own binding laws.¹³⁷ Although the laws of the uncivilized nations were recognized, the superiority of the Law of Nations was axiomatic among the civilized nations at the end of the nineteenth century.¹³⁸ This notion of moral and intellectual supremacy, similar to that which was vehemently upheld in the seventeenth century by Grotius on the supremacy of natural law, fueled the expansionist political desires of the sovereigns.¹³⁹

C. Bringing The Law of Civilized Nations to the Uncivilized

During the height of colonial expansion, the natural law or voluntary law protections that would have been mandated to civilized nations under Vattel’s principles were not accorded to the uncivilized nations that were the objects of conquest in Africa and the Far East.¹⁴⁰ There is no evidence of any “critic[ism] or even suspicio[n] of official colonialism” in the international law treatises of the 1800s; rather, these treatises upheld the belief that civilized nations had the “right to extend their settlement and

understanding of international law, . . . [The Honorable Elihu Root, the first president of the American Society of International Law] remarked: ‘In every civil community . . . the true basis of the peace and order in which we live is not fear of the policeman; it is the self-restraint of the thousands of people who make up the community and their willingness to obey the law and regard the rights of others . . . it is the voluntary observance of the rules and obligations of business life which are universally recognized as essential to business success.’”

¹³⁷ See WHEATON, *supra* note 34, at 16 (“[E]very [group of sovereign] nation[s] has a law of nations – even the Iroquois, who eat their prisoners, have one.”).

¹³⁸ See FINCH, *supra* note 30, at 24-25. A disciple of Grotius, Christian Wolff (1679-1754), “contended that the totality of states forms a world state, the so-called *civitas gentium maxima*, above the component member states.” *Id.* Wolff viewed this world state as having the ability to “tacitly impose” voluntary laws upon the member states. *Id.* at 25; see also ANGHIE, *supra* note 130, at 1.

¹³⁹ Brophy, *supra* note 26 (“[B]y the late nineteenth century, we had a sense that we had figured out the best rules and wanted to impose them everywhere” and “part of the ‘civilizing’ mission was to bring western values like the market and Christianity to far off lands.”).

¹⁴⁰ See ANGHIE, *supra* note 130, at 85; see also discussion *supra* Part II.D (according respect to all human beings under natural law and protection of the safety and welfare of citizens under voluntary law).

authority by discovery and effective occupation in new countries.”¹⁴¹ Furthermore, little attention was drawn to or criticism rendered against the actions taken by the European powers against the native inhabitants of the colonies—actions that were clearly contrary to the laws between sovereigns according to the Law of Nations.¹⁴²

When colonizing uncivilized nations, the imperialists attempted to rectify what they viewed as anarchy by replacing indigenous political governments with European models and imposing the established Law of Nations on the colonies.¹⁴³ A map of Africa during the height of European colonization demonstrates the arbitrariness of the geographic locations of the colonies and the myriad of European imperialists.¹⁴⁴ As Bradley and Gulati contend, this transplantation of the European Law of Nations into the uncivilized nations of the world offers a practical explanation for the perceived shift to the Mandatory View.¹⁴⁵ Extending the civilized Law of Nations to their colonies was not only pragmatic, but also necessary, as European citizens, armies, and diplomats were regularly traveling through the colonies of other European sovereigns and entering into commercial transactions with uncivilized colonists.

The impact of the imperialists’ extension of the Law of Nations to their colonies continued even after decolonization.¹⁴⁶ International law that once applied exclusively to the small, tight-knit European community was now ostensibly afforded the same

¹⁴¹ MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, 116 (2002); see also *Mandatory*, *supra* note 12, at 435.

¹⁴² See KOSKENNIEMI, *supra* note 141, at 166; see also *Mandatory*, *supra* note 12, at 436.

¹⁴³ See KOSKENNIEMI, *supra* note 141, at 166.

¹⁴⁴ *Imperialism in Africa on the Eve of WWI*, W.W. NORTON & CO., <http://www.wwnorton.com/college/history/ralph/resource/impaftr.htm> (last visited Jan. 13, 2012).

¹⁴⁵ See *Mandatory*, *supra* note 12, at 435-36.

¹⁴⁶ See FINCH, *supra* note 30, at 25 (quoting Chancellor James Kent, an early commentator on American law regarding the United States assimilation into the European Family of Nations, who wrote, “when the United States ceased to be a part of the British Empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe, as their public law.”).

deference throughout the new civilized world.¹⁴⁷ For various reasons many countries that were not colonized eventually chose to ratify treaties and adopt CIL.¹⁴⁸ Conversely, some independent uncivilized sovereigns were forced by Western powers to adopt particular aspects, such as “diplomatic and commercial intercourse,” of CIL thought to be universally binding.¹⁴⁹

IV. Supreme Court Decisions

While the majority of colonial expansion in Africa and the Far East was the product of actions taken by Europeans, the United States wrestled with many of the same expansion issues within its own borders against the “savage” natives.¹⁵⁰ Evolving in its own self-perception from colony to empire, Supreme Court dicta began to espouse a dualistic view of the responsibility of the United States to enforce international law.¹⁵¹ In *Withdrawing*, Bradley and Gulati referenced these dicta as evidence of the shift from the Default to the Mandatory View.¹⁵² Although supportive of their premise, the excerpted dicta often deviated from the overriding spirit of the Court’s decision and ultimate holdings.¹⁵³

Recognizing the undisputed influence of Vattel’s treatise on early Supreme Court decisions,¹⁵⁴ this article reexamines Bradley

¹⁴⁷ See ANGHIE, *supra* note 130, at 195 (“Decolonization effectively universalized the European State as the only form of government that would provide equal status in the organized international community supported the powerful claim that international law had finally become, for the first time, truly universal.”).

¹⁴⁸ Timothy Webster, *Insular Minorities: International Law’s Challenge to Japan’s Ethnic Homogeneity*, 36 N.C. J. INT’L L. & COM. REG. 557, 558-59 (2011) (stating Japan’s motivation for ratifying treaties and adopting CIL).

¹⁴⁹ FINCH, *supra* note 30, at 56 (noting in the mid-nineteenth century, Western powers forced China and Japan to engage in “diplomatic and commercial intercourse.”); see also *Mandatory*, *supra* note 12, at 437.

¹⁵⁰ See generally discussion *infra* Part IV.C.

¹⁵¹ See Dodge, *supra* note 7, at 176-78.

¹⁵² See *Withdrawing*, *supra* note 3, at 219-26 (“Early U.S. Supreme Court decisions . . . envisioned that CIL rules were binding only on nations that continued to accept them”). Bradley and Gulati’s article cites dicta in various cases decided by the U.S. Supreme Court throughout the latter half of the eighteenth century and throughout the nineteenth century such as *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), *The Schooner Exchange*, 11 U.S. (7 Cranch) 116 (1812), and ending with *The Paquete Habana*, 175 U.S. 677 (1900). *Id.*

¹⁵³ See discussion *infra* Parts IV.A, B, D; see also Dodge, *supra* note 7, at 179.

¹⁵⁴ See *Withdrawing*, *supra* note 3, at 219 n.68; see also FINCH, *supra* note 30, at 25.

and Gulati's analysis of the Court's application of Vattelian principles in three decisions.¹⁵⁵ By focusing on the holdings, rather than mere dicta, the Court's conceptualization of the Law of Nations in the nineteenth and early twentieth centuries becomes evident, as does its rejection of unilateral withdrawal from CIL.

A. The Schooner Exchange¹⁵⁶

In 1812, the Supreme Court decided *The Schooner Exchange v. McFaddon & Others*.¹⁵⁷ The Court dismissed the libel suit, brought by individuals against another sovereign nation, France, and upheld sovereign immunity as understood and applied through the Law of Nations.¹⁵⁸ As was typical of the beginning of the eighteenth century, the dicta in this decision vacillated between naturalist and positivist sentiments.¹⁵⁹ Within the same sentence, Chief Justice Marshall espoused both the "equal rights and equal independence" of each sovereign throughout the world and the "absolute and complete jurisdiction within their respective territories which sovereignty confers."¹⁶⁰ Marshall enumerated rights conferred on sovereigns, arguably based in Vattel's voluntary law, and explained that a breach of these rights would violate "privileges which are essential to the dignity of his sovereign."¹⁶¹

Whereas Bradley and Gulati emphasized the positivist aspect of the Court's dicta,¹⁶² Marshall's voluntary reasoning undergirded the Court's analysis.¹⁶³ For example, Marshall contended that

¹⁵⁵ See discussion *infra* Parts IV.A - D. For example *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), exemplifies the disparate application of the Law of Nations by the United States to disputes between civilized sovereigns and disputes between a civilized nation and an uncivilized nation.

¹⁵⁶ 11 U.S. (7 Cranch) 116 (1812).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 147.

¹⁵⁹ See *Later-in-Time Rule*, *supra* note 116, at 23.

¹⁶⁰ *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136.

¹⁶¹ *Id.* at 139. *But see* Dodge, *supra* note 7, at 177-79 (discussing other decisions in which the Court questioned voluntary withdrawal from the Law of Nations).

¹⁶² See *Withdrawing*, *supra* note 3, at 220-23.

¹⁶³ *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 137-38 (1812) ("Why has the whole civilized world concurred in this construction?"); see also *Later-in-Time Rule*, *supra* note 116, at 13. There are two tenets of international law that appear at odds in this case—the absolute jurisdiction of a sovereign within his own borders and sovereign

allowing nations to opt out with notice of granting sovereign immunity would deny a sovereign security on which his country depends and “subject him to jurisdiction incompatible with his dignity, and the dignity of his nation”¹⁶⁴ Although Marshall acknowledged positivist ideals in dicta, the Court upheld the Law of Nations without requiring a separate act of the legislative or executive branches.¹⁶⁵

B. The Antelope¹⁶⁶

Another Supreme Court case cited by Bradley and Gulati, *The Antelope*, confronted the same issues of naturalism and positivism.¹⁶⁷ Decided in 1825, Chief Justice Marshall again deferred to the Law of Nations regarding the slaves found aboard the captured vessel, contrary to the vehement arguments of Francis Scott Key and Attorney General William Wirt.¹⁶⁸ Marshall logically bifurcated the conflicting issues of morality and legality when deciding the fate of the human cargo.¹⁶⁹

immunity. See *The Schooner Exchange*, 11 U.S. (7 Cranch) at 138 (absolute jurisdiction of a sovereign within his own borders). The appellees argue under the first tenet while the government argues under sovereign immunity. *Id.* at 117-19. Marshall crafts a response that recognizes both, but crafts it with a positivist stance that changes the voluntary law of sovereign immunity into customary law because it was endorsed by the United States. See *id.* at 118-47.

¹⁶⁴ *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137.

¹⁶⁵ *Id.* at 147.

¹⁶⁶ 23 U.S. (10 Wheat.) 66 (1825).

¹⁶⁷ *Withdrawing*, *supra* note 3, at 229, n.110.

¹⁶⁸ *The Antelope*, 23 U.S. (10 Wheat.) at 66-114. At first glance, the sheer volume of pages dedicated to including the arguments made by opposing counsels demonstrates the significance placed on the decision by the abolitionists. Marshall’s word choice in the first paragraph of the opinion provides insight into the moral dilemma faced by the Court. He points out that the United States:

[A]ppear[s] in the character of guardians, or next friends, of these Africans, who are brought, without any act of their own, into the bosom of our country

[Whereas] [t]he Consuls of Spain and Portugal . . . demand these Africans as slaves, who have, in the regular course of legitimate commerce, been acquired as property by the subjects of their respective sovereigns, and claim their restitution under the laws of the United States.

Id. at 114.

¹⁶⁹ *Id.* at 121. “Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution in those principles of action” *Id.*; see also ANGHIE, *supra* note 130, at 44 (noting the necessity of separating law from morality to positivist

In his moral perspective, Marshall extolled the naturalist perception of the equal dignity and sovereignty of all nations and ascribed to the undeniable claim that slavery violated the law of nature.¹⁷⁰ Nonetheless, as previously noted, these internal obligations did not, by their nature, give the United States the right to compel compliance.¹⁷¹ The country could only do so through a mutual agreement binding each nation.¹⁷² As no statutes existed for guidance, Marshall assigned the jurist the (positivist) task of “search[ing] for [the] legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part”¹⁷³ It was from these observations that he concluded that although slavery was morally contrary to the law of nature, it did not legally violate the Law of Nations.¹⁷⁴

Bradley and Gulati emphasize Marshall’s statement: “No principle of general law is more universally acknowledged, than the perfect equality of nations. . . . It results from this equality, that no one can rightfully impose a rule on another.”¹⁷⁵ When viewed in isolation, this notion could be interpreted as supportive of a country’s right to unilaterally withdraw from CIL. Nonetheless, the reasoning advanced by the Court emphasized a sovereign’s reliance on CIL and the equality of sovereign nations. In search of the legal standard, Marshall looked to the actions of both civilized and uncivilized nations to determine the appropriate standard.¹⁷⁶ Marshall found that civilized countries were not in a

jurists of the nineteenth centuries).

¹⁷⁰ See *id.* at 120-22. “That [the slave trade] is contrary to the law of nature will scarcely be denied.” *Id.* at 120.

¹⁷¹ See Vattel, *supra* note 1, at prelim. § 17 (stating perfect rights give one state the right to compel another to fulfill an obligation).

¹⁷² See *id.* (stating that imperfect rights only give one the right to request compliance).

¹⁷³ *The Antelope*, 23 U.S. (10 Wheat.) 66, 121 (1825); see also *Later-in-Time Rule*, *supra* note 116, at 16.

¹⁷⁴ See *The Antelope*, 23 U.S. (10 Wheat.) at 120-21 (“Slavery, then, has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent, cannot be pronounced unlawful.”).

¹⁷⁵ *Id.* at 122.

¹⁷⁶ See *id.* at 120-121. For a modern explanation of how jurists determine the general principals of law, see JANIS, *supra* note 32, at 56. An exercise in comparative law is the search for evidence of precedent in other foreign jurisdictions that has

position to condemn slavery because they had engaged in the practice in the past.¹⁷⁷ Even though many civilized countries had agreed, by treaty, to abstain from the slave trade, the Law of Nations prohibited them from compelling other sovereigns to abstain likewise.¹⁷⁸ As the Law of Nations only provided a floor, the international slave trade was not prohibited by it.¹⁷⁹

The reality of the holding in *The Antelope*, despite the positivist dicta, was that although the United States opposed the international slave trade, imposing domestic law on other sovereign nations would violate the Law of Nations.¹⁸⁰ In this instance, Francis Scott Key and the Attorney General were arguing for precisely the opt out rule proposed by Bradley and Gulati.¹⁸¹ Hoping the treaties would give notice that the United States no longer supported the international slave trade, they wanted the Court to opt out and free the slaves from the ship; however, the Law of Nations dictated that no nation could prescribe a rule for other nations.¹⁸² A fortiori, no country has the right to unilaterally opt out and begin to enforce its own domestic law on another sovereign—even with notice. Such an action would arguably have been seen as uncivilized because “no civilized nation . . . [would] arrogantly . . . venture to disregard the uniform sense of the established writers of international law.”¹⁸³

Since the argument to allow for unilateral withdrawal from CIL was originally rejected when made by abolitionists to save human beings from the cruelties of slavery, it becomes difficult to

persuasive value to international jurists. *Id.* This process is similar to the process engaged in to discover non-binding precedent in municipal law from other jurisdictions. *Id.*

¹⁷⁷ See *The Antelope*, 23 U.S. (10 Wheat.) at 121 (“Can those who have themselves renounced this law, be permitted to participate in its effects by purchasing the beings who are its victims?”).

¹⁷⁸ See *id.*

¹⁷⁹ *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825) (“[T]his traffic remains lawful to those whose governments have not forbidden it.”).

¹⁸⁰ See *id.*

¹⁸¹ See *id.* at 122-23.

¹⁸² See *id.* at 122. Had the Court applied U.S. municipal law and released the slaves, then it would effectively have sanctioned the imposition of its own law on Spain, which lawfully continued to engage in the slave trade.

¹⁸³ FINCH, *supra* note 30, at 32 (quoting Chancellor Kent’s Commentaries).

imagine other scenarios in which it might be deemed appropriate. Similar to the contemporary interpretation of CIL, countries that disagreed with the Law of Nations had the right to create contrary laws, but these laws were only applicable within its own borders and only to affect its own citizens.¹⁸⁴ Countries could induce others, by treaty, to mutually to relinquish a right established by CIL and then hold each other accountable to the terms of the treaty.¹⁸⁵ This same process, originally outlined by Vattel in order to create a perfect right from an imperfect one—continues to be applicable to modern CIL.

C. *Johnson v. M'Intosh*¹⁸⁶

Bradley and Gulati do not cite *Johnson v. M'Intosh*; nevertheless, the opinion, issued just two years prior to *The Antelope*, illustrates the effect of colonialism on CIL implementation and offers another perspective on the historical evolution of the CIL.¹⁸⁷ It merits noting that the parties in *The Antelope* were equal sovereigns: the United States, France, Spain, and Portugal (the African slaves were mere property to be allocated appropriately).¹⁸⁸ This becomes a material fact when applying the Court's reasoning in *Johnson v. M'Intosh* to two unequal sovereign nations.

Johnson v. M'Intosh addressed whatever the Native Americans had the right to grant title to land and if such title would be recognized in U.S. courts.¹⁸⁹ Originally, colonial law allowed colonists to purchase land directly from the Native Americans as equal sovereigns.¹⁹⁰ Although as the eighteenth century progressed, the colonists evolving perception of the Native

¹⁸⁴ See *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825).

¹⁸⁵ *Id.*

¹⁸⁶ 21 U.S. (8 Wheat.) 543 (1823).

¹⁸⁷ *Id.*

¹⁸⁸ See *The Antelope*, 23 U.S. (10 Wheat.) at 67.

¹⁸⁹ See *Johnson*, 21 U.S. (8 Wheat.) at 543. The plaintiffs in the case had title to tracts of land legally purchased from the Chiefs of the Illinois and Piankeshaw nations fifty years earlier. *Id.* at 550-53. The defendant was a strawman, supported by a group of land speculators, who purchased a single tract of land from the federal government that overlapped the land of the plaintiffs. See *id.* at 560; see also STUART BANNER, HOW THE INDIANS LOST THEIR LAND 52 (2009).

¹⁹⁰ See BANNER, *supra* note 189, at 28.

Americans as unequal sovereigns became increasingly evident; and, was evidenced in the 1763 Proclamation. The Proclamation of 1763 which “marked the first time the imperial government treated Native American and English landowners in such a systematically disparate fashion.”¹⁹¹ Despite the Proclamation, U.S. government officials still considered the land not yet purchased by the federal government as belonging to the Native Americans as late as the 1790s.¹⁹² However, by 1807, there was a documented shift in legal thought; the Native Americans no longer retained an ownership interest in the land but merely a possessory right.¹⁹³ By the time *Johnson v. M’Intosh* was decided in 1823, the transformation from equal to unequal sovereigns was complete. The Marshall Court purported “they were simply following the rule laid down by their English colonial predecessors, and that the Indians had *never* been accorded full ownership of their land.”¹⁹⁴

Similar to *The Antelope*, Marshall rationalized the decision balancing both naturalist and positivist sentiments.¹⁹⁵ Although the United States was one of the newest civilized nations, notions of moral supremacy inherent in colonial expansion were evident in Marshall’s justification of the holding under the doctrines of Discovery and Conquest.¹⁹⁶ Applying the Discovery Doctrine,

¹⁹¹ *Id.* at 94. At the conclusion of the war between France and Britain, the British drew an arbitrary line through the continent and temporarily banned settlement to the west of the line without specific approval from the Crown and ordered anyone already settled west of the line to move immediately. *Id.* at 92. To the “east of the newly established boundary, the proclamation banned private purchasing . . . and established that all land must be purchased only for the Crown . . . and prohibited secret purchases of land from individual Indians.” *Id.* at 93.

¹⁹² *See id.* at 169.

¹⁹³ *See id.* (referencing *Strother v. Cathey*, 5 N.C. 162 (1807) (involving the Cherokee tribe)).

¹⁹⁴ *See id.* at 150 (emphasis included in original).

¹⁹⁵ *See Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 572 (1823).

[I]t will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

Id.

¹⁹⁶ *Id.* at 569.

Marshall contended the Native Americans were not the rightful owners of their land.¹⁹⁷ The Law of Nations afforded the discovering nation not only a territorial right to the entire land, both occupied and vacant, but also freedom to govern the natives without censure from fellow sovereigns.¹⁹⁸ Alternatively, Marshall applied the Conquest Doctrine, explaining that what once began as a discovery had evolved into a conquest; any title so obtained was justified.¹⁹⁹

Under either rationale, the Native Americans were deprived of the title to their land and were subjugated to retaining only a possessory interest that the sovereign could revoke at will.²⁰⁰ Marshall justified the use of force against the natives to maintain the title as necessary to encourage the assimilation of the natives into the new civilized culture.²⁰¹ The Law of Nations obligated the conquering nation to defend its citizens against any natives that continued to assert their independence or threaten the settlers and their families.²⁰² Because only public opinion of fellow civilized sovereigns could circumscribe the acts of the conqueror, there was no recourse available to the conquered natives.²⁰³

While this opinion applied two elements of Vattel's treatise, it evaluated the application solely from the perspective of the civilized nation. The perspective of the uncivilized nation was disregarded. *Johnson v. M'Intosh* confirmed the embarkation of the United States on the same "civilizing mission . . . [that]

¹⁹⁷ *Id.* at 573 (applying the longstanding customary agreement amongst European nations that "discovery gave title to the government by whose subjects, or by whose authority, it was made. . .").

¹⁹⁸ *See id.* at 595.

¹⁹⁹ *See id.* at 588 ("Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.").

²⁰⁰ *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 589 (1823).

²⁰¹ *See id.*

²⁰² *See Vattel*, *supra* note 1, at prelim. § 22. Vattel's universal voluntary law allows a sovereign to "resort to forcible means for the purpose of repressing any one particular nation who openly violates the laws of the society which nature has established between them, or who directly attacks the welfare and safety of that society." *Id.*; *see also Johnson*, 21 U.S. (8 Wheat.) at 566.

²⁰³ *See Johnson*, 21 U.S. (8 Wheat.) at 590 (noting that the only limitation placed on the conqueror, when instigated by the natives, was social reproach from fellow "civilized" sovereigns).

justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe.²⁰⁴ This approach to CIL application conformed to the actions of other nineteenth century imperialists.

Theoretically, the North American continent offered the natives and colonists the opportunity to form a Family of Nations similar to Europe.²⁰⁵ Initially, treaties were signed and title to property was exchanged between sovereigns who arguably, but mistakenly, viewed themselves as equals.²⁰⁶ The Proclamation of 1763, drawing an arbitrary division through the natives' land and restraining alienation, was the functional equivalent of one sovereign unilaterally opting out, with notice, from the CIL that previously dictated exchanges of property. While advantageous to the opting out member, it was undoubtedly to the detriment of those who had relied on established CIL.

D. The Paquete Habana²⁰⁷

As the United States began to emerge as a formidable force internationally, Americans felt less need to defer and succumb to international law.²⁰⁸ Consequently, a dualist perspective of international law emerged which satisfied the nationalism and moral relativism of the era.²⁰⁹ Justice Gray addressed these popular sentiments as he balanced the contradicting dicta in a previous decision and *The Paquete Habana's* holding affirming CIL.²¹⁰ Almost immediately, Gray defers to the "ancient usage

²⁰⁴ ANGHIE, *supra* note 130, at 3.

²⁰⁵ Similar to Vattel's Family of Nations, the natives and colonists could have developed an international law that was mutually binding.

²⁰⁶ See generally BANNER, *supra* note 189.

²⁰⁷ 175 U.S. 677 (1899).

²⁰⁸ See Alfred Brophy, *Bradley and Gulati and the Sine Curve of Customary International Law*, THE FACULTY LOUNGE (Jan. 31, 2010, 9:56 PM), <http://www.thefacultylounge.org/2010/01/bradley-and-gulati-and-the-sine-curve-of-customary-international-law.html>.

²⁰⁹ See *id.*

²¹⁰ See *The Paquete Habana*, 175 U.S. at 694-710. Like Chief Justice Marshal in *The Antelope* and *Johnson v. M'Intosh*, Justice Gray diligently lays out the historical justification for supporting the Law of Nations. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-590 (1823); see also *The Antelope*, 23 U.S. (10 Wheat.) 66, 114-125 (1825).

among civilized nations, beginning centuries ago . . . [that] gradually ripen[s] into a rule of international law . . .”²¹¹ He provided examples of seemingly foolish steps taken by civilized sovereigns during that history attempting to unilaterally opt out of established CIL, regarding treatment of private fishing vessels, the reproach and censure of their civilized neighbors, and their eventual decision to adhere to CIL.²¹²

In *Withdrawing*, Bradley and Gulati suggested that Gray’s extensive rationalization was necessary to justify a change from the Default View.²¹³ This premise has been challenged as contrary to issues of separation of powers and the accepted understanding in 1899 of the binding nature of CIL.²¹⁴ An alternative explanation is Gray’s recognition of the need to justify the Court’s position based on *stare decisis* and to validate “international law . . . [as] a part of our law”²¹⁵ in the midst of growing imperialist and expansionary fervor in the United States.²¹⁶ This need becomes evident when Gray’s opinion is juxtaposed against Chief Justice

²¹¹ *The Paquete Habana*, 175 U.S. 677, 686 (1899). Justice Gray recounts the historical application of this particular CIL rule, concerning the capture of small private fishing vessels, throughout European civilized nations during wartime. *Id.* at 686-700 (emphasis added).

²¹² *See id.* at 689-696. France and Britain seem to have been the greatest offenders during the wars surrounding the French Revolution with many dramatic pleas made to the international community to see the travesties of justice inflicted by one or the other. *Id.* at 689-92. Napoleon declared that this type of conduct “gave to the existing war a character of rage and bitterness which destroyed even the relations usual in a loyal war.” *Id.* at 692.

²¹³ *See Withdrawing*, *supra* note 3, at 215-16 (advancing the premise that previously nations viewed CIL “as binding only until such time as a nation adequately announced that it no longer intended to continue adhering to the rule”); *see also* Luban, *supra* note 4, at 160 (commenting on Bradley and Gulati’s “unsustainable” and “implausible” interpretation of the holding of *The Paquete Habana*).

²¹⁴ *See* Luban, *supra* note 4, at 151-52; *see also* Dodge, *supra* note 7, at 185.

²¹⁵ Luban, *supra* note 4, at 161.

²¹⁶ *See The Paquete Habana*, 175 U.S. 677, 710 (1899). For example, Justice Gray intentionally noted that the dicta

[M]ight seem inconsistent with . . . [the court’s position of] the duty of a prize court to take judicial notice of a rule of international law, established by the general usage of civilized nations. . . . But the actual decision in that case, and the leading reasons on which it was based, appear to us rather to confirm our position.

Id.

Melville Fuller's dissent grounded in the conflicting dicta from previous opinions.²¹⁷

The Paquete Habana offers insight into dual allegiances that must be considered by the jurists interpreting international law and the rationales that must be employed when justifying their decision to opposing constituencies.²¹⁸ With the pressure to opt out of the confines of international law mounting in 1899, a holding that supported previous dicta could have provided an escape hatch.²¹⁹ Rather than confront these larger questions, however, Justice Horace Gray's stoic approach first returned to the poor, humble fishermen and how civilized humanity has chosen to deal with them throughout the centuries.²²⁰ Demonstrative of scholarly support of his position, Chancellor James Kent's quote sought to shame any "civilized nation" that would "arrogantly set all ordinary law and justice at defiance . . . [by] ventur[ing] to disregard the uniform sense of the established writers on international law."²²¹ Echoing the sentiments of Chief Justice Marshall and quoting Justice William Strong's opinion in *The Scotia*,²²² Justice Gray acknowledged the larger scope of CIL and its value in the modern world.²²³ Although *The Paquete Habana*

²¹⁷ *Id.* at 715 (Fuller, C.J., dissenting). In his dissent, Chief Justice Fuller uses dicta from Chief Justice Marshall to argue that CIL "is a guide which the sovereign follows or abandons at his will. . . . It is not an immutable rule of law, but depends on political considerations which may continually vary." *Id.*

²¹⁸ See ANGHIE, *supra* note 130, at 101. "The conundrum presented by this model of sovereignty that lacks an overarching sovereign who can authoritatively articulate and enforce the relevant continues to raise the question of why sovereign states obey, or should obey, international law." *Id.* (emphasis added); see generally JANIS, *supra* note 32, at 85 (explaining the conflicting approaches to international law of dualism and monism).

²¹⁹ See *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814). Bradley and Gulati interpret the quote from *Brown* to "equat[e] an opt-out pursuant to a unilateral public act of the government with an "exemption" authorized by a treaty." *Withdrawing*, *supra* note 3, at 225. Nevertheless, the specific context of that quote references an act of Congress in the initial declaration of war, not a unilateral act post hoc. Professor Dodge construes "*The Paquete Habana*'s dictum to hold that an act of Congress could supersede a rule of customary international law." *Later-in-Time Rule*, *supra* note 116, at 24.

²²⁰ See *The Paquete Habana*, 175 U.S. 677, 687-708 (1899).

²²¹ *Id.* at 701.

²²² 81 U.S. (14 Wall.) 170 (1871).

²²³ *The Paquete Habana*, 175 U.S. at 711. "[B]y common consent of mankind these

Court could have chosen a de facto application of Bradley and Gulati's proposal and unilaterally opted out of applying CIL, it chose instead to honor it.²²⁴

V. A Return to Vattel

Comparing Justice Gray's opinion and Chief Justice Fuller's dissent in *The Paquete Habana* reveals the tension that exists when a system of governance is created based on imperfect rights.²²⁵ Bradley and Gulati initiated an academic discussion to "think[] creatively about how to improve [CIL]"²²⁶ by raising almost the same question posed by Joseph Chitty when editing the 1858 edition of Vattel's treatise: "[O]f what utility is the law of nations since it is of such imperfect and inefficient obligation?"²²⁷ Writing on the eve of vast colonial expansion into uncivilized nations, Chitty upheld the Law of Nations as "necessary for the well-being of a society" and as guiding principles "to be consulted by noble statesmen endeavoring to solve disputes between nations and around which smaller nations could coalesce against aggressors."²²⁸

rules have been acquiesced in as of general obligation." *Id.* (quoting *The Scotia*, 81 U.S. (14 Wall.) at 187). Explaining one of the manners of formation of CIL via custom, Justice Gray wrote, "the concurrent sanction of those nations who may be said to constitute the commercial world" over time results in judicial recognition. *Id.*; see also Dodge, *supra* note 7, at 185-86. *But see Mandatory*, *supra* note 12, at 431-33.

²²⁴ *The Paquete Habana*, 175 U.S. at 711.

²²⁵ Vattel, *supra* note 1, at prelim., n.21 and accompanying text; see also *supra* note 53 and accompanying text. The principles of natural law were resurrected in the Geneva Conventions, yet the vast difference between what is "wrong" and what is "illegal" and what falls on either side of the line remains difficult to distinguish.

²²⁶ *Mandatory*, *supra* note 12, at 421.

²²⁷ Vattel, *supra* note 1, at prelim. § 34, n.1; see also Paul B. Stephan, *Disaggregating Customary International Law*, 21 DUKE J. COMP. & INT'L L. 191, 195 (2010) (referencing the lack of a "mechanism" that imposes an obligation on international tribunals to interpret CIL in accord with previous interpretations).

²²⁸ See Vattel, *supra* note 1, at prelim. § 34, n.1. See e.g., Estreicher, *supra* note 9, at 59 (noting the merits of CIL to weak states that "lack the means to use self-help measures to enforce their expectations of appropriate behavior by other states"); Stephan, *supra* note 227, at 198. Countries with weaker, less developed legal systems use CIL in times of transition or "as an alternative source of legitimizing norms." *Id.* *But see Age of Treaties*, *supra* note 9, at 9 (questioning whether CIL really does protect weaker nations since it was originally developed and imposed by dominant Western powers). The colonization of Africa by the European community was at its zenith between 1880-1900. See *Imperialism in Africa on the Eve of WWI*, *supra* note 145.

Bradley and Gulati's advanced their opt out proposal with the hindsight of the tumultuous twentieth century during which sovereigns repeatedly instituted, challenged, and rebuked international law.²²⁹ State actions regularly force the global community to confront questions of the origin and enforceability of international law. Bradley and Gulati argued that despite efforts to rebuild, heal, and create prophylactic devices to provide a peaceful means to address issues and settle disputes within the international community,²³⁰ the adaptation of the Law of Nations to the modern CIL has been ineffective.²³¹

Although contrary to traditional notions of reform, returning to Vattel's multi-faceted conception of international law offers an innovative approach with the hindsight of history. Emphasizing international law's "deep[] and veritable roots [of] philosophy, ethics and religion,"²³² Vattel's overarching philosophy and approach to international relations was arguably less egocentric and self-gratifying than many modern approaches to international jurisprudence.²³³ Therefore, a return to Vattel's model would require modern sovereigns to adopt the legal principle that Montesquieu advocated to Napoleon in 1748, "nations ought to do to one another in peace, the most good, and in war, the least evil possible."²³⁴

To return to Vattel, sovereigns must embrace the "[natural law] principles of justice and humanity applied to all peoples irrespective of cultural differences" and value the *ser humano*, irrespective of race or religion.²³⁵ A return to Vattel would not

²²⁹ See, e.g., FINCH, *supra* note 30, at 28 (quoting German Chancellor von Bethmann-Hollweg, who said, "This is against the law of nation. . . . The injustice which we thus commit we will repair as soon as our military object has been attained.").

²³⁰ JANIS, *supra* note 32, at 122-25.

²³¹ See *Withdrawing*, *supra* note 3, at 233; see also *Mandatory*, *supra* note 12, at 421 (noting CIL's inefficacy in dealing with "nuclear proliferation, global warming, and international financial stability.").

²³² J.L. Kunz, *The Law of Nations*, 51 AM. J. INT'L L. 77, 87 (1957).

²³³ *But see* Swaine, *supra* note 15, at 208 (citing various references to critics of Vattel who claim that Vattel's principles are too abstract and lack substance).

²³⁴ See JANIS, *supra* note 32, at 2.

²³⁵ See ANGHIE, *supra* note 130, at 73; see also Eistricher, *supra* note 9, at 58 ("CIL provides a currency, linguistic and otherwise, for negotiating differences that avoids the language of self-interest").

include unilaterally opting out of any of these principles—with or without notice.²³⁶ Finally, to return to Vattel, social reproach, fear of hostilities, and moral conscience must again be enough to balance the self-interest and political motivations that may cause a country, especially a powerful country, to resist complying with CIL.²³⁷

VI. Conclusion

Bradley and Gulati contend that “CIL is structurally unable to address the world’s most pressing problems” and have proposed “allowing for broader withdrawal rights under CIL” such as allowing countries to unilaterally opt out of CIL with notice.²³⁸ They seek creative solutions to cure CIL’s purported ailments. By offering “a more sustained historical examination of the intellectual origins of the Mandatory View,”²³⁹ this article demonstrates the importance of understanding the evolution of CIL in its historical, philosophical, and legal context and advances the normative suggestion of returning to Vattel’s perspective of CIL.

Vattel articulated a comprehensive framework of international law valuing the precepts of natural law and voluntary law while recognizing their inherent limitations.²⁴⁰ He viewed these precepts

²³⁶ See Roberts, *supra* note 11, at 174 (stating Bradley and Gulati’s unilateral opt out proposal is “likely to facilitate opportunistic and abusive claims. . . . [And it] shift[s] power from the majority of states to individual states.”)

²³⁷ KOSKENNIEMI, *supra* note 141, at 7. This may prove challenging because “[l]ike any social phenomenon, international law is a complex set of practices and ideas, and the way we engage in them or interpret them cannot be disassociated from the larger . . . political projects we have.” *Id.*

²³⁸ See *Mandatory*, *supra* note 12, at 421, 454. *But see* Swaine, *supra* note 15, at 219. There are various forms of international law that are meant to accomplish different objectives and, therefore, having different withdrawal rights and processes is appropriate. *Id.*

²³⁹ See *Mandatory*, *supra* note 12, at 438.

²⁴⁰ Chancellor Kent espoused a similar view of the interconnectedness of natural and voluntary law:

The most useful and practical part of the law of nations is, no doubt, instituted or positive law, founded on usage, consent, and agreement. But it would be improper to separate this law entirely from natural jurisprudence, and not to consider it as deriving much of its force and dignity from the same principles of right reason . . . [binding] every state, in its relations with other states . . . to conduct itself with justice, good faith and benevolence

as inseparable and fundamental to balancing the disparate needs of multiple sovereigns living in a confined geographic area and sharing common resources.

Under Vattel's framework, the Law of Nations functioned much like a "gentlemen's agreement." Geographic proximity and the long political history of the civilized countries created pervasive, binding ties among the Family of Nations. The gentlemen's agreement valued collaboration over isolation and rejected unilateral actions designed to benefit one nation at the potential detriment of another.

During the past two centuries, as our global society has grown and our Family of Nations has been redefined, applying Vattel's model has proven challenging. Fortunately, technological advances and global financial interdependence are arguably returning our global society to a Family of Nations. Geographic barriers that once circumscribed civilized and uncivilized nations are effectively disappearing. Nevertheless, realistically, the civilized and, thus, equal status of all members is the fulcrum to successfully reforming CIL based on Vattel's model. Robert Lansing, U.S. Secretary of State during World War I, wrote that "[for] an equality among sovereigns to be real [there] must be an equality of might, otherwise it is artificial, an intellectual creation."²⁴¹ If Lansing's cynical analysis is correct, then Vattel's treatise is only theory and the disparate manner in which the Supreme Court applied the Law of Nations in *The Antelope* (between equal sovereigns) and *Johnson v. M'Intosh* (between sovereign and savage) will remain the reality.²⁴²

Alternatively, if the fundamental, immutable precepts of natural law transcend geographic and cultural barriers, then readopting Vattel's unifying approach is plausible. Such a suggestion will likely draw the same skepticism from politicians and scholars as Vattel's advancement of natural law principles in the eighteenth century.²⁴³ Or perhaps, "common principles of

FINCH, *supra* note 30, at 25-26 (quoting CHANCELLOR KENT, 1 COMMENTARIES ON AMERICAN LAW 2 (1826)).

²⁴¹ ANGHIE, *supra* note 130, at 130 (quoting ROBERT LANSING, NOTES ON SOVEREIGNTY: FROM THE STANDPOINT OF THE STATE AND OF THE WORLD 65 (1921)).

²⁴² See discussion *supra* Parts IV.B-C.

²⁴³ See *supra* note 58 and accompanying text.

justice and honor”²⁴⁴ will offer a palatable alternative to the discord and dissension that purportedly plague modern CIL.²⁴⁵ Returning to these principles of mutual respect and equal dignity of sovereigns would reform CIL and promote, rather than impede, interdependency and cooperation. Unilaterally opting out of these principles, even with notice, will not promote solutions that benefit our global society; on the contrary, embracing them may be a way to bring good to our world.

²⁴⁴ VATTEL, *supra* note 1, at prelim. §4 n.1.

²⁴⁵ *But see* Stephan, *supra* note 227, at 192-93, 201-02 (citing all the positive uses of CIL such as “provid[ing] a common ground of discourse among national bureaucracies” that regulate the military, financial and trade institutions, environmental regulators, and INTERPOL; and providing an “overlay” to treaties that may “address a subject but the propositions are framed at a high level of abstraction.”).