

Reversing the Two Wrong Turns in the Economic Analysis of International Law: A Club Goods Theory of Treaty Membership & European Integration

Matthew C. Turk^{*}

This article argues that law-and-economics research on international law has been limited by two methodological wrong turns. First, the literature generally assumes that the standard dilemmas of international cooperation do not apply to the European Union, on the grounds that the EU represents a single super-federation rather than an agreement among multiple countries. That position has proven implausible, however, in light of the recent unraveling of legal coordination across Europe. Second, the economic analysis of international law tends to assume that treaties are designed to facilitate the provision global public goods. That starting point is problematic as well, because a vast body of international agreements cover joint investments in club goods, which raise a distinct set of collective action problems. The broader claim of this article is that the two wrong turns in the economic analysis of international law are related, and correct each other when examined in parallel. The first half of the article shows how the theory of club goods can provide a unified explanation of all three waves of European disintegration: the Eurozone financial crisis, the collapse of Schengen Area border controls, and Brexit. The second half explains why analyzing EU treaties under that framework also clarifies the way that other international agreements dealing with club goods work. Specifically, it reveals that the legal elements which regulate entry and exit in those agreements serve radically different functions than are otherwise suggested by prevailing theories

^{*} Assistant Professor of Business Law, Indiana University - Kelley School of Business. I am grateful for helpful comments from Julian Arato, Caroline Bradley, Shahar Dillbary, J. Benton Heath, Leslie Johns, Nicolas Lamp, Odette Lienau, Frederic Sourgens, Pierre-Hugues Verdier, David Zaring, and Ruvi Ziegler as well as participants at the 2018 ASIL International Economic Law Biennial, 2017 Midwest Law-and-Economics Association Conference, 2017 ASIL Mid-Year Conference, 2017 annual conference for the Academy of Legal Studies in Business, and the annual conference for the International Society of Public Law (I-CON), held at Humboldt University of Berlin on June 17, 2016.

of treaty design. The result is to flip some fundamental debates in international law on their head, including the question of whether treaties act to “screen or constrain” the compliance of members and the extent to which agreements with more flexible terms promote international cooperation.

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INTRODUCTION

Over the past two decades, the study of international law has been transformed by a growing body of research that draws on economic concepts and

related social science tools (the rational choice literature).¹ The main innovation of this scholarship is to treat nation-States as rational, self-interested agents and to view treaties as contracts, which States use in order to obtain mutual gains from cooperation.² In doing so, research from a rational choice perspective has developed a more realistic account of how the global legal system works than is provided in the traditional international law scholarship (the doctrinal literature). Despite the relative rigor of the law-and-economics approach, this Article argues that it has nonetheless been limited by two methodological wrong turns.

The first wrong turn consists of a failure to incorporate the historical process of European integration into its broader theoretical model. A persistent theme in the traditional doctrinal scholarship on international law from the 1990s and early 2000s was that the ambitious commitments to policy coordination that were taking place within the European Union (EU) proved the potential for international law to govern world affairs, and reflected a success story that could be more broadly exported around the globe.³ The rational choice literature, meanwhile, denied the relevance of European integration for international law altogether, on the grounds that the EU is best understood as a unified quasi-federation, rather than an agreement among sovereign States.⁴

¹ The economic analysis of international law is an interdisciplinary project that has been jointly advanced by legal academics and international relations political scientists. See Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001); see generally ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* (2013); ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* (2008); ERIC A. POSNER & JACK GOLDSMITH, *THE LIMITS OF INTERNATIONAL LAW* (2005).

² See POSNER & SYKES, *supra* note 1, at 24 (“[F]rom an economic standpoint the international agreements that create international law are contracts.”); see generally BARBARA KOREMENOS, *THE CONTINENT OF INTERNATIONAL LAW: EXPLAINING AGREEMENT DESIGN* (2016); ALEXANDER COOLEY & HENDRIK SPRUYT, *CONTRACTING STATES: SOVEREIGN TRANSFERS IN INTERNATIONAL RELATIONS* (2009); ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* (2006).

³ See, e.g., William Burke-White & Anne-Marie Slaughter, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 HARV. INT'L L.J. 327, 329 (2006) (“We therefore move beyond description and prediction to prescription, suggesting ways that the European way of law should become the future of international law writ large.”); see also MARK GILBERT, *EUROPEAN INTEGRATION: A CONCISE HISTORY*, 173 (2012) (“By the mid-2000s . . . [c]ommentators on both sides of the Atlantic were convinced that the EU was emerging as a ‘postmodern’ political entity whose values and modus operandi were more appropriate for the challenges of the twenty-first century than those of the neoconservatives in power in Washington.”); JEREMY RIFKIN, *THE EUROPEAN DREAM: HOW EUROPE’S VISION OF THE FUTURE IS QUIETLY ECLIPSING THE AMERICAN DREAM* (2004); cf. JURGEN HABERMAS, *THE CRISIS OF THE EUROPEAN UNION: A RESPONSE* 57 (2012) (“The historically unprecedented construct of the EU would fit seamlessly into the contours of a politically constituted world society.”).

⁴ Because the EU is *sui generis*, the argument went, the standard theories of international cooperation cannot be used to understand its legal development; and conversely, neither can European integration be interpreted as a meaningful data point for testing or revising those theories. See, e.g., GUZMAN, *supra* note 1, at 14 (“[T]he dramatic success of the EU makes it a problematic model for cooperation among states”); POSNER & GOLDSMITH, *supra* note 1, at 5 (“Although the EU project is in some respects constituted by international law, we think it is more usefully viewed as an example of multistate unification akin to pre-twentieth century unification efforts in the United States.”); Michael

None of these positions have aged well in light of the three waves of disintegration that have unfolded across Europe within the last decade: the Eurozone sovereign debt crisis;⁵ the unraveling of coordinated border controls put in place by a pair of treaties known as the Schengen Agreements;⁶ and Brexit.⁷ These developments have exposed that the EU is, at bottom, a collection of nation-States, bound together by treaties that are essentially no different from other international agreements. The recent reversals to legal integration in Europe also represent a historic breakdown in international cooperation, which currently lacks any systematic explanation due to the prior theoretical commitments of both rational choice and doctrinal scholars.

The second wrong turn in the rational choice literature consists of a failure to incorporate the economic theory of clubs in its analysis of treaty design.⁸ That theory seeks to explain the dynamics of “economic clubs,” a term that refers to any association—ranging from literal social clubs to political entities—which is formed to produce benefits, “club goods,” that can be shared among members but excluded from outsiders.⁹ Its core insight is that the optimal size of clubs is always limited: if participants in a club are too numerous or heterogeneous, it will no longer operate to the benefit of its members. As a result, the central problem of institutional design for clubs is properly calibrating the membership decision by identifying the marginal member.¹⁰ The omission of club theory from the economic analysis of treaty design is problematic due to a standard assumption in the literature that States use international agreements to facilitate cooperation over non-excludable “public goods”—for example, climate change mitigation efforts, where the potential for free-riding means that *universal* rather than limited

J. Gilligan & Leslie Johns, *Formal Models of International Institutions*, ANN. REV. POL. SCI., 7.1, 7.2 (2012) (“We do not discuss the European Union because it has become more like a federal organization than an international one. Scholars may debate whether the EU is an international or a supranational institution, but it is qualitatively different from the types of institutions we discuss here.”).

⁵ The euro sovereign debt crisis first emerged in 2010, and has since imperiled the viability of the EU’s common currency, which entered circulation in 2001 under the auspices of the European Monetary Union (EMU or Eurozone). See generally Matthew C. Turk, *Implications of European Disintegration for International Law*, 17 COLUM. J. EUR. L. 1 (2011) (providing an analysis of the Eurozone crisis during its early stages).

⁶ This second wave of disintegration can be traced to the onset of the Syrian civil war in 2011, which sparked a mass migration of political refugees across the EU’s region of shared territorial borders, known as the “Schengen Area.” See generally RUBEN ZAIOTTI, CULTURES OF BORDER CONTROL: SCHENGEN & THE EVOLUTION OF EUROPEAN FRONTIERS (2011).

⁷ The so-called Brexit referendum that took place in June of 2016, when voters in the United Kingdom opted in favor of their country’s complete withdrawal from the EU. See generally Paul Craig, *Brexit: A Drama in Six Acts*, EURO. L. REV. (2016), [HTTP://SSRN.COM/ABSTRACT=2807975](http://ssrn.com/abstract=2807975).

⁸ See *infra* note 36, and accompanying text (reviewing the sparse references to club theory in the rational choice literature).

⁹ See James M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1 (1965); see generally RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS (2d ed. 1996); Todd Sandler & John Tschirhart, *Club Theory: Thirty Years Later*, 93 PUB. CHOICE 335 (1997).

¹⁰ See Buchanan, *supra* note 9, at 2.

participation is optimal.¹¹ The upshot is that, because many international agreements establish economic clubs, the otherwise extensive rational choice literature on treaty design remains incomplete in important respects.¹²

This Article not only identifies the gaps in the scholarship that are summarized above, but also demonstrates that they overlap in a number of surprising ways. In fact, when analyzed in conjunction, the two wrong turns in the economic analysis of international law end up reversing one another. On the one hand, club theory supplies the missing conceptual framework that is necessary for a unified explanation of European disintegration from a rational choice perspective. On the other hand, a close examination of the EU's constitutive treaties provides insights into an overlooked set of design problems that apply to international agreements dealing with club goods.

The first half of the Article takes up the former task by using club theory to construct a simple yet comprehensive account of European disintegration. As will be shown, the common foundations of all three waves of disintegration become apparent once it is recognized that the policy regimes at issue—the Eurozone, the Schengen Area, and the EU as a whole—each share the properties of economic clubs. The underlying cause of the instability these institutions have experienced is that they were structured pursuant to overly inclusive treaty agreements which violate the limited participation constraint that is at the heart of club theory.

In addition to this initial diagnosis, a club theory analysis also clarifies why effective reforms have proven so elusive for EU members. The logic of clubs suggests that two options are available when the membership decision has been subject to miscalculation: either reduce the size of the club, or revise the terms of membership in a way that shifts the costs and benefits of participation so that they are more evenly distributed among members. While European policymakers have pursued a bewildering array of reforms in recent years, nearly all of them boil down to one of those two basic strategies. Once those proposals are reframed as attempts to renegotiate the initial membership decision, the legal and non-legal barriers that have limited their success come into plain view, as do their implications for policy-making in the EU going forward after Brexit.

The second half of this Article turns to the theoretical literature on the design of international agreements. Research in this area seeks to provide a functional explanation for the particular legal elements that States choose to include when drafting treaties.¹³ Here it is argued that, contrary to the dominant assumption in rational choice scholarship, the treaties underpinning European integration are far from irrelevant outliers. Instead, they provide a valuable window into the workings of other treaties that deal with club goods, by playing out the design problems that are shared across those agreements on a uniquely grand scale. The

¹¹ See *infra* Section I.

¹² See *infra* Section III.A.i.

¹³ See, e.g., Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579 (2005); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).

main insight which follows is that, due to unique dynamics of the membership decision for economic clubs, the standard predictions regarding legal elements that regulate treaty entry and exit do not apply to international agreements that form clubs.

The discussion of treaty entry focuses on two kinds of provisions: accession conditions and reservations.¹⁴ In doing so, this discussion provides a new interpretation of the debate over whether treaties “screen or constrain.”¹⁵ The traditional view in the doctrinal literature is that international law effectively constrains State behavior, because the legal obligations that are announced in treaties are “almost always” followed.¹⁶ An influential counter-argument found in the rational choice scholarship is that international law may often be inconsequential, because treaty provisions can operate by only attracting States that already intended to comply with their terms and screening out those that did not. The significance of the competing screen-versus-constrain hypotheses is radically changed in the context of club treaties, however, which must include provisions that function to screen out certain potential entrants in order to provide benefits to member States.¹⁷ In other words, many international agreements cannot constrain *unless* they screen.

The analysis of treaty exit examines how the membership decision is controlled *ex post*, by provisions that set the terms for voluntary withdrawal or involuntary expulsion. Here again, law-and-economics scholars have provided a revisionist critique of the conventional wisdom in the doctrinal literature, which tends to assume that treaties must strictly police exit in order to prevent States from shirking on their obligations.¹⁸ Instead, they argue that States often benefit when international agreements are designed to reduce exit costs,¹⁹ because greater flexibility in treaty obligations provides a useful form of mutual insurance against the uncertainty of future events.²⁰ Notably, a leading article in this area directly

¹⁴ Accession conditions are provisions that set out requirements States must satisfy in order to become party to a treaty. Reservations allow States to enter into agreements on a partial basis, by committing to some treaty obligations but not others.

¹⁵ See Jana Von Stein, *Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance*, 99 AM. POL. SCI. REV. 611 (2005); George W. Downs, David M. Rocke, & Peter N. Barsoom, *Is the Good News About Compliances Good News about Cooperation?*, 50 INT'L ORG. 379 (1996).

¹⁶ LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (1968).

¹⁷ See, e.g., Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307 (2006); Laurence R. Helfer, *Not Fully Committed? Reservations, Risk, and Treaty Design*, 31 YALE J. INT'L L. 307 (2006); Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531 (2002).

¹⁸ Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005) (providing a skeptical analysis of the traditional view).

¹⁹ See generally Helfer, *supra* note 18; Eric Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, Legalized Noncompliance, and Related Issues*, 110 MICH. L. REV. 243 (2011); Timothy Meyer, *Power, Exit Costs, and Renegotiation in International Law*, 51 HARV. J. INT'L L. 379, 420–22 (2010); Barbara Koremenos & Allison Nau, *Exit, No Exit*, 21 DUKE J. COMP. & INT'L L. 81 (2010).

²⁰ See Laurence Helfer, *Flexibility in International Agreements*, in INTERNATIONAL LAW & INTERNATIONAL RELATIONS: TAKING STOCK (Dunoff & Pollack eds. 2012); Barbara Koremenos,

addresses the relevance of club theory, and concludes that exit costs should be especially low when treaties deal with club goods.²¹ After taking a closer look at the way that withdrawal and expulsion provisions function in the context of club treaties, this Article finds that a number of prominent claims in this area do not, in fact, hold up. An implication is that, at least with regard to treaty exit, the standard economic analysis of the role of flexibility in agreement design has a more tenuous theoretical and empirical basis than is conventionally thought.²²

The discussion below proceeds as follows: Section I introduces the basic concepts of club theory, Section II uses those principles as a framework to explain the three waves of European disintegration, Section III addresses broader theoretical questions regarding the design of international agreements, and Section IV briefly concludes.

I.

OVERVIEW OF THE ECONOMIC THEORY OF CLUBS

The economic theory of clubs is generally attributed to a 1965 *Economica* article by James Buchanan.²³ In that article, Buchanan introduced the concept of “economic clubs,” which he used to refer to voluntary associations that are formed to facilitate the joint production and consumption of a “club good.” Its novelty was to distinguish club goods from the traditional economic concept of public goods, such as national defense or clean air.

The key point of difference between the two is that club goods lack the properties of non-excludability and non-rivalry in consumption that are defining features of public goods. When a factory reduces its emissions (and thereby contributes to a public good such as clean air), none of the surrounding residents can be excluded from the benefits of less pollution. Likewise, there is no “rivalry” in the consumption of those benefits because when one person takes a breath, they do not reduce the amount of clean air available to others. The classic example of a club good, provided by Buchanan’s original article, is a community swimming pool.²⁴ Community pools are excludable: the number of swimmers can be limited by gating the pool and establishing membership privileges. They also involve an inherent rivalry in consumption: swimming pools can only hold so many people. Another example of a club good would be a local area computer network. With a computer network, users can be excluded with password-protection, and

Contracting around International Uncertainty, 99 AM. POL. SCI. REV. 549 (2009); Barbara Koremenos, *Loosening the Ties that Bind: A Learning Model of Agreement Flexibility*, 55 INT’L ORG. 289 (2001).

²¹ Helfer, *supra* note 18, at 1637 (“[A]n important prescriptive insight for treaty makers: when negotiating agreements that regulate private or club goods, drafters can include capacious exit clauses to encourage broad ratification or enhance depth.”).

²² See *infra* Section III.C.iii.

²³ See Buchanan, *supra* note 9; but see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 36–43 (1965) (providing a contemporaneous account of the same basic concepts).

²⁴ See Buchanan, *supra* note 9.

consumption rivalry appears when the addition of new users takes up bandwidth and lowers the network's performance for existing users.

When combined, the propositions that club goods are at least partially excludable and partially rivalrous carry the important implication that the optimal size of economic clubs is always limited.²⁵ Although a club will initially grow in size to take advantage of economies of scale, every club eventually arrives at a state in which either existing members are not made better off by the admission of an additional non-member, or potential new members receive no net benefit from joining. By contrast, the optimal production of public goods requires full participation by all relevant parties.²⁶ A consequence is that a central question of institutional design unique to economic clubs involves limiting participation by identifying the marginal member.²⁷ Accordingly, much of club theory explores the variables that determine the optimal size and composition of club membership.

The most important of those variables turns on a distinction between clubs with homogeneous versus heterogeneous members. The simplest model is a homogeneous club, in which members are assumed to have identical "endowments" (capacities for contributing to the production of the club good) and "tastes" (preferences over the characteristics of the club good that is consumed). The primary mechanism limiting the size of homogeneous clubs is consumption rivalry that appears in the form of congestion externalities—in other words, various forms of overcrowding—as membership size increases.

Heterogeneous clubs (also known as "mixed clubs") have members with non-identical endowments or tastes.²⁸ The relevant congestion externalities for mixed clubs derive from the fact that heterogeneity increases with membership size. Heterogeneity in tastes implies that the precise form that the club good takes will not perfectly align with the consumption preferences of a given member, and will increasingly depart from those preferences as the club grows.²⁹ The existence of heterogeneous endowments means that, as a mixed club expands, there will be increasing divergence in the ability of members to contribute to provision of the club good.

Two further structural features are important factors in determining the optimal size of mixed clubs. One is whether a club is designed so as to allow for transfers among members that reallocate the costs or benefits of participation in the club.³⁰ All else equal, the presence of a redistribution mechanism makes the

²⁵ CORNES & SANDLER, *supra* note 9, at 348.

²⁶ *Id.* ("The optimal sharing size for a pure public good includes the entire population of the jurisdiction whose marginal benefit from the public good is positive.")

²⁷ See Buchanan, *supra* note 9, at 2.

²⁸ CORNES & SANDLER, *supra* note 9, at 351.

²⁹ Returning to the swimming pool hypothetical, the presence of heterogeneous tastes could mean that certain individuals prefer to use the pool for swimming laps, others for diving, and still others for wading around. Membership will be limited by the fact that the pool's layout will inevitably entail tradeoffs that accommodate some of those tastes more than others. See Buchanan, *supra* note 9.

³⁰ For the swimming pool, transfers might be accomplished by adopting a policy of charging a per-visit fee rather than a flat membership rate. Such an arrangement would serve as a form of price

optimal size of a mixed club larger than would otherwise be the case.³¹ Another relevant feature is the number of distinct, excludable goods that a club provides. Where there are economies of scope in addition to scale, it may be efficient for a single club to produce more than one kind of club good.³² The optimal size of such “multi-good clubs” will be larger when there are exclusion mechanisms within the club that allow some members to participate in the production and consumption of only a subset of the total club goods that are available.³³ Although these preceding points are somewhat abstract, their relevance will become clear when applied in the case studies of European integration that appear directly below.

Soon after Buchanan’s article, economists began to extend club theory beyond firms and other private associations, by examining cases where club goods are provided via public entities and government regulations.³⁴ Even more expansively, political units themselves (cities, federal states, and entire countries) have been treated as clubs.³⁵ Thus, club theory has proven a popular analytical tool, largely because it is adaptable to a wide array of contexts that involve the formation of groups and coordination of collective action.

Despite its broad application in the social science literature, rational choice scholarship on international law has only incorporated club theory to a minimal extent.³⁶ This is surprising for a couple of reasons. First, club theory is rooted in

discrimination that shifts a larger proportion of the cost of producing the club good to members who prefer to use the pool more often.

³¹ See Todd Sandler & John T. Tschirhart, *The Economic Theory of Clubs: An Evaluative Survey*, 18 J. ECON. LIT. 1481, 1492 (1980).

³² See Jan K. Brueckner & Kangoh Lee, *Economies of Scope and Multi-Product Clubs*, 19 PUB. FIN. 193 (1991).

³³ Country clubs are classic multi-good clubs because they typically provide members with a menu of amenities—golf courses, pools, tennis courts, dining areas, social events. A common exclusionary mechanism used by country clubs is to adopt a tiered membership structure, in which fees increase according to the number of amenities that a member has permission to access.

³⁴ State parks, toll roads, and publicly owned utilities have all been analyzed as clubs. See CORNES & SANDLER, *supra* note 9.

³⁵ The canonical exposition of this idea is known as the Tiebout Model. It assumes that local political jurisdictions such as cities function as clubs that attract tax-paying residents (the members) by offering bundles of public services (the club goods). Charles Tiebout, *A Pure Theory of Local Expenditures*, J. POL. ECON. 416 (1956); cf. Sandler & Tschirhart, *supra* note 31, at 1481 (noting that the Tiebout Model predates the Buchanan article but anticipates its core elements). Recent research by Alberto Alesina and Enrico Spolaora extends the Tiebout Model to its logical extreme, by treating the nation-State as a club in order to explain historical variation in the population-size of countries. Alberto Alesina & Enrico Spolaora, *On the Number and Size of Nations*, 112 Q. J. ECON. 1027 (1997) (applying club theory to State formation); see also Michele Ruta, *Economic Theories of Political (Dis)Integration*, 19 J. ECON. SURVS 1 (2005) (providing a review of the subsequent literature).

³⁶ For example, most of the leading book-length treatments of the economic analysis of the law do not mention economic clubs at all. Nor do they cite Buchanan’s 1965 article, which is a standard reference whenever club theory is discussed. See, e.g., POSNER & SYKES, *supra* note 1; GUZMAN, *supra* note 1; Scott & Stephan, *supra* note 2; KOREMENOS, *supra* note 2. In cases when treaties or international organizations are described as “clubs,” the term is usually used in a colloquial sense (to mean a “small group”) without reference to the technical criteria of excludability or rivalry in club goods. See, e.g. ROBERT O. KEOHANE & JOSEPH S. NYE JR., THE CLUB MODEL OF MULTILATERAL COOPERATION AND

the same basic economic principles that are otherwise used to organize analysis of that research. Second, a dominant concern in the economic analysis of international law is to understand how States can engage in collective action relating to global public goods. Club goods were explicitly conceived as a variation on the public goods concept.³⁷ These connections have not been entirely overlooked, however, and club theory analyses of international law have made scattered appearances in recent years, particularly in the area of international trade.³⁸ One aim of this Article is to advance the nascent literature, which applies club theory to international law, by adding to its rigor and generalizing its scope.

II.

A CLUB THEORY OF EUROPEAN (DIS)INTEGRATION

European integration refers to the trend of deepening legal coordination among European countries that has taken place since World War II.³⁹ The recent reversal of that trend represents a turning point in the history of international cooperation. It is therefore striking that the international law literature lacks any systematic account of those developments. As a result, each succeeding wave of legal disintegration is met with *ad hoc* interpretations, which usually attribute outcomes to idiosyncrasies of a particular policy area or the outbreak of unforeseeable circumstances.⁴⁰ Debate over the necessary institutional reforms is then filled with vague exhortations to greater political solidarity, which beg the question and often take on an accusatory or moralizing tone.⁴¹

The failure to confront European disintegration at a conceptual level is partly due to limitations of the doctrinal literature. In taking an uncritical (and often triumphalist) view of the expansion of European integration, many international law scholars reject the kinds of arguments that can explain its contraction.⁴² It is

PROBLEMS OF PROBLEMS OF DEMOCRATIC LEGITIMACY (2001); Brian Hocking, *Changing the Terms of Trade Policy Making: From the 'Club' to the 'Multistakeholder' Model*, 3 WORLD TRADE REV. 3 (2004).

³⁷ See *infra* Section III.A.ii.

³⁸ See, e.g., Nicolas Lamp, *The Club Approach to Multilateral Trade Lawmaking*, 49 VAND. J. TRANSNAT'L L. 107 (2016); Chris Brummer, *Regional Integration and Incomplete Club Goods: A Trade Perspective*, 8 CHI. J. INT'L L. 535 (2008); Helfer, *supra* note 18, at 1637.

³⁹ For the history of European integration, see generally GILBERT, *supra* note 3; DESMOND DINAN, *EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION* (2010); TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* (2005).

⁴⁰ Thus, the Eurozone was destabilized by an unpredictable global financial crisis, which is unrelated to legal discord in the Schengen Area, a product of political violence in Africa. Meanwhile, Brexit can on some level be traced to Donald Trump. See *What Brexit and Donald Trump Have in Common*, THE ECONOMIST (Jan. 30, 2017), <https://www.economist.com/blogs/bagehot/2017/01/long-list>.

⁴¹ Accordingly, it is frequently claimed that saving the euro requires Germans to become less "stingy" or Greeks to become less "lazy." Likewise, the solution for harmonizing border security and asylum procedures is a spontaneous reduction in xenophobia. See, e.g., Thomas Piketty, *A New Deal for Europe*, N.Y. REV. OF BOOKS (Feb. 25, 2016); Griff Witte, *Immigration Backlash at the Heart of British Push to Leave the E.U.*, WASH. POST, May 22, 2016.

⁴² A common view was that the advance of legal cooperation in Europe was an irreversible, self-

also a product of a particular methodological decision in rational choice literature. By insisting that the EU be treated as if it were the equivalent of a single country (rather than a set of legal agreements among States), law-and-economics research on international law essentially abandoned the field on European integration.⁴³ That decision represents a missed opportunity because, as this Section will demonstrate, the standard theoretical assumptions that are used in the economic analysis of international law apply with equal force to the underlying legal structure of the EU.⁴⁴ Specifically, the discussion that follows provides a unified explanation for all three waves of European disintegration, by incorporating the club theory principles outlined above within a rational choice framework.

Part A covers the Eurozone, Part B turns to the Schengen Area, and Part C looks at Brexit. Part D sums up by briefly noting some normative points that these developments suggest for the future of the EU.

A. *The Eurozone as a Monetary Club*

The “Eurozone” is a term that collectively covers the group of EU countries that have agreed to pool their monetary policy through a common currency. While it was once hailed as the “crown jewel” of the European Union,⁴⁵ the past several years have left the Eurozone in a continuous state of near-collapse. Making sense of this dramatic shift from integration to disintegration becomes much easier once it is recognized that the treaty framework underlying the Eurozone takes the form of an economic club.

i. *From Integration to Disintegration*

The legal foundations of the Eurozone were established by the Maastricht Treaty of 1992, which transformed the European Community into the European Union and set out a roadmap for establishing a European Monetary Union (EMU) within the decade.⁴⁶ The EMU has two core components: the adoption of a

perpetuating historical process. That mindset is epitomized by the colloquial “bicycle theory,” which holds that—just as a cyclist—the project of European integration is sustained by its constant forward trajectory, with stasis leading to collapse. See GILBERT, *supra* note 3, at 4; see also Andrew Moravcsik, *The European Constitutional Compromise and the Neofunctionalist Legacy*, 12 J. EUR. PUB. POL’Y 349, 350 (2005) (“Since the 1950s, this spectacular record of growth and achievement has led most analysts to treat the EU as an institution on an upward, if uneven, course for ‘ever closer union.’”).

⁴³ See *supra* note 4.

⁴⁴ Those assumptions can be summarized as follows: (1) States are the primary actors in international law; (2) States seek to maximize their self-interest, however that may be defined through the domestic political process; (3) the decision-making of States is “rational,” in the sense that the term is used in microeconomics; and (4) international agreements function similar to contracts and are used by States to facilitate cooperative arrangements that provide mutual gains to the contracting parties. See POSNER & SYKES, *supra* note 1.

⁴⁵ Cf. Barry Eichengreen, *Europe’s Historic Gamble*, PROJECT SYNDICATE (May 15, 2010), <https://www.project-syndicate.org/commentary/europe-s-historic-gamble?barrier=accesspaylog>.

⁴⁶ The idea of creating a common European currency emerged in the late 1980s, following two decades in which several less ambitious attempts at monetary coordination were tried and failed. See Turk, *supra* note 5 (reviewing the euro’s historical background).

common currency, eventually to be named the euro; and the creation of a European Central Bank (ECB), tasked with controlling the money supply and otherwise administering the regime. Signatories of the Maastricht Treaty were eligible to be considered for entry into the EMU but not guaranteed admission.⁴⁷ Instead, only those countries that were found to have satisfied the “Maastricht Criteria” and an accompanying “Stability and Growth Pact”—which articulated standards relating to budgetary deficits, inflation rate, and other economic variables—would be allowed to join.⁴⁸

In 1999, after seven years of openly contentious negotiations, eleven of the fifteen countries that signed the Maastricht Treaty were deemed to have met its accession criteria and officially joined the EMU. Greece was admitted as a twelfth member in 2000, and the euro entered physical circulation on January 1, 2001. The Eurozone’s membership expanded to nineteen members, due to seven additional countries adopting the euro following the EU’s enlargement in 2007, and currently stands at twenty-eight members.⁴⁹

The Eurozone falls under a broader category of international regimes that are referred to as currency unions.⁵⁰ As with other currency unions, it reflects the essential features of an economic club and can be analyzed as such. The Eurozone’s central purpose is to facilitate the collective production and consumption of certain benefits by its members. These include the efficiencies that result from transacting across borders in a common currency, and the price stability that is achieved by delegating national monetary policies to the ECB. Those benefits are properly understood as club goods, rather than public goods, because they are excludable. Countries outside of the Eurozone cannot issue euro notes, nor can they have their monetary policy set by the ECB.⁵¹

The EMU is a mixed club that contains member States with diverse economic profiles and policy preferences.⁵² As a result, the ability of the Eurozone

⁴⁷ *Id.*

⁴⁸ Out of concern that the initial Maastricht Criteria were insufficiently stringent, the Stability & Growth Pact (SGP) introduced a further set of requirements in 1995. The SGP was notable for imposing conditions that came into effect *after* the EMU was eventually in place, by committing future members to report their fiscal status on an annual basis and prohibited deficits in excess of 3% of GDP. See Turk, *supra* note 5.

⁴⁹ See *From 6 to 28 Members*, EUROPEAN NEIGHBORHOOD POLICY AND ENLARGEMENT NEGOTIATIONS, https://ec.europa.eu/neighbourhood-enlargement/policy/from-6-to-28-members_en (last visited Apr. 19, 2018) (providing a full timeline of the Eurozone’s membership).

⁵⁰ See MAURICE OBSTFELD AND KENNETH ROGOFF, FOUNDATIONS OF INTERNATIONAL MACROECONOMICS, 632-33 (1996); Alberto Alesina, Robert J. Barro, & Silvana Teneyro, *Optimal Currency Areas*, 17 NBER Wk’g Ppr. No. 9072, at 302 (2002).

⁵¹ See Turk, *supra* note 5.

⁵² EMU countries such as Slovenia, Italy, and France occupy different levels of economic development, and therefore have different capacities to contribute to provision of the club good. See, e.g., Gita Gopinath, Sebnem Kalemli-Ozcan, Loukas Karabarbounis, & Caroline Villegas-Sanchez, *Capital Allocation and Productivity in South Europe*, Fed. Reserv. Bank of Minneapolis, Wk. Ppr. No. 728 (July 2015). Eurozone members also do not have identical preferences over the form the club good takes. In other words, political support varies across countries with respect to the stance of the ECB’s monetary policy, the inflation rate of the euro, and related regulatory variables.

to function effectively depends on whether the heterogeneity of its membership is sufficiently limited. It is possible to answer that question by applying a framework known as the theory of optimum currency areas (OCA theory).⁵³ OCA theory fits well within a club theory analysis, because it identifies particular economic dimensions along which heterogeneity in the economic endowments of currency club members matters most. Specifically, OCA models predict that a currency union will not be viable unless it satisfies three key criteria. First, there must be cross-border mobility of goods, capital, and labor among members. Second, members cannot experience “asymmetric shocks” from common economic developments that affect the union as a whole, such as movements in the business cycle.⁵⁴ Third, if asymmetric shocks *do* occur, their severity must be mitigated by fiscal redistribution among currency union members.

At the time of its original twelve-member configuration in 2001, most economists concluded that the Eurozone did not meet the OCA criteria.⁵⁵ Although goods and capital could flow freely across borders due to the EU’s common market infrastructure, the mobility of labor was relatively limited.⁵⁶ In addition, the Eurozone was vulnerable to asymmetric shocks due to substantial differentials in productivity and fiscal stability that characterized countries in the EMU’s “North” relative to those in its “South.”⁵⁷ The potential for asymmetric shocks was further magnified by the absence of a collective budgetary mechanism capable of channeling fiscal transfers among EMU members during times of divergent economic performance.⁵⁸ From a club theory perspective, the overly diverse membership of the Eurozone meant that it was designed to fail from the outset.

The pessimistic forecast provided by OCA theory fell out of fashion when the euro’s initial years went smoothly, but was confirmed when the EMU membership experienced asymmetric economic shocks in response to the global financial crisis that began in 2008. While the financial crisis depressed economic activity across the Eurozone, it had uniquely destructive effects on five

⁵³ For example, labor market rules are important sources of heterogeneity, while securities regulation policies are not.

⁵⁴ See Charles Wyplosz, *EMU: Why and How It Might Happen*, 3 J. ECON. PERSP. 3, 9–10 (1997).

⁵⁵ See, e.g., Martin Feldstein, *The Political Economy of the European Economic and Monetary Union: Political Sources of an Economic Liability*, 11 J. ECON. PERSP. 23 (1997); Wyplosz, *supra* note 54, at 8 (“[T]he case for Europe as an optimal currency area is lukewarm at best.”).

⁵⁶ Although workers in Eurozone countries may have enjoyed a right to free movement pursuant to foundational principles of EU law, the presence of stringent and highly varied employment regulations across Eurozone countries restricted workers’ mobility in practice. See Wyplosz, *supra* note 54, at 9–10.

⁵⁷ Strong evidence on this point is the period of turbulent exchange rate fluctuations that took place among European countries in the early 1990s. See Turk, *supra* note 5.

⁵⁸ The Stability & Growth Pact was intended to prevent the outbreak of such convergence by constraining the economic policymaking of Eurozone governments. But it proved to be of limited utility once France and Germany violated its requirements without consequence soon after the EMU was formed. See Turk, *supra* note 5.

members—Portugal, Ireland, Italy, Spain, and Greece.⁵⁹ The relatively severe economic slowdowns among that group caused fiscal deficits to shoot up to unprecedented levels. To finance those deficits, all five governments engaged in heavy foreign borrowing, which quickly led international investors to run on their sovereign debt and brought the EMU to the brink of a generalized collapse.⁶⁰ A total meltdown was only averted by a series of multi-billion euro bailouts in 2010 and 2011, jointly provided by the ECB, European Commission, and International Monetary Fund.⁶¹ Thus, within the Eurozone’s first decade, structural weaknesses in the membership rules laid out by the Maastricht Treaty were exposed, at a serious cost to its members.

ii. Renegotiating the Terms of Membership

Looking beyond the immediate crisis management environment of 2010–2011, European policymakers attempted to return the Eurozone to a more sustainable trajectory by renegotiating the terms of the club’s membership. Debate over institutional reforms that could provide a viable burden-shifting device for the Eurozone converged on the idea of a banking union. Subsequent negotiations resulted in the creation of European Banking Authority (EBA), which was formally established in June 2012 and subject to an extensive series of amending agreements and supplemental protocols thereafter.⁶²

The EBA was designed according to a “three pillar” structure. Its first pillar called for the imposition of a uniform set of supervisory standards and procedures, so that the risk-taking of banks within the Eurozone would be monitored and constrained to a similar degree. Its second pillar called for the development of a common resolution authority, which would centralize the liquidation or bailout of failed banks. The EBA’s third pillar envisioned the provision of a joint deposit insurance system—collectively financed by Eurozone members—that would guarantee depositors’ savings in the event of destabilizing bank runs.

In theory, a banking union organized around the EBA’s three pillars could potentially constitute a burden-shifting mechanism capable of dampening the negative impact of asymmetric shocks within the EMU.⁶³ However, the EBA does not contain sufficiently robust versions of the features. The most obvious shortcoming is that agreement on the third pillar, jointly funded deposit insurance, was never finalized in any usable form.⁶⁴ The second pillar was fleshed out more

⁵⁹ *See id.*

⁶⁰ Philip R. Lane, *The European Sovereign Debt Crisis*, 26 J. OF ECON. PERSP. 49–68 (2012).

⁶¹ *See id.*

⁶² *See* Jeffery N. Gordon & Wolf-Georg Ringe, *Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take*, 115 COLUMB. L. REV. 1297 (2015).

⁶³ *But see* Tyler Cowen, *The Big Idea that Won’t Fix Europe’s Banks*, BLOOMBERG, (Aug. 9, 2016), <https://www.bloomberg.com/view/articles/2016-08-09/the-big-idea-that-won-t-fix-europe-s-banks> (taking a contrary position).

⁶⁴ The idea of deposit insurance was abandoned at the outset under pressure from Germany, and has not shown signs of being revived since. Gordon & Ringe, *supra* note 61, at 1309–10.

concretely in July of 2014, with an agreement that established the Single Resolution Mechanism. Yet for a laundry-list of technical reasons, EMU members retain a good deal of authority over the resolution of failing banks within their jurisdictions, and there is less to the Single Resolution Mechanism than meets the eye.⁶⁵ The third pillar is the most fully developed portion of the EBA's structure and is embodied in an agreement forming the Single Supervisory Mechanism, which grants the ECB authority to monitor any large bank within the Eurozone that is considered to pose systemic risks.⁶⁶ Unlike the other two pillars, however, the Single Supervisory Mechanism cannot directly facilitate fiscal transfers among Eurozone members; rather, its function is to make the redistributive machinery of the deposit insurance and resolution authority pillars operate more efficiently. As a result, the Single Supervisory Mechanism, standing alone, is unable to sustain the current configuration of the EBA.

The EBA has been broadly received as a disappointment due to the institutional compromises outlined above, and is often accused of representing a failure of political will on the part Eurozone leaders.⁶⁷ But lack of solidarity is a superficial explanation. Instead, the weaknesses of the EBA are better understood as stemming from the club structure of the Eurozone back when the euro was introduced in 2001. That is because in any currency union as economically diverse as the EMU, a full-fledged banking union implies an open-ended and potentially extravagant transfer of resources from some members to others. For that very reason, it will be opposed by the more financially stable group of club members, and never gain enough support to be adopted. The legal framework governing the Eurozone's original membership decision was therefore a driver of two factors: its original turn to instability, and the inability of its members to negotiate reforms capable of placing the euro on a more sustainable footing.

⁶⁵ To name a few: (1) the resolution process is delegated to national authorities in the first instance; (2) centralized resolution decisions are subject to multiple veto-points; (3) the common resolution fund is severely under-financed relative to reasonably anticipated costs; and (4) the entire package will not be in place until the end of an eight-year long phase-in period. *See id.* at 1348.

⁶⁶ One threshold problem with the Single Supervisory Mechanism is that it applies to only a subset of the Eurozone's financial institutions. Another is that there is little basis to believe it will be enforced in a reliable manner. Eurozone members' previous disregard of requirements promulgated under the Stability & Growth Pact serves as an important precedent on this point. *See* Jens Dammann, *The Banking Union: Flawed by Design*, 45 GEO J. INT'L L. 1057 (2014); *see also* Michele Fratianni & John C. Pattison, *Basel III in Reality*, 30 J. ECON. INTEGRATION 1 (2015).

⁶⁷ *See* William Rhodes, *Eurozone Must Complete Banking Union to Avert Crisis*, FIN. TIMES (July 28, 2016), <https://www.ft.com/content/5eb51992-5413-11e6-9664-e0bdc13c3bef>; Wolfgang Munchau, *Concession to Britain Will Create a Two-Tier Europe*, FIN. TIMES (Feb. 21, 2016), <https://www.ft.com/content/c5680d9a-d6fd-11e5-829b-8564e7528e54> ("The banking union was supposed to be the answer, but is incomplete because it lacks fiscal support and joint deposit insurance"); Wolfgang Munchau, *Politics Undermines Hope of Banking Union*, FIN. TIMES (Dec. 16, 2012) ("If you study the details of [the proposed banking union], the substance evaporates.").

iii. Exit

In the most idealized club models, entry and exit of members is assumed to be costless, which makes reducing membership size a natural solution for mixed clubs that are overly heterogeneous. For the Eurozone, the primary candidates for exit included a handful of members that were experiencing sovereign debt crises, particularly Greece. The prospect of Greece's voluntary withdrawal became tangible in July of 2015, when the Greek government announced its intention to hold a referendum over its continued participation in the euro (Grexit). Around the same period, an alternate Grexit scenario involving Greece's involuntary expulsion also received serious consideration, and was publicly promoted by influential technocrats within the German government and at the ECB.⁶⁸ With respect to either approach, it soon became clear that the theoretical assumption of costless exit did not apply, and that exit of a Eurozone member would impose substantial burdens on all parties involved.

The legal cost associated with Grexit arose from the fact that the applicable EU treaties do not include any reference to the possibility of unilateral withdrawal from the EMU. Moreover, the prevailing interpretation of textual silence on that point is that any such withdrawal would be illegal as a matter of both international and EU law.⁶⁹ As a consequence, the only legal avenue for a Eurozone member to abandon the common currency is by invoking Article 50 of the Treaty of Lisbon, which authorizes exit from the EU as a whole.⁷⁰ The same conclusion holds with even greater force with respect to expulsion from the Eurozone, which commentators uniformly regard as prohibited under EU and international law.⁷¹

The Grexit scenario also drew attention to the substantial extralegal costs of exiting the euro. For Greece, reintroducing drachmas into circulation on very short notice presented a variety of logistical hurdles that its government was ill-prepared to address, and would send the country into even deeper economic

⁶⁸ See Yannis Palaiologos, *How Trichet Threatened to Cut Greece Off*, EKATHEMIRINI (Nov. 3, 2014), <http://www.ekathimerini.com/158504/article/ekathimerini/business/how-trichet-threatened-to-cut-greece-off>; *A Government Divided: Schaeuble's Push for Grexit Puts Merkel on the Defensive*, DER SPIEGEL (July 17, 2015) <http://www.spiegel.de/international/germany/schaeuble-pushed-for-a-grexit-and-backed-merkel-into-a-corner-a-1044259.html>; Hans-Werner Sinn, *Why Greece Should Leave the Eurozone*, N.Y. TIMES (July 24, 2015), <https://www.nytimes.com/2015/07/25/opinion/why-greece-should-leave-the-eurozone.html>.

⁶⁹ Phoebus Athanassiou, *Withdrawal and Expulsion from the EU and EMU: Some Reflections*, European Central Bank Working Paper Series No. 10 (2009). The fact that the Greek referendum was posed in tortured language (which left its legal import with respect to membership in the Eurozone completely unclear), may reflect an attempt to finesse the costly legal sanctions that would accompany the decision. See Joel Gunter, *The Greek Referendum Question Makes (Almost) No Sense*, BBC NEWS (June 29, 2015) <http://www.bbc.com/news/world-europe-33311422>.

⁷⁰ See Athanassiou, *supra* note 69; see also *infra* note 117. The cost of withdrawing from the euro is thereby heightened because, in order to be valid, it must be packaged with a self-imposed ouster from other, potentially desirable, aspects of EU membership.

⁷¹ See *id.*; Annie Lowrey, *Could Greece Get Kicked Out of the European Union? No*, FOREIGN POLICY (Mar. 23, 2010), <http://foreignpolicy.com/2010/03/23/could-greece-get-kicked-out-of-the-european-union/>.

depression if handled poorly.⁷² Grexit (whether voluntary or involuntary) also posed a potential problem for the economies of remaining Eurozone members. The departure of Greece would inevitably lead international markets to speculate over the fate of similarly-situated EMU members—such as Portugal, Italy, or Spain. By doing so, Grexit threatened to reverse those countries' economic recoveries and reduce business activity across the Eurozone more broadly. Awareness of this collateral damage likely limited support for proposals to expel Greece.

To summarize, the initial source of the Eurozone crisis was its overly diverse membership. A return to stability has proved difficult due to the high costs of renegotiating the original membership decision. On one hand, the experiment with banking union revealed that a fundamental reallocation of the benefits and burdens of membership is politically unrealistic. On the other hand, the Grexit scenario led to a widespread appreciation that entrance into the Eurozone club is much easier than exit. As a result of its legal-institutional structure, the EMU now occupies a new status quo of indefinite financial instability and economic dysfunction.⁷³

B. *The Schengen Area as a Border Security Club*

The “Schengen Area” refers to an institutional framework (and literal geographic region) established by European countries for the purpose of collectively administering the security of their national borders.⁷⁴ Outside of Europe, the Schengen Area may be less well known than the Eurozone, but it represents an equally audacious experiment in international policy coordination.⁷⁵ Accordingly, the increasingly widespread perception that the entire Schengen system has fallen apart signifies a reversal of the historical arc of European integration that is no less profound than the case of the Eurozone financial crisis.

i. *From Integration to Disintegration*

The legal basis for the Schengen Area can be traced to a pair of treaties: the Schengen Agreement of 1985⁷⁶ and the 1990 Convention Implementing the

⁷² See Athanassiou, *supra* note 69, at 39.

⁷³ See Sarah Gordon, *The Spreading Pain of Italy's Bank Saga*, FIN. TIMES (Aug. 10, 2016) <https://www.ft.com/content/821f138a-5e2a-11e6-bb77-a121aa8abd95>; Giovanni Legorano, *Bad Debt Piled in Italian Banks Looms as Next Crisis*, WALL ST. J. (July 4, 2016), <https://www.wsj.com/articles/bad-debt-piled-in-italian-banks-looms-as-next-crisis-1467671900>.

⁷⁴ See *The Schengen zone: a timeline*, TELEGRAPH (Dec. 21, 2007), <https://www.telegraph.co.uk/news/worldnews/1573359/The-Schengen-zone-a-timeline.html>.

⁷⁵ Control of a physical territory—along with the policing of its borders that such control necessarily entails—is a hallmark of the modern Westphalian nation-state. Cf. Benedict Anderson, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983; 3d ed. 2006). The goal of eliminating internal borders within the Schengen Area is therefore one of the most ambitious projects in international law that has been attempted in recent times. See ZAIOTTI, *supra* note 6.

⁷⁶ The Schengen Agreement gets its name from the fact that it was concluded on a boat outside of the town of Schengen, Luxembourg. The original signatories were France, Germany, Belgium, the

Schengen Agreement (CISA or Schengen II) (collectively, Schengen Agreements).⁷⁷ As conceived by those agreements, the construction of a common border policy took place through a two-step process. The first step was to allow for the free movement of treaty-member nationals within the Schengen Area by abolishing all pre-existing controls that were in place along the region's shared internal borders.⁷⁸ The second step was to counter-balance the removal of internal border controls by providing enhanced security measures along the external borders of the Schengen Area's shared perimeter.⁷⁹

In its original form, the Schengen Area was notable for its narrow membership, consisting only of five of the six countries responsible for the origins of European integration (Italy was left out).⁸⁰ Subsequent admission of new entrants was limited by restrictions requiring that an eligible country receive the unanimous approval of pre-existing members.⁸¹ It was also restricted to States that were able to satisfy an assessment covering a number of technical and political criteria meant to determine the applicant's fitness for contributing to the regime.⁸² Those procedures nonetheless coincided with a steady expansion of the Schengen Area, from its initial five members in 1995, to fifteen in 2001, to its present total of twenty-six.⁸³

All of the defining properties of an economic club apply to the Schengen Area.⁸⁴ Like the Eurozone, the Schengen Area is a mixed club with member

Netherlands, and Luxemburg. See ZAIOTTI, *supra* note 6, at 68-70.

⁷⁷ CONVENTION IMPLEMENTING THE SCHENGEN AGREEMENT OF JUNE 14, 1985 BETWEEN THE GOVERNMENTS OF THE STATES OF THE BENELUX ECONOMIC UNION, THE FEDERAL REPUBLIC OF GERMANY AND THE FRENCH REPUBLIC ON THE GRADUAL ABOLITION OF CHECKS AT THEIR BORDER BOUNDARIES, June 19, 1990 [*hereinafter*, Schengen II]. The Schengen Agreement initially represented "more of a working program than a detailed plan of action," but gained greater practical significance with the signing of Schengen II, which created an elaborate bureaucratic apparatus to administer the goals laid out in the prior agreement. ZAIOTTI, *supra* note 6, at 70.

⁷⁸ SCHENGEN II, art. 1. Facilitating free movement within Schengen Area's internal borders not only necessitated the complete elimination of border checks, but also required coordination on a number of other fronts, including: the development of a common visa policy, harmonization of policing practices, and the creation of an information-sharing infrastructure, known as the Schengen Information System (SIS). See ZAIOTTI, *supra* note 6.

⁷⁹ ZAIOTTI, *supra* note 6, at 72; SCHENGEN II, arts. 2.1, 17. Enhancing controls along the external border entailed an equally extensive set of harmonization efforts, regarding issues such as asylum procedures, customs rules, airport security, and the prevention of drug trafficking and terrorism.

⁸⁰ Notably, unlike the Eurozone and most other projects of European integration, the Schengen negotiating process took place in complete independence from any EU decision-making bodies and its legal outputs lacked any formal connection to EU law. See ZAIOTTI, *supra* note 6, at 73-74.

⁸¹ See ZAIOTTI, *supra* note 6.

⁸² *Id.* at 72, 99 ("The original group of Schengen members included countries that had the will and capacity to carry out the task of dismantling borders across Europe.").

⁸³ During that same period, the Schengen Agreements and their associated body of regulations were incorporated into the EU's legal structure via the Treaty of Amsterdam, which entered into force in 1999. The Schengen Area's current membership of 26 is due to the admission of nine countries following the 2007 Enlargement, along with the subsequent entry of Switzerland and Lichtenstein.

⁸⁴ The elimination of internal border controls and standardization of travel documentation provided legal residents of member countries with greater freedom of movement, which is a collective good analogous to the transaction cost efficiencies of the EMU's common currency. The pooling of internal

countries that vary along a number of relevant dimensions.⁸⁵ Its long-run sustainability therefore turns on the same three factors that were relevant in the prior analysis: heterogeneity of membership, susceptibility to asymmetric shocks, and the presence of burden-shifting mechanisms to mitigate those shocks. As with the Eurozone, the legal structure of the Schengen Area also provides grounds for skepticism with regard to all three criteria.

Perhaps the most glaring issue relates to asymmetric shocks. Pursuant to a protocol known as the Dublin Regulation, asylum procedures in the Schengen Area must be conducted by the member-State where a migrant first enters from outside the common external border.⁸⁶ The disparate burdens that such a system creates for Schengen's landlocked members compared to those on its periphery are obvious and severe. The asymmetry created by the Dublin Regulation is further exacerbated by the absence of genuine redistributive devices for sharing the burden of administering the movement of people within the Schengen Area. Although Schengen Area members have established a pair of border security programs—Europol (responsible for policing of internal borders), and Frontex (addressing security along external borders)—that would appear to fill such a role, a closer look reveals that those organizations lack meaningful funding and are essentially information-sharing agreements.⁸⁷

Recent developments have also made clear that the Schengen Area fails the first criteria regarding membership homogeneity. Since the influx of North African refugees into Europe began to escalate in 2012 (the migrant crisis), there has been a widespread breakdown in coordination along the Schengen Area's external borders.⁸⁸ One source of conflict is a seemingly irreconcilable rift in member's preferences over the stringency of asylum procedures. On one hand, Northern European countries, such as Germany and Sweden, have tended to adopt an accommodating position on the admission of migrants. On the other hand, members such as Hungary, Austria and many Balkan States have taken radical steps toward keeping their borders tightly policed.⁸⁹ Another division has been

policing and external border control measures also provides members with the non-rivalrous good of security. The benefits of both security and mobility are largely excludable from non-members. The Schengen Area's status as an economic club is further confirmed by its legal structure and historical development, both of which evidence a focus on maintaining a limited and cohesive membership.

⁸⁵ One source of heterogeneity is that its members do not share identical policy preferences with respect to the openness-versus-security tradeoff that is implicit in any given level of border controls. Another is that the ability of Schengen Area countries to effectively administer the regime's border controls inevitably varies due to differences in geography, wealth, and institutional capacity.

⁸⁶ Council Regulation 343/2003, O.J. (L 50), 25.2.2003.

⁸⁷ See Henry Farrell, *Here's Why Europe Can't Police Terrorism Very Well*, WASH. POST (Mar. 22, 2016).

⁸⁸ See Griff Witte & Anthony Faiola, *Spring Could Bring a Fresh Surge of Refugees. But Europe Isn't Ready for Them*, WASH. POST (Feb. 16, 2016).

⁸⁹ The extent of this gap is captured by the recent decision of a Finnish administrative law court, which blocked the transfer of an asylum seeker from Finland to Hungary on the grounds that doing so would potentially subject that individual to "unhuman and degrading treatment" and thereby violate Finland's obligations under human rights treaties. It is difficult to imagine a meaningful agreement on common border control policies if one party to the agreement interprets its interactions with certain other

produced by certain members' inability to secure their external borders. The clearest cases here are countries along the Mediterranean periphery—in particular Greece and Italy—which have encountered logistical challenges that vastly exceed their institutional-resource capacity.⁹⁰

Administration of the Schengen Area's internal borders has also fragmented in the wake of a series of catastrophic terrorist attacks that took place in France and other EU countries over the course of 2015 and 2016.⁹¹ Heterogeneous security preferences are evident in the emergency re-imposition of internal border controls by France and several neighboring countries.⁹² Divergent resource constraints have also become problematic in connection with internal borders. For example, the mismanagement of cross-border manhunts in search of fleeing terror suspects has revealed that many jurisdictions within the Schengen Area are not equipped to police internal borders at a level that is consistent with their treaty obligations.⁹³

From a club theory perspective, there are several reasons why the collapse of the Schengen Area should be attributed to defects in the institutional design of its membership decisions, rather than extreme or unforeseeable events. First, the present incompatibility of its members is not unprecedented, and in fact closely parallels disputes that arose during the Schengen Area's formative period in the 1990s.⁹⁴ Second, although the flow of migrants into Europe has certainly increased in recent years, it is still not high by international standards, nor is it large relative to the EU's population of over 600 million people.⁹⁵ Third, the Schengen Area is a much more ambitious undertaking than Europe's previous border club, an arrangement known as the Nordic Passport Union. While that arrangement proved fairly stable, it does not suggest that a club including countries as diverse as Portugal, Hungary, Finland, Spain, Lichtenstein, and Estonia could coordinate every substantive dimension of both internal and

members as constituting a human rights violation. See Umut Uras, *Finland Court Rules Against Sending Refugee to Hungary*, AL JAZEERA (Apr. 22, 2016).

⁹⁰ Witte & Faiola, *supra* note 88.

⁹¹ See *Timeline: Attacks in France*, B.B.C. NEWS (Jul. 26, 2016), <http://www.bbc.com/news/world-europe-33288542>.

⁹² See Michael Stothard, *France Plans to Keep State of Emergency Until ISIS is Defeated*, FIN. TIMES (Jan. 22, 2016).

⁹³ See Adam Nossiter, *As Terrorists Cross Borders, Europe Sees Anew that its Intelligence Does Not*, N.Y. TIMES, Mar. 23, 2016; Farrell, *supra* note 87 (“Belgium is a notorious problem case, because its policing arrangements are heavily localized. In the past, many Belgian policing forces have had difficulty cooperating with each other, let alone with other European forces.”).

⁹⁴ France's recent re-imposition of border checks due to terrorism concerns is a replay of its previous decision to do so (on identical grounds) for much of the 1990s. Similarly, doubts over Italy's wherewithal to fully secure its external borders was the main reason why its entrance into the Schengen Area club was delayed for the first several years of its existence. ZAIOTTI, *supra* note 6, at 105–07.

⁹⁵ For example, the peak years of the EU's refugee crisis have involved less total annual migration than the U.S. experiences during normal times. See Gordon Hanson & Craig McIntosh, *Is the Mediterranean the New Rio Grande? US and EU Immigration Pressures in the Long Run*, 30 J. ECON. PERSP. 57 (2016).

external border security on a sustainable basis.⁹⁶ Lastly, a border club that is built for only tranquil geopolitical conditions is flawed by conception, and the Schengen Area was structured so that any major fluctuation in the border security environment would sow discord among its members. Therefore, just as the Eurozone crisis served as a reminder that currency unions must be designed to only include participants that can equally withstand the business cycle's inevitable troughs, the Schengen Area repeats a parallel lesson for border clubs.

ii. Renegotiating the Terms Membership

In response to the conflicts that have swept across the Schengen Area, European policymakers have bargained toward several reforms, many of which are at least theoretically consistent with the burden-shifting imperative suggested by club theory. The three most prominent proposals are surveyed below. The common outcome in each instance, however, is that creative policy thinking has not been accompanied by meaningful implementation.

One attempt to overhaul the Schengen Area has been a proposed "quota system," spearheaded by Germany. The quota system calls on each Schengen Member to accept a reallocation of 160,000 refugees into their jurisdiction, and targets members with a 250,000-euro penalty for each refugee that is denied admission before the quota has been met.⁹⁷ It thereby dissolves the asymmetrical costs of asylum policy established pursuant to the Dublin Regulation, and represents a very direct form of burden shifting among club members. The problem is that the quota system has been ignored. Below-quota members, such as Hungary, scoffed at the idea of paying fines, and the proposal has yet to result in the transfer of more than a handful of refugees among Schengen members.⁹⁸

A second avenue of reform involves enhancements to the Schengen Area's common border security organizations. This has specifically taken the form of the creation of a new subsidiary entity within Frontex, the European Border and Coast Guard, which has been tasked with securing external borders along the Mediterranean. The burden-smoothing features of these efforts are self-evident. They have not been realized, however, because Schengen members have been unable to agree on more than modest funding increases for the new programs.⁹⁹

⁹⁶ The Nordic Passport Union called for the harmonization of passports among a handful of politically, geographically, culturally, and economically homogeneous Northern European countries, and functioned fairly smoothly in doing so. ZAIOTTI, *supra* note 6, at 105-07.

⁹⁷ See Alex Barker & Duncan Robinson, *EU States Face Charge for Refusing Refugees*, FIN. TIMES (May 2, 2017), <https://www.ft.com/content/346ba28a-10b8-11e6-bb40-c30e3bfcf63b>.

⁹⁸ See *Hungarian PM Vows to Resist EU's 'Misguided' Migrant Policy*, REUTERS (Feb. 26, 2016) (noting opposition to quota system); *No European Solution on the Migration Crisis in Sight* OPEN EUROPE (Feb. 26, 2016) (observing that less than 500 migrants had been transferred pursuant to the Schengen members quota plan).

⁹⁹ See Witte & Faiola, *supra* note 88 (describing the insufficient funding of Frontex); Daniel Gros, *Can Schengen Survive?*, CENTRE FOR EUROPEAN POLICY STUDIES (Dec. 2015) (discussing the need for greater progress toward a common European Coast Guard).

As a result, countries such as Italy and Greece remain largely on their own when it comes to securing critical portions of the Schengen Area's external border.

The third and most controversial reform strategy consists of a deal between the Schengen Area membership and Turkey. The Turkey deal anticipated a multi-billion-dollar payment from the EU to the autocratic Erdogan government, in exchange for its commitment to retain migrants who were attempting to enter the Schengen Area via Turkish territory.¹⁰⁰ Even though it involves large transfers to a third party, the agreement represents another attempt at intra-club reallocation, because it implies a more collectivized funding of border security on the part of Schengen members. As might have been expected, though, the Turkey deal unraveled on both sides almost immediately after it was finalized.¹⁰¹

Thus, attempts to renegotiate the terms of membership under the Schengen Agreements parallel the Eurozone's struggle to establish a banking union. In both cases, because the uneven distributional impact of proposed policies was substantial and predictable, members were only willing to agree to superficial reforms. And, although the bargaining process in both cases has been infused with rhetoric of solidarity, the failure to set administration of the Schengen Area border club on a more sustainable path is ultimately due to a prior miscalculation of the membership decision under the Schengen Agreements, just as it was for the Maastricht Treaty and EMU.¹⁰²

iii. Exit

The Schengen Area has yet to produce showdowns on the scale of Grexit or Brexit, but its member States have nonetheless continuously explored the possibility of exit. This has taken place most explicitly in countries such as Hungary, where political leaders have raised the prospect of holding national withdrawal referenda. Exit has also been pursued in more ambiguous forms. For example, Austria and nine Balkan States held a summit in February of 2016 in order to collectively rethink their asylum policies.¹⁰³ The plans that were explored at that meeting in effect implied the creation of a new border club within the Schengen Area. Another example is the decision by France (along with several neighboring countries) to announce an indefinite suspension of restrictions on internal border controls.¹⁰⁴ In one sense, then, there has already been widespread

¹⁰⁰ See STATEMENT OF THE EU HEADS OF STATE OR GOVERNMENT (July 3, 2016) (summarizing the terms of the Turkey deal); Adam Chandler, *Europe's Latest Proposal for the Refugee Crisis*, ATLANTIC (Mar. 8, 2016).

¹⁰¹ See Anthony Faiola, *EU Strikes Deal to Send Migrants Back to Turkey*, WASH. POST (Mar. 18, 2016) ("But even as an agreement was being hashed out, Turkey's authoritarian President Recep Tayyip Erdogan appeared to belittle European demands.").

¹⁰² Cf. EDINA LILLA MESZAROS & IOAN HORGA, SOLIDARITY AND EQUAL BURDEN SHARING IN THE EU OVER IRREGULAR MIGRATION: PERVASIVE REALITY OR BEDTIME STORY (2013).

¹⁰³ See Alison Smale, *With E.U. Paralyzed, 10 Nations Try to Stem Migrant Flow*, N.Y. TIMES (Feb. 24, 2016).

¹⁰⁴ Compare Stothard, *supra* note 91 (covering France's decision to reinstate border controls "until ISIS is defeated") with Schengen II, art. 2.2 (only authorizing controls at the Schengen Area's internal

de facto exit from the Schengen Area by members that have adopted a posture of permanent non-compliance.

The Schengen Agreements do not contain provisions that allow for either voluntary withdrawal or involuntary expulsion, and therefore likely impose the same prohibition on exit that characterizes the EMU.¹⁰⁵ From one perspective, exit from the Schengen Area club appears more manageable than for the Eurozone, because the mass defection of treaty members reduces the reputational sanction associated with the violation of treaty commitments. However, while informal or implicit withdrawal dampens the cost of illegal exit along some dimensions, it simultaneously increases them with respect to others.¹⁰⁶

For one, because *de facto* exit lacks the publicity of formal withdrawal, it raises the cost of coordination for non-exiting members by introducing ambiguity as to which treaty commitments will remain focal points for cooperation, and among whom.¹⁰⁷ In the Schengen Area, the opacity of informal withdrawal creates obvious issues, because migrant flows or terrorist threats pose time-sensitive problems that require a swift collective response. And, as a result of the week-to-week uncertainty over which portions of the Schengen Agreements are still in place, the entire regime has become unmanageable.

Another reason why informal exit has not returned the Schengen Area to functionality is that it has not involved the removal of *marginal* members.¹⁰⁸ Exit might not be destabilizing if it involved peripheral States like Latvia or Malta, while the original core membership of the border club remained intact. Instead *de facto* withdrawal has been pursued by countries, such as France and Belgium, that have played a central historical-political role in the development of the Schengen Agreements, or by members such as Italy or Greece, with geographic attributes that make their participation essential from a logistical perspective. The exit of certain Schengen Area countries therefore resembles the mutually assured destruction logic that was at work with the Grexit scenario in the Eurozone.

In summary, the disintegration of the Schengen Area is best understood to have resulted from its club structure, combined with the fact that the Schengen Agreements have allowed for an overly numerous and diverse membership. As with the Eurozone, miscalculation of the initial membership decision cannot be easily remedied through burden-shifting reforms or through member exit.

borders on a temporary, emergency basis); *see also* Duncan Robinson & Richard Milne, *EU States Told to Lift Schengen Border Controls Within 6 Months*, FIN. TIMES, May 2, 2017 (detailing a European Commission warning over the legality of “temporary” border controls put in place by Germany, Denmark, and Sweden).

¹⁰⁵ The legality of withdrawal or expulsion from the Schengen Area has received essentially zero attention from commentators, but the absence of applicable EU treaty provisions that explicitly authorize either form of exit suggests that, as in the Eurozone context, such actions would constitute violations of both EU and international law. *See* Athanassiou, *supra* note 69.

¹⁰⁶ *Cf.* Helfer, *supra* note 18, at 1627 (explaining the costs and benefits of formal versus informal treaty exit).

¹⁰⁷ *See id.*

¹⁰⁸ *See* Buchanan, *supra* note 9, at 2.

Unfortunately, the institutional dysfunction that has recently overtaken the Schengen Area is likely to remain problematic, because the rise of global migration and specter of terrorism are not temporary emergencies that will pass in the short term.¹⁰⁹

C. *The EU Club-of-Clubs & Brexit*

The third wave of European disintegration was triggered by the Brexit referendum. It can also be analyzed from a club perspective, by treating the European Union in its entirety as a single economic club. That is because the EU represents an umbrella “club-of-clubs” within which subsidiary clubs such as the Eurozone and Schengen Area are nested. Since the coordination of monetary policy and border security are only two examples of the numerous prerogatives that have been pooled at the EU level, it is an extreme example of a multi-good club.¹¹⁰

Starting from the founding six-member group of countries that established the European Coal & Steel Community with the 1951 Treaty of Paris, the history of the EU is one of staged, negotiated expansions.¹¹¹ Consistent with the limited participation constraint that defines mixed clubs, members have sought to manage not only size of this club but also the homogeneity of new entrants.¹¹² Since 1993, that task has been guided by the “Copenhagen Criteria,” which are a set of principles used to determine a potential entrant’s ability to comply with the obligations that accompany EU membership.¹¹³ While the EU consisted of twelve members at the time the Copenhagen Criteria were adopted, it has subsequently undergone a series of “enlargements.” The most significant of these occurred in 2004 and 2007, which resulted in a doubling of the EU’s membership due to the admission of a dozen Eastern European countries.¹¹⁴

The UK was excluded from Europe’s formative club institutions for sixteen years—largely due to opposition from France—until joining the European Economic Community in 1973. Since then, the UK has consistently sought to keep the extent of its participation in the EU to a minimum, most notably by

¹⁰⁹ See T. Alexander Aleinikoff & Stephen Poellet, *The Responsibility to Solve: The International Community and Protracted Refugee Situations*, 54 VA. J. INT’L L. 195 (2013) (explaining how the current refugee crisis is part of a broader, long-term acceleration in global migration patterns).

¹¹⁰ See *supra* note 32, and accompanying text (explaining the concept of multi-good clubs).

¹¹¹ Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140. See generally GILBERT, *supra* note 3.

¹¹² See generally CHRISTINA J. SCHNEIDER, CONFLICT, NEGOTIATION AND EUROPEAN UNION ENLARGEMENT (2009); Frank Emmert & Sinisa Petrovic, *The Past Present and Future of EU Enlargement*, 37 FORDHAM INT’L L.J. 1349 (2014).

¹¹³ The Copenhagen Criteria assess a potential entrant’s admissibility with respect to democratization and human rights practices, the presence of a functioning market economy, and a physical proximity to the historical geographic territory of ‘Europe.’ See generally Christophe Hillion, *The Copenhagen Criteria and their Progeny* (2014).

¹¹⁴ With the accession of Croatia in 2013, the EU presently includes twenty-eight member States. See Emmert & Petrovic, *supra* note 103.

foregoing membership in the Eurozone and Schengen Area.¹¹⁵ Thus, the UK has never been at the forefront of European integration, and an ambivalence over its membership in Europe's club institutions (known colloquially as "Euroscepticism") is a longstanding feature of British political culture.¹¹⁶

The path to Brexit gained momentum with the UK's elections in 2010, which resulted in a new government led by the (relatively Eurosceptic) Conservative Party. Brexit can be traced even more directly to Prime Minister David Cameron's "Bloomberg Speech" on January 23, 2013,¹¹⁷ in which he pledged to negotiate a more limited basis for the UK's membership in the EU, and to subject the resulting terms to a national referendum.¹¹⁸ Those negotiations eventually resulted in an agreement between the UK and the EU in February of 2016 (the Renegotiation Agreement). Terms of the Renegotiation Agreement included changes to the UK's obligations in areas relating to financial regulation, procedural limitations on the scope of EU legislation, and certain social benefits available to immigrants into the UK from other parts of the EU.¹¹⁹ Ultimately, however, the deal constituted only a modest reshuffling of the UK's relationship with the EU.

The Brexit referendum that followed presented voters with two alternatives: "Remain" in the EU pursuant to the new terms provided in the Renegotiation Agreement, or "Leave" the EU entirely. When the vote was held on June 23, 2016, Leave beat Remain by a margin of 52 to 48 percent.¹²⁰ The Brexit vote itself, however, did not result in the immediate withdrawal of the UK from the EU. Instead, it opened a highly uncertain path forward that both sides must navigate before exit can take effect.¹²¹

The EU's legal structure is a major source of that uncertainty. Before the 2007 Treaty of Lisbon, no EU treaty provided explicit terms for withdrawal, which meant that the legal permissibility of exit was at best ambiguous.¹²² Article

¹¹⁵ In the border controls context, this ambivalence is epitomized by Margaret Thatcher's famous "Bruges Speech" of 1988. Margaret Thatcher, *Speech Delivered at the College of Europe, Bruges*, Sept. 20, 1988.

¹¹⁶ See generally GILBERT, *supra* note 3; see also Stephen George, *Britain: Anatomy of a Eurosceptic state*, 22 J. EUR. INTEGRATION 15–33 (2000).

¹¹⁷ See Craig, *supra* note 7.

¹¹⁸ David Cameron, *The EU Is Not Working and We Will Change It*, TELEGRAPH (Mar. 15, 2014), <https://www.telegraph.co.uk/news/newstopics/eureferendum/10700644/David-Cameron-the-EU-is-not-working-and-we-will-change-it.html>.

¹¹⁹ See George Park & Alex Barker, *EU Referendum: Tusk Releases Outline Reform Deal for UK*, FIN. TIMES, Feb. 2, 2016; Stephen Booth, *What Did the UK Achieve in its EU Renegotiation*, OPEN EUROPE (Feb. 21, 2016), <https://openeurope.org.uk/today/blog/what-did-the-uk-achieve-in-its-eu-renegotiation> (providing an analysis).

¹²⁰ *E.U. Referendum: Results*, B.B.C. NEWS, http://www.bbc.com/news/politics/eu_referendum/results (last visited Apr. 20, 2018).

¹²¹ See generally Phaedon Nicolaides, *Withdrawal from the European Union: A Typology of Effects*, 20 MAASTRICHT J. EUR. & COMP. L. 2 (2013).

¹²² The only historical precedent of formal exit from the EU is the withdrawal of Greenland in 1985, which for obvious reasons does not provide much guidance applicable to Brexit. Potentially more relevant is the "empty chair" crisis, which was triggered by France in the 1960s under Charles de Gaulle, and could be considered a prior instance of informal withdrawal. See GILBERT, *supra* note 3.

50 of the Lisbon Treaty eliminates the ambiguity regarding a right of exit by expressly setting forth terms for withdrawal, but its provisions introduce further complications. The problem is that, while the opening subsections of Article 50 appear to allow for a simple unconditional exit,¹²³ they are immediately followed by language that triggers a compulsory yet ill-defined renegotiation process that may take two years, or more, to complete.¹²⁴

Moreover, although it is implausible that a member contemplating withdrawal would want to lose access to every club good that is produced within the EU, Article 50 anchors a legal framework that largely forecloses piecemeal forms of exit. Rather than facilitate exit from the EU, the structure of Article 50 calls attention to the massive cost of unwinding such a complicated legal relationship on an all-or-nothing basis. As a result, the UK now bears the risks involved in bargaining its way back into desirable terms of trade and preserving its compliance with various regulatory standards necessary for market access.¹²⁵ In light of the magnitude of those risks, a common speculation is that the logistical hurdles of Article 50 will cause the UK to abandon its attempt at withdrawal altogether.

Brexit stunned many observers and was widely considered an inconceivable outcome up to the eve of the vote. Seen through a club theory lens, however, it is entirely consistent with the EU's historical development and legal structure, and reflects the same underlying dynamics that apply to the Eurozone and Schengen Area. As an economic club, the optimal size and heterogeneity of the EU's membership is inherently limited. Yet, due to the EU's constantly evolving structure, the question of whether its membership is optimal is never permanently settled. Existing members must not only gauge their compatibility with new entrants, but also evaluate the benefits they receive from the changing menu of club goods that is provided as the EU's policy space expands.¹²⁶ The increasingly aggressive rounds of enlargement that took place during the 2000s clearly threatened to exceed those limits.

Like Greece in the Eurozone, or the Balkan States in the Schengen Area, the UK represents the EU's marginal member under the particular logic of club theory, and is an obvious focal point for reconfiguring its size. Accordingly, the UK Renegotiation Agreement was intended to secure the UK's continued participation in the EU club on more favorable conditions. But, as with the Eurozone banking union and Schengen Area reforms, the terms of the Renegotiation Agreement were too superficial to alter the UK's membership

¹²³ Art. 50(1), (2): stating that “[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements,” and that “[a] Member State which decides to withdraw shall notify the European Council of its intention.”

¹²⁴ *Id.*, art. 50(2). A final subsection regarding timing sets a default deadline of two years, but allows that deadline to be extended indefinitely by the parties' agreement. *Id.* art. 50(3).

¹²⁵ See, e.g., Niamh Moloney, *Financial Services, the EU, and Brexit: An Uncertain Future for the City?*, 17 GERMAN L.J. 75 (2016).

¹²⁶ Susanne Lechner & Renate Ohr, *The Right of Withdrawal in the Treaty of Lisbon: A Game Theoretic Reflection on Different Decision Processes in the EU*, 32 EUR. J. L. & ECON. 357, 362 (2011).

calculus in a meaningful way. And, as with the EMU and Schengen Agreements, the limited scope for renegotiation under the Lisbon Treaty motivated efforts toward full withdrawal. Lastly, a final parallel among the three waves of disintegration is reflected in the Article 50 process, which once again demonstrates that exit from Europe's club institutions is no easy solution and imposes serious costs of its own.

D. Summary & Implications

This Section has applied a club theory framework to understand European disintegration at a conceptual level that allows for a unified explanation of its underlying causes, as well as the policy dilemmas it raises. The argument that emerges is that the EU has become dysfunctional along a number of dimensions because its underlying treaty agreements form economic clubs, but have been structured in a way that is inconsistent with the membership constraint inherently accompanying such an undertaking. Thus, although the three waves of disintegration may seem largely unrelated from one another, they are all the result of common defects in institutional design, rather than unforeseeable events or shortfalls in mutual goodwill.

While the primary aim of this analysis has been descriptive and diagnostic, it does point to one higher-level policy prescription. Namely, that the commitment to "ever closer union," which is formally enshrined in the Maastricht Treaty and has otherwise been the historic polestar of European integration, should no longer be pursued. Because it directly conflicts with the limited participation constraint that defines economic clubs, the ideal of ever-closer union is not within the EU's "feasible set" of political options and will ultimately be self-defeating.¹²⁷ Recent events have confirmed this basic theoretical point. Each of the EU clubs was created with the expectation that it would foster increasingly greater levels of mutual trust among European citizens. In all three cases, however, an overly ambitious institutional structure has led to division and mutual recrimination rather than solidarity, and thereby dealt a significant blow to the overarching project of European integration.¹²⁸

A rejection of ever-closer union can be restated in positive terms as an embrace of "multi-speed" treaties, in which member countries are able to limit their participation across the EU's menu of club goods. Although such an approach has traditionally been derided as unacceptable (it is sometimes labelled "Europe à la carte"), it should instead be viewed as an appropriate end-goal of institutional design.¹²⁹ Club theory principles not only foreclose the availability of

¹²⁷ Cf. Tyler Cowen, *The Importance of Defining the Feasible Set*, 23 *ECON. & PHIL.* 1 (2007).

¹²⁸ See Jürgen Habermas, *Democracy, Solidarity and the European Crisis*, Lecture delivered at Leuven, Belgium on April 26, 2013 ("What unites the European citizens today are the Eurosceptical mindsets that have become more pronounced in all of the member countries during the [Euro] crisis.").

¹²⁹ Compare Wolfgang Munchau, *An à la carte Europe Is Likely to Split*, *FIN. TIMES* (Oct. 4, 2004) with Wolfgang Munchau, *A Multi-Speed Formula Will Shape Europe's Future*, *FIN. TIMES* (Mar. 12, 2017), <https://www.ft.com/content/f01f1266-058e-11e7-ace0-1ce02ef0def9>.

ever-closer union, but also indicate that a multi-speed framework will increase the overall amount of cooperation within the EU. Multi-good clubs that are able to exclude members from certain club goods are able to have a larger membership and achieve greater overall benefits for their members.¹³⁰ Going forward, then, policymakers should look for creative ways to accommodate the reality that most member countries prefer to coordinate on only a subset of the many policies that are under the EU's purview.¹³¹

This final point suggests a tentative reinterpretation of Brexit, which is almost uniformly framed as a purely negative turn of events.¹³² What the conventional, alarmist view fails to appreciate, however, is that if the political process operates smoothly enough, Brexit could be a useful precedent that spurs a broader recalibration of the EU club-of-clubs on a more sustainable basis. While a positive resolution to the Brexit negotiations is far from certain, this potential upside is rarely acknowledged.

III.

REASSESSING THE DESIGN OF INTERNATIONAL AGREEMENTS

The pair of methodological missteps in research on the economic analysis of international law which this Article identifies are its tendency to disregard European integration and a failure to incorporate concepts from club theory. The previous Section sought to remedy the former blindspot by showing that a rational choice explanation of European disintegration is possible once the EU is understood as a collection of international treaty agreements that establish economic clubs. This Section draws on the preceding analysis of EU treaties as a case study, and uses it to examine the implications that club theory carries for the economic analysis of international agreements in general.¹³³

In doing so, it provides a critical reassessment of the rational choice literature on treaty design. That topic has been subject to an extensive body of scholarship which looks at the particular legal components that States include when drafting

¹³⁰ See Sandler, *supra* note 31.

¹³¹ Certain EU regulations include harmonized requirements relating to the permissible decibel levels for lawnmowers, for example. See Philip Stephens, *Why Europe Needs Cross-Border Lawnmower Regulations*, FIN. TIMES (Oct. 15, 2013) <https://www.ft.com/content/ac04efc8-34c8-11e3-a13a-00144feab7de>; see generally Alberto Alesina, Ignazio Angeloni, & Ludger Schuknecht, *What does the European Union Do?* 123 PUB. CHOICE 275 (2005).

¹³² See, e.g. Fiona Hill, *The "Greatest Catastrophe" of the 21st Century? Brexit and the Dissolution of the UK*, BROOKINGS (June 24, 2016), <https://www.brookings.edu/blog/order-from-chaos/2016/06/24/the-greatest-catastrophe-of-the-21st-century-brexit-and-the-dissolution-of-the-uk/>.

¹³³ It should be noted that international agreements come in many legal formats, including informal "soft law" texts that are not technically considered treaties. See Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171 (2010). This article uses terms "agreement" and "treaty" interchangeably, and does not distinguish among agreements based on their degree of legal formality.

international agreements, and seeks to explain how those features function to facilitate cooperation among treaty members. Of course, the idea of looking at the legal structure of international agreements is not novel, and the same basic questions have been addressed by the doctrinal literature in various ways. The rational choice research on treaty design is therefore best understood as posing a revisionist challenge to the traditional answers provided in international law scholarship. The theoretical innovation introduced by economic analyses is to treat international agreements as self-enforcing contracts between States (rather than binding laws handed down by a hypothetical world government, or moral imperatives).¹³⁴ In addition to developing a more rigorous theoretical framework, the law-and-economics scholarship has also made advances by conducting large-scale empirical studies that quantify how frequently various design features appear in the text of treaties.¹³⁵

Despite this more sophisticated approach, the discussion below will demonstrate that the leading rational choice accounts of treaty design remain substantially incomplete due to the two “wrong turns” in that literature. Part A explains why treaty provisions which govern the membership of agreements relating to club goods are the key area of misunderstanding. Part B narrows the analysis and looks at specific design features that regulate the membership decision by setting the terms for treaty entry. Part C does the same for treaty exit.

A. *The Membership Decision in Club versus Non-Club Treaties*

This Part begins with an overview of international agreements outside of the EU that also deal with club goods (club treaties). It then turns to treaties concerning public goods (public goods treaties), which are usually taken as the baseline case in the rational choice literature on treaty design. A third and final sub-Part briefly reviews human rights treaties, which are a focal point of the doctrinal literature. As will be shown, the limited membership condition that applies to club treaties is reversed in the context of both public goods agreements and human rights treaties, where the central challenge of institutional design is to induce *maximal* participation.

i. *Club Treaties*

Perhaps the most well-developed area of international law is a body of economic agreements that have been formalized through trade and investment treaties. Both operate as clubs. With trade agreements, States make reciprocal commitments to reduce tariffs and other protectionist measures, and thereby enjoy

¹³⁴ See *supra* note 2, and accompanying text; Guzman, *supra* note 13, at 585 (“It is therefore helpful to think of international agreements as a form of contract and bring to bear on the study of those agreements some of the insights from the contracts literature.”).

¹³⁵ See, e.g., KOREMENOS, *supra* note 2; Thomas J. Miles & Eric A. Posner, *Which States Enter into Treaties, and Why?* (U. Chicago Law & Econ., Olin Working Paper No. 420, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1211177.

the benefits of an excludable club good in the form of market access.¹³⁶ Rivalry in consumption of the benefits of market access may appear for a number of reasons, such as the fact that there is heterogeneity in States' preferences for economic liberalization.¹³⁷ The optimal membership of trade treaties is therefore limited, and determined by a mix of factors that includes States' geographic proximity, domestic politics, economic productivity, and industrial organization. International investment agreements are often incorporated as chapters in trade treaties, but are also concluded on a stand-alone basis, and generally have similar club dynamics.¹³⁸

The club properties of trade treaties are most apparent in the case of "preferential trade agreements"—such as NAFTA, Mercosur, and ASEAN—which have a relatively exclusive membership, often consisting of a handful of States within a given region.¹³⁹ Despite a much more expansive membership, the multilateral system established pursuant to the General Agreement on Tariffs and Trade (GATT) functions as an economic club as well. As a careful study by Nicolas Lamp has shown, the GATT framework contained a number of subtle procedural mechanisms that allowed sub-groups of States within the GATT to exchange trade preferences without providing them to all GATT member States.¹⁴⁰ When the GATT was transformed to the World Trade Organization (WTO) in 1994, those kinds of excludable bargains were eliminated by new WTO rules that imposed greater uniformity.¹⁴¹ Along with the EU treaties discussed above, the WTO arguably provides another example of an over-extended club membership, as evidenced by the paralysis of global trade negotiations that occurred post-1994 and the widespread abandonment of the WTO as a bargaining forum that resulted.¹⁴²

¹³⁶ Trade agreements are commonly divided into two sub-categories: customs unions and free trade areas. See Brummer, *supra* note 38.

¹³⁷ Another source of consumption rivalry is introduced by the fact that new entrants can potentially "divert" trade in their direction in a way that reduces the value of market access previously enjoyed by existing parties. See *id.*; cf. JACOB VINER, *THE CUSTOMS UNION ISSUE* (1950).

¹³⁸ Investment agreements typically consist of mutual commitments to protect direct private investments from expropriation, and to submit investor-state disputes to third-party arbitral tribunals for resolution. See POSNER & SYKES, *supra* note 1, at 288–97 (providing an overview of investment treaties). When entered into outside of trade treaties, investment agreements are frequently bilateral, and known as BITs (Bilateral Investment Treaties). See Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 640 (1998).

¹³⁹ Michele Fratianni & John Pattison, *International Organizations in a World of Regional Trade Agreements: Lessons from Club Theory*, 24 WORLD ECON. 333 (2001); see also Brummer, *supra* note 38, at 544–45 (arguing that regional trading agreements resemble clubs but deviate from the idealized club criteria along certain dimensions).

¹⁴⁰ See Lamp, *supra* note 38.

¹⁴¹ See *id.* For the WTO's constitutive treaty, see Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

¹⁴² In addition to the rise of PTAs, another recent example on this point is the United States pursuing trade agreements, such as the Trans-Pacific Partnership (TPP), outside of the very same WTO structure that it was largely responsible for creating. Cf. Fratianni & Pattison, *supra* note 139, at 335–36 (on use of PTAs as substitute for WTO negotiating rounds).

Security alliances also tend to constitute economic clubs, depending on the particular military context.¹⁴³ The North Atlantic Treaty Organization (NATO) provides a subtle illustration of this point, because it has embodied both the exception and the rule at various stages in its development. During the height of the Cold War, the United States' commitment to the mutual defense rule laid out in Article V of the NATO charter meant that it provided a public good, in the form of a (non-excludable and non-rivalrous) nuclear umbrella that covered all of Western Europe, regardless of whether countries in that region were formally part of the NATO membership.¹⁴⁴ In the post-Cold War shift to conventional military engagement, however, Article V of NATO represents a club good, because it involves the deployment of scarce resources along a security perimeter that can exclude some national territories but not others.¹⁴⁵ Under those conditions, the optimal size of NATO is limited. It should therefore not be surprising that membership in NATO has been a critical issue over the past few decades, and the eastern expansions to the alliance that have taken place during that period have been controversial and carefully staged.¹⁴⁶

Another prominent club treaty is the Articles of Agreement of the International Monetary Fund (IMF).¹⁴⁷ The IMF oversees a diverse set of initiatives, but at its core it is a common fund that is used for lending operations. In that respect, the IMF is the functional equivalent of a credit union that provides the excludable club good of financial liquidity to its members.¹⁴⁸ The club good aspect of IMF lending was particularly clear during the Bretton Woods era (roughly, 1945–1970), when its loans were directed at mitigating foreign exchange volatility among a homogeneous group of advanced economies that had pegged their currencies to the U.S. dollar.¹⁴⁹ Once the IMF's financing activities began to include a broader and more diverse set of States—specifically, in the 1990s, with various “bailouts” of developing countries that were facing financial crises at the time—the excessive heterogeneity of IMF members became more apparent, and the organization was subsequently consumed by in-fighting

¹⁴³ CORNES & SANDLER, *supra* note 9, at 393; *see generally* Todd Sandler & Keith Hartley, *Economics of Alliances: The Lessons for Collective Action*, J. ECON. LIT. 869 (2001).

¹⁴⁴ Article V of NATO provides that: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all.” North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244 34 U.N.T.S. 243, 246. *See* Mancur Olson & Richard Zeckhauser, *An Economic Theory of Alliances*, 48 REV. ECON. STUD. 266 (1966) (providing the public good interpretation); CORNES & SANDLER, *supra* note 9, at 529–34 (same).

¹⁴⁵ *See* TODD SANDLER & KEITH HARTLEY, *THE POLITICAL ECONOMY OF NATO: PAST, PRESENT, AND INTO THE 21ST CENTURY* (1999).

¹⁴⁶ *See* Herman W. Hoen, *NATO's Retirement?: A Club-theoretical Approach to the Alliance*, in *NATO'S RETIREMENT? ESSAYS IN HONOUR OF PETER VOLTEN* (Margriet Drent et al., eds. 2011).

¹⁴⁷ Articles of Agreement of the IMF, 60 Stat. 1401, 2 U.N.T.S. 39.

¹⁴⁸ Stanley Fisher, *The Asian Crisis: A View from the IMF*, 9 J. INT'L FIN. MGMT. & ACCT. 167, 167 (1998) (analogizing the IMF to a credit union); Joseph P. Joyce & Todd Sandler, *IMF Retrospective and Prospective: A Public Goods Viewpoint*, 3 REV. INT'L ORG. (2008) (distinguishing between the various public goods and club goods that the IMF produces).

¹⁴⁹ Carmen M. Reinhart & Christoph Trebesch, *The International Monetary Fund: 70 Years of Reinvention*, 30 J. ECON. PERSP. 3 (2016).

between internal lender and borrower factions.¹⁵⁰ The result, which parallels the rise of PTAs in the trade area, was that States shifted away from the global platform of the IMF to more exclusive regional credit clubs, such as the Chiang Mai Initiative in East Asia, the Fondo Latinoamericano de Reservas in Latin America, and the Arab Monetary Fund in the Middle East.¹⁵¹

A few further examples of club treaties are worth noting in passing. One involves agreements governing the administration of certain globally scaled technologies that have the properties of club goods; for example, the regime for outer-space telecommunications satellites, known as INTELSAT.¹⁵² Another illustration of club treaties is provided by “democratization agreements”—such as those establishing the Organization of American States, Southern African Development Community, and the Central European Free Trade Area—which typically have a limited regional membership comprised of States that are attempting to coordinate their transition away from authoritarian political regimes.¹⁵³ A final relevant category includes certain international standard-setting entities like the International Standards Organization (ISO), which develop technical codes or best practices protocols.¹⁵⁴

The foregoing survey is not meant to be comprehensive but instead to establish two preliminary points. First, it is a mistake to dismiss EU treaties as unrepresentative outliers: club treaties are pervasive, span a variety of policy areas and institutional forms, and represent some of the most ambitious agreements in international law. Second, the colloquial use of “clubs” that sometimes appears in the literature can be misleading because a small number of members is neither a necessary nor sufficient condition for economic clubs. Rather than the sheer size of a group, the key analytical considerations are the nature of the cooperative undertaking at issue, as well as the presence of a mechanism that can exclude outsiders from its benefits.

¹⁵⁰ See JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

¹⁵¹ See Barry Eichengreen, *Regional Funds: Paper Tigers or Tigers with Teeth?*, in *REGIONAL AND GLOBAL LIQUIDITY ARRANGEMENTS* 39 (Volz & Caliri eds., 2010).

¹⁵² International technology agreements of this kind can be seen as analogous to domestic regulatory clubs, such as those that oversee the provisions of utilities like electricity. See CORNES & SANDLER, *supra* note 9, at 412–13, 526–27 (discussing INTELSAT); see also Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 *WORLD POL.* 336 (1991).

¹⁵³ See Christodoulos Kaoutzakis, Paul Poast, & Johannes Urpelainen, *Not letting ‘bad apples’ spoil the bunch: Democratization and strict international organization accession rules*, 11 *REV. INT’L ORGS.* 399 (2016).

¹⁵⁴ Standards can be made excludable through a certification process. Firms or government bodies that are able to opt-in to these standards gain access to a club good that takes the form of the “brand value” associated with verified compliance with a given standard. See Aseem Prakash & Matthew Potoski, *International Standards Organization as a Global Governor: A Club Theory Perspective* (Nov. 2007). Determining the optimal membership size is a crucial issue for international standards clubs: overly stringent criteria will result in an excessively small membership that does not leverage the scale economies of a common brand; overly lax standards will dilute the signal of quality that accompanies exclusivity. See Aseem Prakash & Matthew Potoski, *Collective Action through Voluntary Environmental Programs: A Club Theory Perspective*, 35 *POL’Y STUD. J.* 773, 778–79 (2007).

ii. *Public Goods Treaties and Commons Treaties*

The rational choice literature generally analyzes international agreements based on the assumption that they are designed to facilitate cooperation on international public goods.¹⁵⁵ That decision is significant because, as mentioned, the defining properties of club goods—excludability and rivalry in consumption—are reversed in the case of public goods.¹⁵⁶ The upshot is that in contrast to the limited membership constraint on clubs, the optimal provision of public goods requires universal participation.¹⁵⁷ This distinction is critical for purposes of institutional design. For club agreements, the central challenge is to limit participation by identifying the marginal member and excluding other potential entrants. For public goods agreements, it is a given that the membership should include all willing entrants, and the problem of treaty design is how to induce participation to the greatest extent possible (through *de jure* membership and *de facto* compliance).¹⁵⁸

Environmental treaties often concern public goods, and present a clear illustration of the membership dynamic in these types of agreements. A classic case is international agreements relating to climate change: no State can be excluded from the benefits associated with curbing global warming, and when one State “consumes” those benefits it does not limit their availability to others.¹⁵⁹ Accordingly, for agreements that attempt to limit global carbon emissions, such as the Kyoto Protocol and the more recent Paris Agreement,¹⁶⁰ the negotiation process is all about maximizing participation.¹⁶¹ Other examples of public goods treaties are international disarmament agreements like the Treaty on the Non-Proliferation of Nuclear Weapons (NPT Treaty) or Ottawa Land Mine Removal Treaty.¹⁶² Because the benefits that flow from limiting the cross-border circulation

¹⁵⁵ See, e.g., Posner & Sykes, *supra* note 1, at 14, 20–24; GUZMAN, *supra* note 1, at 66–68; Miles & Posner, *supra* note 135, at 3 (“We argue that [S]tates enter treaties in order to obtain public goods.”).

¹⁵⁶ See *infra* Section I (contrasting club goods with public goods and providing examples).

¹⁵⁷ Because every State can enjoy the benefits of a public good, any State that does not contribute to the production of that good is said to be “free riding” on the cost of making the good available. See generally OLSON, *supra* note 23.

¹⁵⁸ See SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 195 (2003); Timothy L. Meyer, *Global Public Goods, Governance Risk, and International Energy*, 22 DUKE J. COMP. & INT’L L. 319, 323–24 (2012); Sandler & Tschirhart, *supra* note 9, at 340.

¹⁵⁹ Meyer, *supra* note 158, at 324.

¹⁶⁰ The Kyoto Protocol was signed in 1997. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22. The Paris Agreement was signed in 2016. UNFCCC, Rep. of the Conf. of the Parties on its Twenty-First Session, U.N. Doc. FCCC/CP/2015/10/Add.1, at 21 (Jan. 29, 2016).

¹⁶¹ See Helfer, *Fully Committed?*, *supra* note 18, at 377; cf. William Nordhaus, *Climate Clubs: Overcoming Free-Riding in International Climate Policy*, 105 AM. ECON. REV. 1339 (2015) (proposing a scheme for converting the public goods posture of climate agreements to the club format of trade agreements).

¹⁶² The Ottawa Treaty was signed by 133 countries in 1997. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 35597 (2002), 36 I.L.M. 1507 (1997). The NPT Treaty was signed in 1968, and

of nuclear weapons or hidden underground explosives are largely non-excludable and non-rivalrous, these agreements are designed with the aim of achieving the broadest possible membership.¹⁶³

Agreements which relate to what are known as common pool goods (commons treaties) are distinguishable from public goods treaties in certain respects but raise similar design problems for purposes of treaty membership. Common pool goods, which frequently take the form of un-proprietary natural resources (such as open fields, lakes, or forests), share the non-excludable quality of public goods but are distinguishable because they exhibit rivalry in consumption. That combination leads to the well-known “tragedy of the commons,” where there is over-exploitation of resources and over-investment in technological races to capture the resources first.¹⁶⁴ In order to combat this dynamic, commons treaties must have a broad membership, or else a small minority of non-participating States will be able to take advantage of unlimited access to the common pool good at issue. The quintessential commons treaty is the United Nations Convention on the Law of the Sea (UNCLOS), which sets forth rules over how States may exploit natural resources present in the world’s oceans, and has a near-universal global membership totaling 167 States.¹⁶⁵

One caveat to the presumption that maximal membership in public goods agreements is optimal is that the universe of relevant participants may not include every country in the world, depending on whether the public good at issue is global or local in scope.¹⁶⁶ Thus, while the Kyoto Protocol and other agreements on carbon emissions sought a worldwide membership, participation in the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) only needed to include the subset of countries that released a non-negligible amount of the CFC gases that are responsible for depletion of the ozone.¹⁶⁷ The same qualification applies to commons treaties as well. Because the UNCLOS applies across the worldwide body of oceans, full participation implies that essentially every State must become a member to that treaty. For treaties relating to regional common pool goods, such as the Caspian Sea Agreement,

presently includes 190 State parties. U.N. General Assembly, A/RES/2373(xxii), Annex, U.N. Doc. A/7016/Add.1, Annex, June 10, 1968.

¹⁶³ See Daniel Verdier, *Multilateralism, Bilateralism, and Exclusion in the Nuclear Proliferation Regime*, 62 INT’L ORG. 439, 439, 461 (2008); Helfer, *supra* note 18, at 1619 (noting the uproar that took place in 1993 after North Korea disavowed its participation in the NPT treaty).

¹⁶⁴ See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

¹⁶⁵ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 297. The main function of the UNCLOS is to divide up access to a number of common pool resources—such as seabed minerals, undersea oil and gas deposits, and fisheries—that would otherwise be subject to over-consumption. See Eric A. Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 AM. J. INT’L L. 569 (2010).

¹⁶⁶ See Michael Gilligan, *Is There a Broader-Deeper Tradeoff in International Multilateral Agreements?*, 58 INT’L ORG. 459 (2004).

¹⁶⁷ See *id.* at n.3; BARRETT, *supra* note 158, at 221–53.

“universal” membership means the four countries that are adjacent to the Caspian Sea.¹⁶⁸

A more fundamental complication in the membership decision for public goods treaties is raised by the so-called “breadth-versus-depth tradeoff.” That phrase refers to an influential argument, which holds that treaty terms may be drafted so as to either accommodate more member States (increasing breadth), or to require more intensive forms of cooperation from its members (increasing depth), but not both.¹⁶⁹ These claims are relevant because they introduce the possibility that, in addition to club treaties, all other international agreements must also be designed to limit rather than to maximize their membership.¹⁷⁰ The significance of the breadth-versus-depth dilemma is often overstated, however. That is because, at a basic conceptual level, no such tradeoff applies in the case of public goods treaties: a limited core of deep cooperators is always made better off by the addition of any party willing to make an investment in the public good, no matter how minimal or “shallow” that investment may be.¹⁷¹ As a consequence, the membership of a public goods treaty can be expanded at no cost to its depth, so long as the agreement is designed to allow for variation in the contribution levels of its members. Because there are a number of ways that agreements achieve that result,¹⁷² it should not be surprising that empirical studies that investigate the breadth-versus-depth tradeoff have failed to confirm any correlation between the intensity of treaty obligations and size of membership.¹⁷³

In short, public goods treaties may not actually reflect universal membership as a practical matter. And the literature contains voluminous technical debates—including those over the breadth-versus-depth tradeoff—about how and when such second-best conditions might apply.¹⁷⁴ But it is a mistake to interpret those

¹⁶⁸ Helfer, *supra* note 18, at 1638 n.159 (noting the requirement that all four States enter into the Caspian Sea Agreement); Gilligan, *supra* note 166 (making the same point with regard to a treaty relating to clean up of the Black Sea).

¹⁶⁹ See George W. Downs, David M. Roake & Peter N. Barsoom, *Managing the Evolution of Multilateralism*, 52 INT’L ORG. 419 (1998) (providing an influential version of the theory).

¹⁷⁰ See, e.g., *id.* (arguing that treaties are most effective when they are initially narrow and deep, and then broaden their membership thereafter).

¹⁷¹ Gilligan, *supra* note 166, at 461. In one sense, non-excludability implies that there is *always* universal participation in public goods agreements, in the form of universal consumption of benefits. A pacifist who objects to her government’s decision to maintain a military still has no choice but to consume the public good of national security.

¹⁷² This can be done formally, with terms that tier obligations to accommodate less cooperative parties—and such tiered treaty structures are commonplace. See generally Lavanya Rajamani, *DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW* (2006). The same result can also be achieved informally, by simply enforcing the obligations of low-contribution treaty members less vigorously.

¹⁷³ See Thomas Bernauer, Anna Kalbhenn, Valley Koubi & Gabriele Ruoff, *Is There a ‘Depth versus Participation’ Dilemma in International Cooperation?*, 8 REV. INT’L ORG. 477 (2013).

¹⁷⁴ See, e.g., Guzman, *supra* note 13 (focusing on the relationship between enforcement costs and treaty membership); Anu Bradford, *How International Institutions Evolve*, 15 CHINA J. INT’L L. 47 (2015) (focusing on transaction costs of negotiating treaty terms); Miles & Posner, *supra* note 135 (also emphasizing transaction costs).

claims as collapsing the fundamental distinction between the optimal membership of treaties relating to public goods and club goods. That distinction derives from the excludability of the collective benefit being consumed, rather than enforcement problems or other limitations of the bargaining environment. In other words, for club agreements, the limited membership principle holds even under idealized conditions where it is assumed that full compliance is always forthcoming and treaty terms can be negotiated with zero transaction costs.

iii. *Human Rights Treaties*

The rational choice literature acknowledges one major exception to its default assumption that international agreements are meant to coordinate joint investments in public or common pool goods: human rights treaties.¹⁷⁵ That is because the legal obligations contained in human rights agreements do not call for international cooperation of any kind, and instead concern States' treatment of their own populations.¹⁷⁶ From a law-and-economics perspective, this inward-looking orientation makes human rights treaties somewhat mysterious and, as a result, there is no consensus theory of why those agreements are created or how they are intended to work.¹⁷⁷ Probably the most common hypothesis is that human rights treaties function as commitment devices, which governments use to signal that they will forego repressive domestic policies, especially in future periods when they may have an incentive to impose them.¹⁷⁸ But, regardless of the particular interpretation of human rights treaties that is put forward, it is rare for the rational choice scholarship to identify a mechanism that would make it attractive for States to limit the membership of those agreements, or seek to block potential entrants.¹⁷⁹

The doctrinal literature, by contrast, is quite emphatic that global participation in human rights treaties is optimal.¹⁸⁰ This view is often associated with the legal principle of *jus cogens*, which embodies the notion that every State must comply with a body of "peremptory" or "non-derogable" norms, including certain human rights.¹⁸¹ Adopting the concept of *jus cogens* means that human

¹⁷⁵ Posner & Sykes, *supra* note 1, at 202 (noting that human rights treaties "do not seem to fit th[e] model" that normally explains international cooperation).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See James Vreeland, *Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture*, 62 INT'L ORG. 65 (2008); Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties*, 51 J. CONFLICT RES. 588 (2007).

¹⁷⁹ See Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RES. 925, 926–32 (2005) (surveying some leading theories); *but cf.* James Hollyer & Peter Rosendorff, *Why Do Authoritarian Regimes Sign the Convention Against Torture? Signaling, Domestic Politics, and Non-Compliance*, 6 QUART. J. POL. SCI. 275 (2011) (suggesting autocratic governments may use entry into human rights treaties as a tactic to signal an intention to *violate* the terms of those agreements).

¹⁸⁰ See Eric A. Posner, *THE PERILS OF GLOBAL LEGALISM*, 176–90 (2009).

¹⁸¹ See Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July

rights treaties call for universal membership almost by definition, since they tend to articulate obligations that the entire global community is already bound to honor in the first place, essentially as a matter of natural law.¹⁸²

The way that human rights treaties are negotiated closely conforms to the doctrinal perspective. Beginning with the 1948 United Nations Declaration on Human Rights, an historic landmark in the development of human rights law, almost all human rights agreements have been characterized by a vast, nearly global membership.¹⁸³ Moreover, one of the most salient aspects of human rights treaties is that they often involve shaming campaigns that aim to encourage full participation, and tend to erupt into controversy when even a small minority of States refuse to join.¹⁸⁴ State practice therefore suggests that a key problem of agreement design in the context of human rights is how to attain maximal participation, just as it is in the case of treaties on public goods.

While economic analyses of international law tend to conclude that human rights treaties are an idiosyncratic phenomenon of questionable practical importance, they represent a paradigmatic case for the doctrinal literature. For traditional international law scholars, the universalist impulse that animates treaty-making on human rights is the most prominent expression of a more general view, which holds that world affairs should be governed by legal principle—rather than power or force—to the greatest extent possible.¹⁸⁵ Accordingly, the emphasis that they place on obtaining maximal participation in human rights treaties is often applied to other international agreements in a mechanical fashion.

The foregoing observations introduce a considerable irony. When approaching questions of treaty design, rational choice and doctrinal scholars proceed by focusing on two starkly dissimilar kinds of international agreements: treaties on public goods and those on human rights. They then analyze the membership dynamic of those agreements with conceptual frameworks that could not be less alike: the logic of collective action on one hand, and a cosmopolitan moral philosophy on the other. Yet by sheer coincidence, those literatures manage to arrive in the same place. That is, scholars from both perspectives tend to assume

8, 1996); Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937).

¹⁸² See Posner & Sykes, *supra* note 1, at 198–99 (explaining how a natural law philosophy is an underlying justification for the advocacy of human rights).

¹⁸³ See, e.g., 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (146 State parties); 1979 Convention on the Elimination of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (189 State parties); 1984 United Nations Convention Against Torture, Dec. 10, 1984, 1465 U.N.T.S. 85 (161 State parties).

¹⁸⁴ See Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011). One controversy occurred in 1997, when North Korea's announced it would no longer abide by the International Covenant on Civil and Political Rights (ICCPR). ICCPR, Dec. 19, 1966, 999 U.N.T.S. 171.

¹⁸⁵ See generally MARTTI KOSKENIEMMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2006); see, e.g. Antonia Chayes, *How American Treaty Behavior Threatens National Security*, 33 INT'L SECURITY 45 (2008); Harold Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997).

that the main problem of treaty design is for States to find ways to induce maximal participation by all relevant parties.

Taking that premise as a starting point is problematic in the case of treaties that concern club goods, because the assumption is diametrically opposed to the limited participation constraint that defines those agreements and was found to be so decisive in the context of European disintegration. Because many treaties outside of the EU also establish economic clubs, existing theories of treaty design are likely to miss important aspects of how international agreements work. This is especially so with respect to legal elements that are used to manage the numerosity and heterogeneity of treaty members. The particular issues of treaty design that have been overlooked are discussed in more detail in the remaining two parts of this Section, which follow directly below.

B. *Designing Treaty Entry*

When examining the design features that are relevant to treaty membership, it is helpful to distinguish legal terms that govern treaty participation *ex ante* from those that apply *ex post*. In the former category are “entry provisions,” which regulate the membership decision on the front-end by setting rules for joining a treaty. The latter group consists of “exit provisions,” which influence the back-end of the membership decision by announcing procedures for the removal of existing members. Both kinds of provisions raise questions of agreement design, because States can influence the structure of treaty membership by drafting them with relatively liberal or restrictive terms.

This Part focuses on an important pair of entry provisions: accession conditions and reservations. As will be shown, both terms operate in counterintuitive ways when they are used in club agreements. On one hand, the optimal design of accession conditions in club treaties is more stringent than is conventionally understood. On the other hand, the optimal scope of reservations is broader than standard theories would predict. Taken together, these findings carry some surprising implications for one of the most foundational debates in international law, which turns on competing views over whether treaties function to either screen or constrain the States that join them, and what that means for the efficacy of international agreements in general.

i. *Accession Conditions*

Accession conditions govern the entry decision of potential member States by specifying requirements a State must meet before it will be accepted as a party to a treaty by existing members.¹⁸⁶ There is no background rule of international law that requires a treaty to include accession conditions—an agreement may expressly allow for the unconditional entry of any State that desires to join.¹⁸⁷

¹⁸⁶ See Vienna Convention on the Laws of Treaties, art. 15, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCOLT].

¹⁸⁷ See *id.*

When treaties incorporate accession conditions, there are two basic ways that States can design those provisions. With voting rules, states are able to introduce a procedural hurdle to membership by conditioning accession on the approval of existing members.¹⁸⁸ Accession conditions may also be drafted to include substantive requirements that a State must meet, such as being located in a particular geographic region, or obtaining a certain level of political or economic development.

It is revealing that the international law literature contains no general account of how accession conditions function as an element of treaty design.¹⁸⁹ Moreover, when those provisions *do* receive notice, the discussion typically assumes that they set forth toothless, ministerial requirements that have a limited effect on how treaties function as a whole. The standard view of accession conditions has been well-summarized as follows:

To become a member in global IOs [international organizations], it is often sufficient for countries to express an interest in membership, show some vaguely defined good-will, commit to a few, often non-binding, policy measures, have their request superficially discussed by existing members, and then their accession request is invariably accepted. In other words, global IOs are typically built on the premise that States have a 'presumptive right of membership save in the case of intractable and difficult political circumstances.'¹⁹⁰

The absence of any comprehensive analysis of accession conditions is not an accident. Instead, it is a byproduct of the controlling assumptions in theories of treaty design, which extrapolate from agreements where the goal of maximal participation means that barriers to entry do not serve any useful purpose. In the case of public goods treaties, it makes no sense for existing parties to restrict the accession of additional States. Because non-parties cannot be excluded from the benefits that those treaties produce, the only effect that accession conditions have is to deter additional investment in the public good. The idea of including accession conditions is no less awkward in the context of human rights treaties. The terms of those agreements are thought to embody legal obligations that are *inescapable*, and it is bizarre to think of something like the prohibition on torture as a privilege of treaty membership that may be extended to some States but not others. The common theoretical intuition that accession conditions are rare and unimportant is further reinforced by a review of the major human rights treaties, as well as prominent agreements on global public goods, such as the Kyoto Protocol. A typical procedure in both instances is for treaties to be deposited with

¹⁸⁸ The stringency of that hurdle can be further calibrated to various degrees, depending on the applicable voting threshold: for example, a majority rule, super-majority rule, or requiring unanimous consent. Cf. Eric A. Posner & Alan O. Sykes, *Voting Rules in International Organizations*, 15 CHI. J. INT'L L. 195 (2014).

¹⁸⁹ A Westlaw search of international law journals and general law reviews returns zero articles that contain the word "accession" in their title.

¹⁹⁰ Eric Neumayer, *Strategic Delaying and Concessions Extraction in Accession Negotiations to The World Trade Organization*, 12 WORLD TRADE REV. 669, 670 (2013).

the Secretary General of the United Nations and then held open on an unconditional basis to any State that is willing to join.¹⁹¹

Once club agreements are taken into consideration, however, it becomes clear that accession conditions can play a central role in treaty design. With economic clubs, those provisions are an essential tool for policing entry in order to limit the size and heterogeneity of treaty members. If a club treaty is designed with accession conditions that are insufficiently stringent, its membership may expand to the point that existing parties no longer benefit from participation in the agreement.

This Article's case study of European disintegration illustrates the importance of accession provisions for club treaties. The applicable treaty agreements for all three European clubs (the Eurozone, the Schengen Area, and the EU as a whole) were designed with voting rules that condition entry on the unanimous approval of existing members, which is the most restrictive procedural requirement possible.¹⁹² The constitutive legal agreements for each club also demand that new members satisfy elaborate substantive policy conditions, and impose an onerous multi-year review process for verifying when those requirements have been met.¹⁹³ The history of European integration also suggests that the details of these provisions matter. During the bargaining processes that accompanied the development of all three clubs, the specific terms of accession procedures were a focal point of the EU members' negotiations.¹⁹⁴

Trade agreements provide another example. Although accession to the GATT and WTO is not widely studied outside of the specialized literature on international trade, scholars in that area often note the highly burdensome accession conditions that those organizations have developed and consider them to be a key aspect of how the multilateral trade regime operates.¹⁹⁵ Accession conditions in both the GATT and WTO treaties include what are effectively unanimous voting rules. More subtly, those agreements also contain provisions that authorize each existing member to conduct a series of meetings with potential newcomers, which provide a mechanism for members to extract particularized trade concessions as a condition of approving a non-party's entrance.¹⁹⁶ The result tends to be a protracted accession process. For example, it took over a decade of bargaining for both China and Russia to be admitted to the WTO.¹⁹⁷ Nor are

¹⁹¹ United Nations, Office of Legal Affairs, Treaty Handbook, Section 2.3 (2006); Miles & Posner, *supra* note 135, at 2-3.

¹⁹² See *supra* Sections II.A.i (the Eurozone), II.B.i (the Schengen Area), & II.C (the EU).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See Krzysztof Pelc, *Why Do Some Countries Get Better WTO Accession Terms Than Others?*, INT'L ORG. (2011); Todd L. Allee & Jamie E. Scalera, *The Divergent Effects of Joining International Organizations: Trade Gains and the Rigors of WTO Accession*, 66 INT'L ORG. 243 (2012); Christina L. Davis & Meredith Wilf, *Joining the Club: Accession to the GATT/WTO*, 79 J. POL. 964 (2017).

¹⁹⁶ See Lamp, *supra* note 38, at 184-85.

¹⁹⁷ China acceded to the WTO in 2001, after fifteen years of negotiations. Russia became the WTO's 156th member on August 22, 2012, after eighteen years of negotiating.

smaller States immune from similar treatment, as highlighted by a vaguely abusive round of negotiations that recently took place between WTO members and the island nation of Vanuatu.¹⁹⁸

Heavy reliance on accession conditions is not due to anything unique about European politics or large trade agreements. Instead, it is a predictable institutional response to the excludability and rivalry in consumption that characterize club goods, and the same pattern holds across clubs treaties in most other areas; exacting accession procedures can be found in the constituent treaties for NATO, the IMF, and regional democratization agreements.¹⁹⁹ Thus, contrary to the conventional wisdom, accession conditions frequently appear in international agreements, are often drafted to include relatively sophisticated terms that introduce substantial barriers to entry, and in many cases are a key factor that determines whether a treaty will function effectively or not. The fact that the rational choice literature takes minimal notice of accession conditions therefore represents a significant missing piece in the overall understanding of treaty design.

The most basic takeaway from the preceding analysis is that accession conditions should receive greater attention from international law scholars. But a more subtle lesson follows as well, which turns on the distinction between the way that accession conditions are designed as a formal legal matter and how they actually operate in practice. An examination of European disintegration reveals that a treaty regime that includes rigorous accession conditions on paper may still be destabilized when those provisions are loosely applied.²⁰⁰ The NATO charter provides a counterexample to the EU scenario, where strict accession conditions allowed the expansion of NATO's membership to be managed in a more discriminating and sustainable manner.²⁰¹ The disparity in these two outcomes points to an underappreciated limitation of empirical research on treaty design. The data underlying those studies is usually produced from a text-based analysis of a large sample of treaty documents. As a review of accession conditions indicates, the fact that a certain subset of treaties contains facially similar terms may not have any meaningful relationship to the way that those provisions influence the behavior of treaty members.

¹⁹⁸ See Roman Grynberg & Roy Mickey Joy, *The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System*, 34 J. WORLD TRADE 159 (2000).

¹⁹⁹ On accession to NATO, see Andrew Kydd, *Trust Building, Trust Breaking: The Dilemma of NATO Enlargement*, 55 INT'L ORG. 801 (2001). On the IMF, see Beth Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 4 AM. POL. SCI. REV. 819 (2000); Von Stein, *supra* note 15. On democratization treaties, see Christina J. Schneider & Johannes Urpelainen, *Accession Rules for International Institutions: A Legitimacy-Efficacy Trade-Off?* 56 J. CONFLICT RES. 290 (2012).

²⁰⁰ Frank Schimmelfennig, *EU Political Accession Conditionality After the 2004 Enlargement: Consistency and Effectiveness*, 15 J. EUR. PUB. POL'Y 918 (2008).

²⁰¹ See Andrew Kydd, *Trust Building, Trust Breaking: The Dilemma of NATO Enlargement*, 55 INT'L ORG. 801 (2001).

ii. Reservations

Reservation provisions allow States to agree to be bound by some treaty obligations but not others.²⁰² The default rule of international law is that reservations are permissible so long as they do not undermine the “object and purpose” of a treaty.²⁰³ A further background norm is that reservations will be interpreted to operate in reciprocal fashion; when State A announces that it will not honor treaty term T, State B is thereby relieved of its commitment to comply with term T in its dealings with State A.²⁰⁴ Subject to these limitations, reservations introduce another design variable that is relevant to the membership decision, because they allow States to fine tune treaty participation by converting it from a yes-or-no question into a matter of degree.²⁰⁵

Compared to the case of accession conditions, international law scholarship contains a lively debate over reservations.²⁰⁶ In the doctrinal literature, reservations are generally viewed as suspect.²⁰⁷ Although doctrinal international law scholars grant that reservations provide a source of flexibility that is desirable to some degree, the main concern is that they enable States to shirk international legal obligations by adopting a strategy of opportunistic “over-reserving,” and thereby undermine the goal of universal treaty participation.²⁰⁸ As might be expected, these claims are most often applied in the context of human rights agreements, where doctrinal scholars have emphasized the need for treaties to explicitly prohibit reservations or otherwise include harsh severability terms.²⁰⁹

Research on the economic analysis of treaty design rejects the traditional skepticism that international lawyers have held towards reservations. This is primarily for two reasons. First, reservations can serve a useful information-producing function. When a reserving State announces that it will only join a treaty subject to certain limiting terms, non-reserving treaty members receive a potentially valuable signal about the reserving State’s perceived costs and benefits of treaty compliance.²¹⁰ Second, while full participation in a treaty may be ideal,

²⁰² See VCOLT, *supra* note 186, art. 2(1)(d).

²⁰³ See *id.*, art. 19(3).

²⁰⁴ See *id.*, art. 21.

²⁰⁵ In addition to the decision of whether to permit reservations at all, there are a number of ways States can customize those provisions on a more granular level. One method of making a treaty’s reservation rules less restrictive is to include a provision that expressly defines the agreement’s “object and purpose” in narrow terms. See Swaine, *supra* note 18, at 324–25. Another design variable involves the particular “severability” procedure that applies in the event that a treaty member attempts to assert a reservation that is overly broad or otherwise objectionable to other non-reserving parties. See Goodman, *supra* note 17; Swaine, *supra* note 17, at 322–23.

²⁰⁶ See generally *supra* note 17.

²⁰⁷ See Helfer, *supra* note 18, at 368 (noting the traditional opposition to reservations); Swaine, *supra* note 17, at 310 (same); see, e.g., Goodman, *supra* note 17; Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341 (1995).

²⁰⁸ See Goodman, *supra* note 17, at 533.

²⁰⁹ *Id.*

²¹⁰ See Swaine, *supra* note 17, at 333–39.

the availability of reservations can induce some States to partially enter into agreements that they would otherwise refuse to join altogether.²¹¹ Under this something-is-better-than-nothing logic, reservations provide a way for States to get closer to the goal of maximal treaty membership by circumventing the breadth-versus-depth tradeoff with variable commitment levels. Lastly, while rational choice scholars concede that opportunistic reservations are a possibility, they argue that the ability to use reservations as a free-riding strategy is substantially reduced by the reciprocity principle as well as the object-and-purpose limitation.²¹²

Both of these competing views run into a conspicuous empirical problem. The issue is that quantitative studies on treaty design have repeatedly found that States almost never enter reservations except in connection with human rights treaties.²¹³ Even more strangely, almost all reservations from human rights treaties are made by advanced liberal democracies, rather than the autocracies that tend to violate human rights.²¹⁴ This is awkward for doctrinal claims, because it reveals that the alleged downside of reservations—that they allow States to evade human rights commitments—does not materialize; governments that are scrupulous about human rights rely on reservations, while those that flout human rights do not. It also undermines the rational choice position, which is (implicitly) premised on the value of reservations for overcoming information and incentive problems in connection with public goods treaties, where those provisions appear never to be used.²¹⁵

A more coherent picture of how treaty reservations work emerges once two points are appreciated. First, the dramatic skew towards human rights treaties found in quantitative studies is misleading, because those studies only code for provisions that meet the technical definition of “reservations” under the law of treaties, along with a handful of close variants, such as “declarations” and “understandings.”²¹⁶ However, many international agreements that do not meet those formal requirements nevertheless perform an equivalent function by allowing member States to selectively opt-out of some treaty requirements.²¹⁷ The distribution of reservations is less lopsided if such “informal” reservations are taken into account. Second, theoretical arguments often do not draw sharp

²¹¹ *Id.* at 311.

²¹² *See, e.g.*, Posner & Sykes, *Efficient Breach*, *supra* note 19, at 285 (“The reciprocity principle following the entry of a reservation further ensures that in most cases the reserve states cannot free ride.”).

²¹³ *See* KOREMENOS, *supra* note 2, at 163.

²¹⁴ Eric Neumayer, *Qualified Ratification: Explaining Reservations to International Human Rights Treaties*, 36 J. LEGAL STUD. 397, 401 (2007).

²¹⁵ Statistical studies of reservations find that those provisions are invoked in only 98 percent of environmental agreements, which is one of the lowest rates across all treaty genres. *See* KOREMENOS, *supra* note 2, at 163. A well-known feature of the UNCLoS treaty on the law of the sea is that it was negotiated as a “package deal,” meaning that the parties expressly prohibited reservations of any kind. *See* Swaine, *supra* note 17, at 332.

²¹⁶ *See, e.g.*, Neumayer, *supra* note 214, 405–06; KOREMENOS, *supra* note 2.

²¹⁷ *See* Helfer, *supra* note 18, at 377 (making this point).

distinctions across genres of agreements. This overlooks the fact that reservations serve fundamentally different functions, depending on whether the treaty at issue deals with human rights, public goods, or club goods.²¹⁸

For example, the otherwise strange pattern of reserving that characterizes human rights treaties becomes straightforward once it is understood that the reciprocity principle is meaningless for those agreements, while the object-and-purpose rule does all the work.²¹⁹ By allowing non-participation at the margin, the object-and-purpose limitation enables countries in the United States and Europe to signal subtle philosophical disagreements over the nature of human rights when they join a treaty.²²⁰ But by prohibiting reservations that go to the heart of an agreement, the rule also allows advanced democracies to express a mutual condemnation of the human rights abuses committed by illiberal States. Repressive autocracies have no use for reservations, because they intend to impose precisely those policies that violate the object-and-purpose of human rights agreements.²²¹

The use of reservations in public goods treaties turns on an unrelated set of considerations. There, the driving factor is the non-excludability of public and common pool goods, which implies that, contrary to the conventional rational choice analysis, reservations almost always allow States to free ride. A consequence is that States rely on informal reserving mechanisms for public goods treaties, because neither the reciprocity principle nor the object-and-purpose rule that accompany formal reservations are desirable in those agreements. Enforcing the object-and-purpose rule would be self-defeating, since the entire point of reservations is to provide a second-best solution to expand treaty membership, by facilitating a limited amount of free-riding on investments that are at the core of the treaty's mission.²²² If applied, the reciprocity principle would also cause cooperation on public goods treaties to unravel due to the non-excludability feature.²²³

²¹⁸ See, e.g., Swaine, *supra* note 17, at 312.

²¹⁹ The problem with reciprocal abdications of human rights commitments is well established. See Franco Parisi & Catherine Sevchenko, *Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention*, 21 BERKELEY J. INT'L L. 1, 20–25 (2003) (explaining the “irrelevance of reciprocity in human rights agreements”).

²²⁰ See Neumayer, *supra* note 214, 400–01.

²²¹ See *id.* at 401.

²²² For example, *de facto* reservations to the Montreal Protocol on Substances that Deplete the Ozone Layer take the form of “differential treatment” provisions, which authorize some members to make relatively smaller efforts at reducing their emission of the CFC gases that are responsible for depleting the ozone layer. See *supra* note 172, and accompanying text.

²²³ Consider a hypothetical commons treaty that places limits on the hunting of fur seals. There is no way for non-reserving State A to disregard its treaty obligation with respect to reserving State B in a purely bilateral, reciprocal manner. When State A resumes hunting activities in response to State B's reservation, there are fewer seals in the world's oceans and every treaty member is equally disadvantaged. See Barrett, *supra* note 158, at 50 (labelling this the problem of “multilateral externalities”).

A distinct set of issues is raised when a treaty provides multiple benefits to member States, at least one of which takes the form of a club good. For international agreements that establish multi-good clubs, reservations also tend to be informal, but for reasons that are much different than in the case of public goods treaties. The critical factor once again is excludability. Because a reserving State is opting-out of both investment in and consumption of the club good, reservations do not give rise to free-riding, even when the treaty obligations in question are part of the object-and-purpose of an agreement. Excludability also means that reservations are automatically reciprocal as a functional matter, whether or not the reciprocity principle legally applies. An important implication of these features is that reservations to club treaties may be a first-best arrangement for facilitating international cooperation, rather than a pragmatic compromise aimed at expanding treaty membership.²²⁴

The case study of European disintegration highlights the under-appreciated aspects of treaty reservations that have been outlined above. First, it shows the artificiality of the formal definition of reservations that is used in empirical studies on treaty design. EU treaties are riddled with “opt-out” protocols and analogous devices for selective participation, despite lacking formal reservation provisions. Second, it demonstrates how the built-in reciprocity of reservations in club treaties precludes free-riding. By opting out of the euro, the Czech Republic does not enjoy the benefits of a common currency which accrue to Eurozone members, nor is it free-riding on other EU members’ investments in the monetary infrastructure administered by the ECB.²²⁵ Third, the prescription for a multi-speed EU that eschews ever-closer union can be understood as an application of the proposition that the broad availability of reservations can be a first-best arrangement for international cooperation when club goods are at issue.²²⁶

The same dynamics can be seen at work in other treaties that oversee multi-good clubs. The multilateral trading system is one example. While it is often stated that the GATT prohibits reservations, that is only true in the technical legal sense. As mentioned, the GATT traditionally included procedures that allowed sub-groups of members to agree to excludable trade concessions; to the extent those carve-outs represented discrete bargains over market access, the GATT functioned as a multi-club treaty with liberal reservation rules.²²⁷ Another example is the IMF Articles of Agreement. In addition to its core lending function, the IMF houses an array of other projects relating to global financial stability. As a study by Todd Sandler and Joseph Joyce has shown, the sustainability of the

²²⁴ In technical terms, this results from the presence of heterogeneous preferences plus rivalry in consumption. The combination means there can be circumstances where participation in certain club goods will lead to Pareto-inferior outcomes that are welfare reducing for both reserving and non-reserving States.

²²⁵ Likewise, by opting out of the Schengen Area, Ireland is not free-riding on other EU members’ investments in a common passport system or external border infrastructure.

²²⁶ See *supra* Section III.D.

²²⁷ Posner & Sykes, *Efficient Breach*, *supra* note 19, at 285 n.156 (on the GATT’s system of *de facto* reservations); Lamp, *supra* note 38 (same).

IMF depends on whether its membership structure includes reservation-like policies that allow for selective access to services that represent club goods, while also maintaining full participation in the undertakings that provide public goods.²²⁸

As with the discussion of accession conditions, the preceding analysis of reservations has uncovered both empirical and theoretical gaps in the existing account of treaty design. The theoretical contribution is to introduce an overlooked conceptual distinction in the way that reservations function across different classes of international agreements. Reservation provisions can be particularly broad in the context of treaty obligations relating to club goods, where the drawbacks that accompany reservations in public goods treaties do not apply. The empirical point is that the use of reservations is more widespread than is generally recognized, because many provisions that do not technically qualify as reservations perform an equivalent function for purposes of treaty participation. This once again points to the limits of otherwise sophisticated quantitative studies in the rational choice literature, which must rely on a relatively formalistic analysis of treaty texts when making inferences about agreement design.

iii. Treaties as Screens versus Constraints

The preceding analysis of entry provisions has delved into somewhat technical aspects of treaty structure but, when considered as a whole, it is also relevant to what is arguably the most fundamental debate in all of international law. That debate turns on competing interpretations of a famous remark made by Louis Henkin, who claimed that “[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”²²⁹ Henkin’s observation was intended as a rejoinder to international relations realists who doubted the possibility that international law could ever supersede raw power politics as an organizing principle in world affairs.²³⁰ In Henkin’s view, the tendency for State behavior to conform to applicable treaty requirements or customary norms was persuasive evidence for the contrary view, and proved that international law “matters” because it effectively demands compliance from States. A hallmark of doctrinal scholarship is to accept this assessment at face value.²³¹

One of the more influential contributions of the economic analysis of international law is its challenge to the traditional version of this claim. The key move by rational choice scholars was to point out that, regardless of whether Henkin’s observation is literally correct, it is irrelevant to the underlying question

²²⁸ See generally Joyce & Sandler, *supra* note 148.

²²⁹ Henkin, *supra* note 16.

²³⁰ *Id.*

²³¹ See, e.g., Oran Young COMPLIANCE AND PUBLIC AUTHORITY: A THEORY WITH INTERNATIONAL APPLICATIONS, 140 (1979); Abraham Chayes & Antonia Chayes, *On Compliance*, 47 INT’L ORG. 125 (1993).

of interest.²³² That is because the Henkin assertion does not preclude the possibility that States never violate the rules of international law for the simple reason that those rules only prohibit conduct that States never had any interest or intention to pursue in the first place.²³³

The rational critique was largely successful, and has led the oldest question in international law to be reframed as follows. International law matters to the extent that it operates as a “constraint” that causes member States to adopt a course of action that they would not otherwise follow in the absence of their treaty obligations. By contrast, treaties are inconsequential for purposes of international cooperation when they act as “screens,” which merely attract a set of States that were already going to observe the relevant treaty requirements no matter what.²³⁴ Widespread acceptance of these theoretical points has turned debate over whether international law “matters” into an empirical question, and sparked a quantitative arms race in which researchers attempt to show that the “real,” more sophisticated form of compliance (reflecting treaties-as-constraints) is what often happens.²³⁵

From a perspective that is concerned with the design of human rights or public goods treaties, the screen-versus-constraint framework makes perfect sense. In both cases, the goal of achieving universal participation means that entry provisions should be structured so as to minimize a treaty’s screening function as much as possible. The design problem is to draw into a treaty’s membership those States that are otherwise reluctant to invest in global public goods or refrain from violating their nationals’ human rights. The other major design problem is to develop enforcement mechanisms that ensure that States actually comply with a treaty’s requirements once they become members. That is, to maximize the treaty’s ability to constrain participants. If States agree to honor human rights norms or contribute to public goods arrangements, but then disregard their commitment to do so, not much has been accomplished.

However, the standard screen-versus-constraint logic is turned upside down when applied to club treaties. Due to the limited membership principle that governs economic clubs, a club agreement cannot be effective at fostering international cooperation *unless* it successfully functions as a screen. The design problem is to draft entry provisions that enable treaty membership to expand to its optimal size, and then exclude all additional entrants. This is easy to see with accession conditions, which work as screens that allow current members to filter the population of potential new entrants into admissible and inadmissible types. The function performed by reservations is slightly more subtle, but amounts to a mirror-image version of the same thing. That is, reservations place discretion in

²³² See Von Stein, *supra* note 15.

²³³ Downs, Rocke, & Barsoom, *supra* note 15, at 397-419.

²³⁴ *Id.*

²³⁵ See, e.g., BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); Adam S. Chilton, *Experimentally Testing the Effectiveness of Human Rights Treaties*, 18 CHI. J. INT’L L. 164 (2017); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935 (2002).

the hands of the non-member States with heterogeneous preferences to self-screen from certain treaty provisions, by avoiding participation in a sub-set of club goods that do not provide any benefits. Moreover, the need for maintaining a homogeneous membership in club treaties flips the conventional screening logic in an especially extreme way. In contrast to human rights or public goods treaties—where one goal is to include and then constrain the most recalcitrant and non-cooperative States—the design imperative for club treaties is to, first and foremost, establish screens that exclude heterogeneous outlier States from participation.

One value of the case study of European disintegration is that it makes these otherwise counter-intuitive dynamics of club treaties self-evident. Participation in the Eurozone has destabilized the financial systems of its members because the treaties underlying the EMU did not contain entry provisions that were effective at screening out States like Portugal or Greece.²³⁶ Likewise, the benefits that the Schengen Area provides to its members have evaporated due to a treaty structure that imposed much less stringent screens than did previously successful European border security clubs, such as the Nordic Passport Union.²³⁷ Lastly, Brexit can be attributed to a combination of weakly screening accession and reservation provisions, which simultaneously allowed the EU's membership to expand at an aggressive pace while limiting the ability for the UK to opt-out of many EU club goods.²³⁸

Other club agreements reflect a similar inversion of the standard screen-versus-constraint dynamic. The success of a diverse set of treaties—including security alliances (such as NATO), preferential trading agreements (such as ASEAN) and democratization treaties (like the Organization of American States)—can in part be explained by the fact they include entry provisions which have been designed to limit membership by acting as screens. At the same time, the past two decades of paralysis in the multilateral trading regime is largely due to the “single undertaking” format introduced by the WTO, which dismantled informal reservation procedures that served as screening devices in the old GATT system.²³⁹ The flight to “mini-lateral” treaty arrangements that has also occurred in the area of international finance is symptomatic of the limited availability of internal screens at the IMF as well.²⁴⁰

To sum up, the rational choice literature has adopted an overly narrow view of how international agreements work, by shifting the debate over compliance with international law to a question of whether treaties screen or constrain. For a prominent genre of treaties—those that deal with club goods—a major design

²³⁶ See *supra* Section II.A.i.

²³⁷ See *supra* Section II.B.i.

²³⁸ See *supra* Sections II.C & II.D.

²³⁹ See Lamp, *supra* note 38.

²⁴⁰ On the IMF, see *supra* notes 139 & 140, and accompanying text; see generally CHRIS BRUMMER, MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW, AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT (2014).

problem is to structure entry provisions such that certain States are excluded from participation. If the screening function that those provisions perform is not sufficiently restrictive, international cooperation may stall or unravel altogether. This stands in stark contrast to the conventional analysis, where a finding that treaties operate as screens is considered synonymous with the idea that international law “does not matter.”

A. *Designing Treaty Exit*

In addition to entry provisions, treaty membership is also determined on the “back-end,” by design features that manage participation in international agreements after States have already joined. There are primarily two kinds of legal elements that regulate treaty exit: provisions that set the terms for a State’s voluntary withdrawal and those that relate to a State’s involuntary expulsion from an agreement’s membership. Traditional international lawyers take a dim view of treaty exit, as well as legal rules that make it easier to achieve.²⁴¹ However, the rational choice literature has made an effort to push back on that position by arguing that States can (and do) promote greater levels of international legal cooperation by designing treaties so that members are subject to more “flexible” legal obligations, including those that allow more latitude for exit.²⁴²

This Part walks through the mechanics of withdrawal provisions, and explains why the standard theoretical claims that point in favor of flexible treaty exit should apply with special force in the case of club treaties. It then turns to treaty exit through expulsion, which has largely been ignored by international law scholarship, and shows that the same conclusions apply there as well. In each instance, an empirical puzzle emerges, because club treaties (both inside and outside the EU) often include withdrawal and expulsion provisions that are deliberately designed to *raise* the cost of treaty exit. The discussion closes by suggesting that this disconnect is due to the fact that rational choice scholars have drawn from the economic theory of contracts in a selective and overly simplistic way.

i. *Withdrawal Provisions*

Withdrawal provisions, sometimes referred to as “denunciation provisions,” define when it is legal for a State to unilaterally terminate its membership in a treaty. The default norm of international law is that an agreement’s silence regarding withdrawal gives rise to a presumption that it is prohibited.²⁴³ That presumption is rebuttable, however, if the treaty’s subject matter or the

²⁴¹ The fundamental anarchy of the international system means that States are ultimately free to abandon their treaty commitments at any time. However, international agreements can nonetheless be designed in ways that raise or lower the costs of that decision, by triggering a legal sanction for some forms of exit but not others. *See Helfer, supra* note 18 (cataloguing the advantages States enjoy from legal treaty exit compared to illegal exit).

²⁴² *See supra* note 20 (citing to the flexibility research).

²⁴³ VCOLT, *supra* note 186, art. 56(2).

circumstances that surrounded the drafting process indicate that the parties intended for withdrawal to be available.²⁴⁴ States can also opt-out of the default prohibition by agreeing to terms that affirmatively authorize withdrawal. And in practice, treaties frequently include express withdrawal provisions. Although treaties can permit States to withdraw on an unconditional basis, withdrawal provisions often restrict the ease of exit with a variety of mechanisms, including notice requirements, waiting periods, and terms that make the availability of withdrawal subject to the occurrence of certain events.²⁴⁵ Another way that treaties can be designed to raise the cost of exit is to provide that members can only withdraw with respect to the entirety of the agreement, rather than particular sub-parts.²⁴⁶

As mentioned, doctrinal scholars usually take a negative view of design features that facilitate treaty withdrawal.²⁴⁷ That orientation is consistent with a classic background norm of international law, *pacta sunt servanda*, which, roughly stated, stands for the proposition that agreements are meant to be honored.²⁴⁸ The fact that doctrinal scholars treat human rights treaties as the archetypal international agreement also explains their aversion to withdrawal. In keeping with the natural law principle of *jus cogens*, States' withdrawal from human rights obligations (such as prohibitions on torture and the like) would appear to be justified under rare or nonexistent circumstances.

Law-and-economics scholars have challenged this conventional wisdom with a number of counter-arguments for why treaties should be designed so that withdrawal is readily available to members. One is that, from an *ex ante* perspective, treaties that lower the cost of exit provide an inducement for States to join those agreements in the first place.²⁴⁹ This is essentially the same reasoning that is applied to reservations, and interprets liberal withdrawal provisions as another workaround of the breadth-versus-depth tradeoff that can further the goal of maximizing the membership of public goods treaties.²⁵⁰

A separate line of argument in literature builds off of the economic theory of incomplete contracts. Contracts are considered "incomplete" when parties lack the foresight (or time, or other resources) to specify terms that identify an efficient set of performance obligations for every possible state of the world, and therefore leave some contingencies open for renegotiation.²⁵¹ In applying the contract

²⁴⁴ *Id.* Where that is the case, any member can exit after announcing an intent to withdraw and completing a year-long "notice period." *Id.*

²⁴⁵ Helfer, *supra* note 18; KOREMENOS, *supra* note 2.

²⁴⁶ See Posner & Sykes, *supra* note 19.

²⁴⁷ See Helfer, *supra* note 18.

²⁴⁸ VCOLT, *supra* note 186, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

²⁴⁹ See Koremenos & Nau, *supra* note 19, at 83.

²⁵⁰ See Helfer, *supra* note 18, at 1638; Gilligan & Johns, *supra* note 4.

²⁵¹ A "complete contingent contract," by contrast, is said to be renegotiation-proof because its terms are both *ex ante* and *ex post* efficient for both parties with respect to all potential eventualities. See generally Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 *ECONOMETRICA*

analogy to treaties, rational choice scholars emphasize that the complexity and pervasive uncertainty of global affairs makes it unlikely that States will be able to draft “complete” international agreements, meaning that treaties will tend to leave many issues open for renegotiation.²⁵² Under this analysis, withdrawal provisions should be designed to include liberal terms that lower the cost of treaty exit because the availability of exit serves as a valuable form of co-insurance for treaty members.²⁵³

Rational choice scholars often state the theoretical claim in favor of low exit costs at a general level, but the same arguments also make sense in the specific context of club treaties. Laurence Helfer, who wrote what is perhaps the leading study on treaty exit (as well as one of the few handful of pages in the treaty design literature that directly discusses the implications of club theory), provides some confirmation on this point. Helfer concludes that discussion as follows:

This [rational choice] analysis yields important prescriptive insight for treaty makers: when negotiating agreements that regulate private or club goods, drafters can include capacious exit clauses to encourage broad ratification or enhance depth.²⁵⁴

Helfer’s primary argument relies on the excludability of club goods, which means that, unlike with public goods treaties, withdrawal from club agreements cannot be used as an opportunistic strategy for free riding by exiting members.²⁵⁵ In addition, the rivalry in consumption that applies to club goods provides a further reason why broad withdrawal provisions may be particularly useful in club treaties, because it raises the possibility that remaining members may affirmatively benefit from the exit of certain States. These considerations imply that club agreements should represent an especially strong case for the rational choice claim that flexible treaty terms can promote international cooperation by reducing exit costs.

However, the theoretical intuition that club treaties are well suited for capacious exit clauses does not receive empirical support from a review of actual international agreements dealing with club goods. The case study of European disintegration provides a notable counter-example here, since exit from all three of the EU clubs has been complicated by treaties which include conspicuously narrow withdrawal provisions.²⁵⁶ Neither does a consistent pattern of broad

755 (1988).

²⁵² See Koremenos & Nau, *supra* note 19, at 90–91; Helfer, *supra* note 18; Koremenos, *supra* note 18.

²⁵³ Cf. Posner & Sykes, *supra* note 19 (approaching the same general argument from a “theory of efficient breach” perspective).

²⁵⁴ Helfer, *supra* note 18, at 1637.

²⁵⁵ *Id.* at 1637–68.

²⁵⁶ In the case of the Eurozone and Schengen Area, for example, the absence of any applicable treaty provision authorizing withdrawal is usually interpreted to mean that a member’s unilateral exit is legally prohibited. See *supra* Sections II.A.iii & II.B.iii. The result is that withdrawal is restricted to the multi-good level of the EU as a whole. Even then, the EU itself did legally permit withdrawal until

withdrawal terms surface in a review of non-EU club treaties. BITs and related investment agreements are usually structured so that an exiting member will remain bound by certain treaty commitments for multiple decades after its withdrawal. Article 13 of the NATO Charter, on the other hand, allows for withdrawal after a one-year notice period. Meanwhile, the IMF Articles of Agreement grant members the flexibility to exercise an immediate, unconditional withdrawal.²⁵⁷ Even within a common policy area, such as trade agreements, the design of treaty terms governing withdrawal varies in a wide and seemingly random fashion.²⁵⁸

The discrepancy between the theoretical rational choice research on treaty exit and observed State practice is susceptible to multiple interpretations. One possibility is that the standard analysis is ultimately sound, but that States often design withdrawal provisions to include inefficient terms that impose needless costs on treaty members. Indeed, it is not uncommon for the treaty design literature to adopt such an explicitly normative posture.²⁵⁹ Moreover, the same lesson is often drawn from European disintegration, where restrictive exit clauses have exacerbated the considerable political chaos surrounding the Brexit and Grexit referenda.²⁶⁰ Another possibility, however, is that the law-and-economics framework is in fact flawed, and overlooks functional reasons that explain why raising the costs of exit may be efficient for international agreements relating to club goods.²⁶¹ After turning to expulsion provisions directly below, this Part concludes by defending the latter interpretation.

ii. Expulsion Provisions

Expulsion provisions are the other design feature that allows States to modify the membership of an international agreement *ex post*. The main difference between expulsion and withdrawal, of course, is voluntariness: the former authorizes forcible ouster of certain treaty members by others. Another distinction is that, unlike the case of withdrawal, the law of treaties does not specifically address the scenario where an agreement is silent as to expulsion.²⁶² As a result,

Article 50 of the Treaty of Lisbon was adopted in 2007. Yet, as explained in the discussion of Brexit, Article 50 incorporates a vague and potentially burdensome two-year renegotiation period that makes withdrawal from the EU quite difficult as well. *See supra* Section I.I.C.

²⁵⁷ On BITs, see Laurence Helfer, *Terminating Treaties*, in OXFORD GUIDE TO TREATIES, 642–43 (Hollis ed., 2012); Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 471–72 (2010); KOREMENOS, *supra* note 2, at 142.

²⁵⁸ The ASEAN treaty is silent with regard to withdrawal; Mercosur allows for withdrawal after a two-year notice period; the WTO and NAFTA treaties both limit the same restriction to a relatively brief period of six-months. KOREMENOS, *supra* note 2.

²⁵⁹ Note, for example, that Helfer's analysis of treaty exit is framed as support for "prescriptive" (rather than descriptive) claims. Helfer, *supra* note 18, at 1637.

²⁶⁰ *See, e.g.*, Jens C. Dammann, *The Right to Leave the Eurozone*, 48 TEX. INT'L L.J. 125 (2012).

²⁶¹ *Cf.* SCOTT & STEPHAN, *supra* note 2, at 9 (arguing that the standard presumption that contracting by firms tends towards efficiency should also carry over to the analysis of international agreements).

²⁶² The background rules for both withdrawal and expulsion should be interpreted as applying to members' ability to exit "without cause." This is because the main enforcement device in international

the default rule of international law is usually understood to be that the lack of any provision on point means expulsion is prohibited, regardless of whether the drafting history or other textual cues suggest an intent of the treaty parties to the contrary.²⁶³ However, States are not barred from opting out of that default. And, such provisions can be designed so that the availability of expulsion is calibrated along a spectrum, with the introduction of contingent terms, voting rules, and other procedural hurdles.

In comparison to treaty withdrawal, expulsion provisions are essentially ignored in both the doctrinal and rational choice research on agreement design.²⁶⁴ The disparity in scholarly attention that is given to these two exit provisions parallels the case of treaty entry where there is a neglect of accession conditions relative to reservations. And it is for the same reasons. As with accession conditions, it makes little sense for States to include expulsion provisions in agreements on public goods or human rights, where universal membership is optimal.²⁶⁵ In other words, for both kinds of treaties, forcing one State's exit rarely provides benefits to remaining members.

As was found with accession conditions, the neglect of treaty expulsion is also problematic when it comes to the design of club agreements, where those provisions would appear to present significant value for treaty members. From an incomplete contracts perspective, the logic of easy exit as insurance applies to expulsion no less than it does for withdrawal. While withdrawal provisions mitigate the error costs of the membership decision for acceding members, expulsion provisions help protect existing members from the uncertainty of future events, by allowing them to reverse prior accession approvals that turned out to be unwise. Moreover, the excludability of club goods means that the threat of expulsion can provide a powerful incentive for members to avoid shirking on their treaty obligations, and thereby provides an enforcement device that is unavailable in agreements on public goods.²⁶⁶

law is a form of "exit for cause," where States no longer need to comply with treaty commitments with respect to counter-parties that are in material breach of their legal obligations. See VCOLT, *supra* note 186, art. 60(2) (laying out the rules for "terminating" treaties); cf. Hathaway & Shapiro, *supra* note 173.

²⁶³ See Athanassiou, *supra* note 69; Jerzy Makarczyk, *Legal Basis for Suspension and Expulsion of a State from an International Organization*, 25 GERMAN Y.B. INT'L L. 476 (1982).

²⁶⁴ In fact, none of the leading articles on flexibility in agreement design mention the possibility of expulsion, including those that specifically purport to address the topic of treaty "exit." For a very recent exception, see Joseph Blocher, Mitu Gulati, and Laurence R. Helfer, *Can Greece Be Expelled from the Eurozone? Toward a Default Rule on Expulsion from International Organizations*, FILLING THE GAPS IN GOVERNANCE: THE CASE OF EUROPE 127-50 (EUROPEAN UNIVERSITY INSTITUTE 2016), <https://ssrn.com/abstract=2780743>.

²⁶⁵ Under a rational choice framework, it is a *non sequitur* to expel a State from a public goods agreement, because by definition they cannot be excluded from consuming the treaty's benefits, only from contributing towards its cost. For doctrinal scholars, the idea of excluding a State from its human rights obligations is abhorrent in principle and absurd in practice—in what sense could a State be "expelled" from a *jus cogens* prohibition against abusing its own citizens?

²⁶⁶ See Blocher et al., *supra* note 264 (noting the potential for expulsion as an enforcement device in the case of club goods).

With expulsion, a look at European disintegration again reveals a gap in the thinking on treaty design. Specifically, the German-led proposal to expel Greece from the Eurozone pursuant to a sort of “buyout” package²⁶⁷ has brought forth a stream of scholarly commentary on the merits of treaty expulsion, within the EU and otherwise.²⁶⁸ In keeping with the theoretical points about the advantages of expulsion in club treaties outlined above, a general theme of recent research on the topic is that some potential benefits of treaty expulsion have been overlooked, and that international agreements should be interpreted or designed so that expulsion is more readily available to members.²⁶⁹

The foregoing observations regarding treaty expulsion lead to the same stalemate that arose in the discussion of withdrawal. Namely, there are clear theoretical reasons why States should consider the inclusion of expulsion provisions to be an especially attractive option when it comes to the design of club treaties. There is also empirical support for that theoretical intuition in the case of European disintegration, which provides a concrete illustration of how expulsion might provide benefits to treaty members. Yet, as was found with respect to withdrawal, there is no discernable pattern which reflects that liberal expulsion provisions are particularly common to club treaties. In addition to the absence of any legal basis for expelling Greece out of the Eurozone, the structure of treaties underlying the Schengen Area and the EU club-of-clubs implicitly make expulsion illegal as well.²⁷⁰ Moreover, a review of international agreements outside of Europe once again indicates that it is rare for club treaties to reduce the cost of exit by incorporating expansive expulsion provisions.²⁷¹

In short, the use of exit provisions in club agreements poses an explanatory problem that could be summed up as the “puzzle of positive exit costs.” The puzzle is how to explain the obvious tension between: (a) a high incidence of treaty provisions which appear deliberately designed to restrict exit; and (b) the use of those provisions in a context where theory suggests that States should be most concerned with making sure exit costs are low.

²⁶⁷ See Sinn, *supra* note 68, and accompanying text.

²⁶⁸ See Blocher et al., *supra* note 264; Jens Dammann, *Paradise Lost: Can the European Union Expel Countries from the Eurozone?*, 49 VAND. J. TRANSNAT'L L. 693 (2016); Melissa Gutierrez, *Flying Too Close to the Sun: How an EMU Expulsion Provision Will Prevent the European Sovereign Debt Crisis from Becoming a Modern Day Greek Tragedy*, 35 HOUS. J. INT'L L. 431 (2013); Boyko Blagoev, *Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality?*, 16 TILBURG L. REV. 191 (2011).

²⁶⁹ See, e.g., Blocher et al., *supra* note 264, at 13 n.45 (building off of the Grexit experience, and proposing a change to the law of treaties which makes the default rule more accommodating to expulsion).

²⁷⁰ See Athanassiou, *supra* note 69.

²⁷¹ The exceptions that prove the rule are the IMF—where an expulsion provision was exercised to force out the Czech Republic in 1954 (then Czechoslovakia)—as well as the legally authorized expulsion of Cuba from the Organization of American States. See Blocher et al., *supra* note 264, at 708 (providing these examples, among other cases, including the League of Nations); CHRISTOPHER F. BRUMMER, *SOFT LAW AND THE GLOBAL SYSTEM: RULE MAKING IN THE 21ST CENTURY*, 159–61 (2015) (also noting treaties that incorporate rules on expulsion).

iii. Resolving the Exit Costs Puzzle

The mismatch between theory and observation that characterizes rational choice scholarship on treaty exit can be resolved by revisiting the incomplete contract frameworks that is the basis for those predictions. A general weakness of the standard approach to incomplete contracts is that the benefits of renegotiation as a form of insurance which it emphasizes only follow when treaties that are formed under idealized conditions. Whenever the contracting environment is complicated by informational or strategic considerations, it is no longer safe to assume that renegotiation serves an insurance function. Taking a close look at European disintegration proves valuable in this context because it provides a nearly comprehensive checklist of when and how the simplified model of treaty formation that is typically used in an incomplete contracts analysis do not hold. It also serves as a useful baseline case for gauging when those contracting problems will apply to other club treaties as well.

An initial technical issue is that most incomplete contract analyses rely on an assumption about the information available to States that appears conservative at first glance, but in fact is quite demanding. Specifically, while rational choice theories emphasize that States face uncertainty due to limited information over how the costs and benefits of treaty participation will be distributed in future states of the world, States can only design treaties in a way that provides insurance against that uncertainty when they all share the exact same body of limited information.²⁷² Where there is asymmetric information among treaty members, however, it is impossible to say in the abstract whether contractual incompleteness reflects the successful provision of mutually beneficial insurance, or whether it is the result of some breakdown in the bargaining process.²⁷³ The use of this framework is particularly problematic for research on treaty design, because it means that the information gap which those studies focus on (uncertainty about how the costs-and-benefits of treaty participation will be distributed in light of future events), and the information gap which they assume away (uncertainty about the attributes of other treaty parties), are likely to be highly correlated.²⁷⁴

One significant form of asymmetric information that can make it efficient to *raise* rather than lower exit costs appears when States are unable to observe the actions of other treaty members. This kind of information asymmetry introduces the problem of moral hazard,²⁷⁵ which is when treaty members may have an incentive to shirk on compliance by allocating resources away from investment in the club good or public good at issue in the treaty.²⁷⁶ If a State is able to discreetly shift resources away from treaty compliance toward other outside options, it can thereby increase its bargaining power relative to other treaty members. An

²⁷² See, e.g., Koremenos, *Contracting Around International Uncertainty*, *supra* note 20.

²⁷³ See BERNARD SALANIE, *THE ECONOMICS OF CONTRACTS* 208 (2d ed. 2005); PATRICK BOLTON & MATHIAS DEWATRIPONT, *CONTRACT THEORY* 37 (2005).

²⁷⁴ SALANIE, *supra* note 273, at 208 n.13; SCOTT & STEPHAN, *supra* note 2, at 70.

²⁷⁵ See Bengt Holmstrom, *Moral Hazard and Observability*, 10 *BELL J. ECON.* 74 (1979).

²⁷⁶ *Id.*; see also Bengt Holmstrom, *Moral Hazard in Teams*, 13 *BELL J. ECON.* 324 (1982).

obvious way for that State to exercise its newfound bargaining power is to threaten to withdraw from the treaty unless other members commit to securing its future participation on better terms. Treaties can be designed to mitigate this moral hazard problem by raising exit costs through strict withdrawal provisions. Discouraging exit in this way provides a lock-in mechanism, which reduces the incentive for treaty members to leverage unobservable investments for opportunistic renegotiation.²⁷⁷

There are a number of ways in which the economic clubs established under EU treaties raise the problem of moral hazard due to unobservable State behavior. For instance, in the Eurozone Greece effectively concealed the extent to which its economic policies and financial condition were consistent with a good faith effort to abide by the Stability and Growth Pact, a set of treaty obligations that were aimed at maintaining macroeconomic homogeneity across the EMU.²⁷⁸ The Schengen Area presents similar examples. These generally involve a question of whether Schengen members adequately invest in the myriad measures necessary to consolidate the club's common-border infrastructure, or instead take subtle steps to prioritize a more insular focus on domestic policing and security institutions.²⁷⁹ The same moral hazard dynamics may appear across many non-European club agreements as well, although the degree to which that is the case will depend on the particulars of the treaty structure and policy area at issue.²⁸⁰

The other contracting problem that receives short shrift in the law-and-economics analysis of treaty design involves what are known as "relational contracts" and the related concept of asset-specificity.²⁸¹ Investments are considered asset-specific if the resources in question have a higher value when deployed in a particular contractual relationship compared to what they would be

²⁷⁷ See Massimo Bordignon & Sandro Brusco, *Optimal Secession Rules*, 45 EUR. ECON. REV. 1811 (2001) (arguing that limiting exit options can mitigate the moral hazard issue); see also Ronald Gilson & Alan Schwartz, *Understanding MACS: Moral Hazard in Acquisitions*, 21 J. L. ECON. & ORG. 330 (2005) (same); D. Gordon Smith, *The Exit Structure of Strategic Alliances*, ILL. L. REV. 303 (2005) (same); but cf. Meyer, *supra* note 19, at 413–15 (suggesting that an adverse selection model of information asymmetry may lead to different results).

²⁷⁸ See *supra* Section III.A; IMF, *Greece: Ex Post Evaluation of Exceptional Access Under the 2010 Stand-By Arrangement*, COUNTRY REPORT NO. 13/156 (June 2013).

²⁷⁹ A concrete illustration of this problem was when Belgium's policing apparatus proved wholly unprepared to coordinate with French authorities on the various cross-border security issues that were triggered following terrorist attacks in and around Paris. See *supra* Section III.B.i.

²⁸⁰ On one end of the spectrum, information asymmetry regarding compliance may be relatively high for securitization alliances, such as NATO, as well as democratization treaties, which call for investments in institutional reform that are hard to measure. On the other end is the WTO, where many of the key liberalization obligations, such as the reduction of tariff schedules for imports, are fairly transparent. See SCOTT & STEPHAN, *supra* note 2, at 75, 154–56 (on the observability of States' compliance with WTO rules). The IMF may provide the most extreme case of observable compliance, in the sense that a primary treaty commitment is for members to contribute their "quota" to the common treaty fund, which essentially consists of writing a check to the IMF.

²⁸¹ OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985).

worth when put to an alternative use or otherwise priced on the open market.²⁸² Asset-specificity creates another avenue for opportunistic renegotiation, referred to as the “hold-up problem.”²⁸³

Like moral hazard, the hold-up problem can be mitigated by creating barriers to renegotiation that raise the cost of exiting the contractual relationship.²⁸⁴ While the rational choice literature at times acknowledges that the hold-up problem may be relevant to treaty design, it is often passed over in a brief, issue-spotting manner and treated as a special case.²⁸⁵ But there is good reason to expect relational contracting will be endemic to club treaties, in large part due to the importance of maintaining a homogeneous membership in economic clubs. An implication is that the issues raised by asset-specificity likely factor into the design of exit provisions for those agreements at least as much as the problem of insuring against uncertainty does.²⁸⁶

European club treaties are all analogous to relational contracts that exhibit a high degree of asset-specificity. This is most conspicuously on display in the Eurozone, where members are obliged to dismantle their traditional domestic monetary institutions and bind themselves to the ECB.²⁸⁷ The Schengen Agreement is also largely an exercise in pooling investments in relation-specific security assets: for example, if Italy decides to pull out of its role of maintaining a large portion of the Schengen Area’s external Mediterranean border, most of continental Europe would be exposed.²⁸⁸ The Brexit negotiations reflect the logic of relational contracting as well. A major source of speculation in that process is whether London’s financial sector is a relation-specific asset that will lose its global preeminence once the UK is eventually untethered from the EU’s regulatory apparatus.²⁸⁹

²⁸² See WILLIAMSON, *supra* note 281.

²⁸³ Basically, if I know my counter-party’s investment would be much less valuable outside of our contractual relationship, I can threaten to sever that relationship unless the contract is renegotiated in a way that gives me a greater share of the benefits. Knowing that such a scenario is possible *ex ante* means that the party that may potentially be held-up becomes less willing to invest in the relationship in the first place, to the detriment of both sides. See *id.*; see also David A. Lake, *Anarchy, Hierarchy, and the Variety of International Relations*, 50 INT’L ORG. 1, 14 (1996).

²⁸⁴ See SPRUYT, *supra* note 2; See Bradley Wimmer & John F. Garen, *Moral Hazard, Asset Specificity, Implicit Bonding, and Compensation: The Case of Franchising*, 35 ECON. INQUIRY 544 (1997); See Aaron Edlin & Stefan Reichelstein, *Holdups, Standard Breach Remedies, and Optimal Investment*, 86 AM. ECON. REV. 478 (1996).

²⁸⁵ See, e.g., Curtis Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202 (2010); Laurence R. Helfer, *Exiting Custom: Analogies to Treaty Withdrawals*, 21 DUKE J. COMP. & INT’L L. 65, 67, n.10 (2010); Helfer, *supra* note 18, at 1624; Posner & Sykes, *supra* note 19.

²⁸⁶ See Bradley Wimmer & John F. Garen, *Moral Hazard, Asset Specificity, Implicit Bonding, and Compensation: The Case of Franchising*, 35 ECON. INQUIRY 544 (1997); Aaron Edlin & Stefan Reichelstein, *Holdups, Standard Breach Remedies, and Optimal Investment*, 86 AM. ECON. REV. 478 (1996).

²⁸⁷ One striking aspect of Grexit was that it was unclear whether Greece had the printing presses on hand that would be needed to produce drachmas. See *supra* Section II.A.iii.

²⁸⁸ See *supra* Section II.B.iii.

²⁸⁹ See *supra* Section II.C.

The extent of relational contracting goes a long way towards explaining the variation in withdrawal provisions across club treaties outside of the EU as well. For example, foreign direct investment (FDI) involves the most extreme form of asset-specificity possible, and investment treaties which involve commitments to protect FDI contain some of the most stringent withdrawal terms that can be found in international agreements.²⁹⁰ International monetary agreements, which tend to mimic the asset-specific features of the Eurozone, systematically tend toward harsh withdrawal terms as well.²⁹¹ Security alliances present an intermediate case that will likely be very context-dependent, and turn on the particular military technologies and strategic environment in question.²⁹² By contrast, trade agreements—especially when concluded on a multilateral basis pursuant to most-favored-nation principles—will include obligations that call for relatively low levels of asset-specific investments.²⁹³ The tendency for regional preferential trade agreements to be designed with stricter withdrawal terms than those in the GATT/WTO framework provides some tentative empirical confirmation on this final point.

Lastly, asset-specificity may also explain the lack of broad expulsion provisions in club treaties. This is because the stringent accession conditions that accompany club agreements require new entrants to make extensive upfront investments, so that certain of their legal and political institutions are sufficiently homogeneous with those of existing members. Given the large sunk costs incurred in the process of acquiring those relation-specific assets, States that accede to club treaties are particularly vulnerable to being held-up. As a result, acceding States will never commit the resources necessary to join club treaties if existing parties to the agreement can easily threaten expulsion thereafter as a way to opportunistically renegotiate terms with the newer members.²⁹⁴

The arguments regarding the design of treaty exit that are presented above have been outlined at a high level and supported with evidence that is anecdotal and suggestive. Nonetheless, they are sufficient to establish several claims that are not widely appreciated. First, although doctrinal international law scholarship is often accused of lacking analytical rigor, there is also a certain faux-sophistication to the reliance on economic contract theory that appears in rational choice research on treaty design. In truth, contract theory supplies a complex family of models—many of which provide indeterminate or conflicting answers about which outcomes should be expected in the real world—and there is not a strong reason to believe that the specific models that law-and-economics scholars tend to select from that family are the ones that contain the most realistic

²⁹⁰ See Salacuse, *supra* note 257, at 471–72; Posner & Sykes, *supra* note 19.

²⁹¹ KOREMENOS, *supra* note 2, at 142.

²⁹² See generally Celeste A. Wallander, *Institutional Assets and Adaptability: NATO after the Cold War*, 54 INT'L ORG. 705 (2000).

²⁹³ See, e.g., Meyer, *supra* note 19, at 420–22.

²⁹⁴ See Joel Demski & David Sappington, *Resolving Double Moral Hazard Problems with Buyout Agreements*, RAND J. ECON. 232 (1991); cf. N.M. Kay, *Markets, False Hierarchies, and the Evolution for the Modern Corporation*, 17 J. ECON. BEHAVIOR & ORG. 315 (1992).

assumptions. Second, the fragility of that theoretical framework provides the best explanation why some of the more emphatic predictions in the treaty design literature are frequently inconsistent with the way international agreements are structured as an empirical matter.²⁹⁵ Third, the discussion once again highlights how it can often be necessary to undertake a fact-intensive examination of the particular cross-border issues that a treaty has been designed to address in order to understand its legal structure. Most broadly, the bottom-line implication of the foregoing analysis is that, at least with regard to treaty exit, the role of legal flexibility for promoting international cooperation has a more tenuous basis than is conventionally thought.

CONCLUSION

This Article has provided an internal critique of research on the economic analysis of international law, meaning that it shares most of the same working assumptions and normative commitments that appear in that literature but argues that they have, at times, been applied in a counterproductive way. One wrong turn in the rational choice scholarship has been its dismissal of the relevance of European integration for other areas of international law. The other wrong turn is its tendency to approach problems of treaty design exclusively from the perspective of public goods, while overlooking a distinct set of dynamics that characterize treaties relating to club goods.

By analyzing these methodological blind spots in conjunction, this Article shows that they can effectively remedy one another, and in doing so provide an array of novel insights into how the international legal system works. Specifically, a club theory framework allows for a unified explanation of all three waves of legal disintegration that have recently swept across the European Union: the Eurozone financial crisis, the collapse of the Schengen Area, and Brexit. In addition, a careful examination of European disintegration yields a uniquely powerful case study for understanding the institutional logic of other international agreements that establish economic clubs. Taken together, the two halves of this Article present a more complete picture of the potential for rational States to construct legal arrangements that facilitate sustainable patterns of international cooperation.

²⁹⁵ Cf. Eric Posner, *Economic Analysis of Contract Law After Thirty Years: Success or Failure?* 112 *YALE L.J.* 829 (2003).