

SECESSION AND THE PREVALENCE OF BOTH MILITANT DEMOCRACY AND ETERNITY CLAUSES WORLDWIDE

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The prevalent approach suggests that constitutions are silent about secession and may even implicitly allow it. But an examination of world constitutions reveals that the overwhelming majority of countries vigorously protect territorial integrity. This is true even of countries classified as consociational or consensus democracies. Scholars further point to the existence of secessionist political parties as proof that secession may align with constitutionalism. This Article, however, explains how democracies engage in a delicate game to chase and eliminate secessionist political mobilization. Democracies have been able to conceal their fight against secessionists by creating a large gap between “the law on the books” and “the law as practiced.”

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Some constitutions also use doublespeak to declare territorial integrity inviolable while nevertheless setting procedures for territorial change. In fact, democracies employ the most unconventional constitutional weapons to fight against secession. These include a ban on secessionist political parties from participating at elections and a constitutional eternity clause that makes territorial integrity an eternal value, not subject to constitutional amendment. These tools raise democratic paradoxes so extreme that democracies appear to be using the tools of authoritarian regimes. Militant democracy must be re-characterized to capture not just bans on political parties, but also eternity clauses. It serves to protect existential needs of states, not just their democratic regime. Even when democracies allow for secession, they set such hurdles that secession becomes all but impossible to achieve. Countries' total prohibition on secession may be explained on strategic as well as principled constitutional law considerations. This Article argues that constitutions' treatment of secession reveals that "We the People" is a territorial concept. The Canadian landmark Reference re Secession of Quebec decision's precedential value for world constitutionalism must thus be qualified.

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INTRODUCTION

In 1945, the United Nations General Assembly began with fifty-one member states; today, it has almost quadrupled its membership to 193 states.¹ The literature suggests that almost three-quarters of new states created in the twentieth century owe their births to secession.² This number includes decolonization of states that some today may consider as outside of the secessionist phenomenon because the respective territories should never have been considered part of the territory of the colonizing state.³ However, one should bear in mind that it took two World Wars (WWI and WWII) to truly recognize and implement a people's right to self-determination, free of colonial domination. Even then, decolonization often required blood and war.⁴

This Article defines secession to include situations in which both citizens and territory depart from an existing state that enjoys sovereign power (ultimate political power) over them.⁵ It argues that, to minimize world unrest, international law is strategically vague regarding the right to secede, outside colonial or alien occupation.⁶ The Article further argues that, at the same time, constitutions by and large ban secession

¹ *Growth in United Nations Membership, 1945–Present*, UNITED NATIONS, <http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html> [<https://perma.cc/LS87-PV9Y>] (last visited Oct. 10, 2018).

² Even in the nineteenth century (1816–1916), 63% of new states were created by secession, and the figure rose to 73% by the latter half of the twentieth century. Bridget L. Coggins, *The History of Secession: An Overview*, in THE ASHGATE RESEARCH COMPANION TO SECESSION 23, 27–28 (Aleksandar Pavković & Peter Radan eds., 2011); see also Tanisha Fazal & Ryan Griffiths, *A State of One's Own: The Rise of Secession Since World War II*, 15 BROWN J. WORLD AFF. 199, 199–200 (2008).

³ Cf. G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) (addressing the principle of self-determination without using the term “secession”).

⁴ See generally DANE KENNEDY, *DECOLONIZATION: A VERY SHORT INTRODUCTION* (2016).

⁵ See *infra* Section I.A.

⁶ See *infra* Section I.E.

using their most unconventional weapons, but may conceal their fights against secession through doublespeak and camouflage to accommodate both internal and external pressures.⁷ I argue that this strategy, as well as the Canadian landmark constitutional case of *Reference re Secession of Quebec*,⁸ succeeded in convincing scholars that constitutions by and large implicitly allow secession.⁹ The prevalent absolute constitutional ban on secession may be explained on strategic as well as principled constitutional law grounds.¹⁰ I argue that when there is a departure of both citizens and territory from an existing state, this combined challenge requires a new act of self-constituting on the parts of both the seceding and remaining populations.¹¹ The Article suggests that “We the People” is a territorial concept.

There are secessionist movements in all parts of the world, encompassing both democratic and non-democratic countries—Scotland in the United Kingdom; Catalonia and Basque Country in Spain; Flanders in Belgium; Kurdistan in Iraq; Vermont, Texas, and Alaska in the United States; Kashmir in India; Corsica in France; Crimea, Donetsk, and Luhansk in Ukraine; the Islamic State in Syria; and Tibet in China.¹² Wherever one places a finger on the globe, one is likely to find a secessionist movement.

Secession is typically thought of as a topic of international law, not least because secessionists need the recognition of the international community to accomplish their objectives. It is assumed that constitutional law has nothing interesting to say on the subject. But constitutional literature is increasingly dealing with secession, debating whether it is advisable for a democracy to legalize secession and even set procedures for it in the constitution. Scholars like Patrick Monahan and Michael Bryant, Robert Young, Wayne Norman, Daniel Weinstock, and Susanna Mancini argue that, if secession is permissible but regulated by a constitutional document, then there is a greater likelihood that it will

⁷ See *infra* Parts II–IV.

⁸ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.).

⁹ See *infra* text accompanying notes 17–25.

¹⁰ See *infra* Part V.

¹¹ *Id.*

¹² For information on the widespread secessionist activity, see *Separatist, Independence, and Decentralization Movements*, CONST. SOC’Y, http://www.constitution.org/cs_separ.htm (last updated Nov. 11, 2018) [hereinafter *Separatist*, CONSTITUTION SOCIETY]. See also BRIAN BEARY, *SEPARATIST MOVEMENTS: A GLOBAL REFERENCE* (1st ed. 2011); www.secession.net (site under construction as of Nov. 17, 2018).

occur through peaceful means, governed by rule of law principles, than through violence.¹³ But others, like Cass Sunstein and Donald Horowitz, warn that to regulate secession is to invite a self-fulfilling prophecy, or at least strategic exploitations of threats to secede, and that such tactics can tear apart the fabric of cooperation and compromises that hold democracies together.¹⁴ They further argue that the easier it is to exit the community, the less likely it is that the population will attempt to bring about consensual changes from within.¹⁵ Vicki Jackson argues in favor of the intermediate solution of constitutional “silence” as a way to minimize the threat of secession.¹⁶

When we move from the theoretical discussion to that of the actual practices of democratic countries, the common wisdom is that “[i]n most cases, the constitution is simply silent on the matter.”¹⁷ Since constitutional democracies are typically founded on the principle of the

¹³ See Wayne Norman, *Domesticating Secession*, in SECESSION AND SELF-DETERMINATION 193, 205 (Stephen Macedo & Allen Buchanan eds., 2003) [hereinafter Norman, *Domesticating*]; Wayne Norman, *The Ethics of Secession as the Regulation of Secessionist Politics*, in NATIONAL SELF-DETERMINATION AND SECESSION 34 (Margaret Moore ed., 1998) [hereinafter Norman, *Ethics*]; Susanna Mancini, *Rethinking the Boundaries of Democratic Secession: Liberalism, Nationalism, and the Right of Minorities to Self-Determination*, 6 INT’L J. CONST. L. 553, 578–79, 583–84 (2008); Patrick J. Monahan et al., *Coming to Terms with Plan B: Ten Principles Governing Secession*, C.D. HOWE INST. COMMENT., June 1996, at 1, 4–6, <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1070&context=reports> [https://perma.cc/XSZ3-CUC5]; Daniel Weinstock, *Constitutionalizing the Right to Secede*, 9 J. POL. PHIL. 182, 195–96 (2001) [hereinafter Weinstock, *Constitutionalizing*]; Daniel M. Weinstock, *Toward a Proceduralist Theory of Secession*, 13 CANADIAN J.L. & JURIS. 251, 261–62 (2000) [hereinafter Weinstock, *Proceduralist Theory*]; Robert A. Young, *How Do Peaceful Secessions Happen?*, 27 CANADIAN J. POL. SCI. 773, 787 (1994); see also ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 147–48 (1991) (suggesting that a constitutional secession clause should be considered in a contextualized manner, rather than being advisable for all countries).

¹⁴ See Donald L. Horowitz, *The Cracked Foundations of the Right to Secede*, 14 J. DEMOCRACY 5 (2003) [hereinafter Horowitz, *Cracked Foundations*]; Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633 (1991). See generally Donald L. Horowitz, *Self-Determination: Politics, Philosophy, and Law*, 39 NOMOS 421 (1997) [hereinafter Horowitz, *Self-Determination*].

¹⁵ See, e.g., ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

¹⁶ Vicki C. Jackson, *Secession, Transnational Precedents, and Constitutional Silences*, in NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 314 (Sanford Levinson ed., 2016).

¹⁷ Monahan et al., *supra* note 13, at 7; accord Weinstock, *Proceduralist Theory*, *supra* note 13, at 251, 261.

consent of the governed,¹⁸ their constitutional silence might be interpreted as tacit permission for secession. In fact, Monahan and Bryant with Coté advised Canada to treat its own constitutional silence as permission to secede,¹⁹ and it seems the Canadian Supreme Court followed this advice in its landmark decision regarding Quebec.²⁰ Wayne Norman even suggests it is a “freak of history” and a “historical accident” that constitutions do not include an explicit secession clause on how exit may be conducted.²¹

Scholars further argue that only a minority of constitutional democracies explicitly ban secession in their constitutional documents.²² They also suggest that such a ban may be easily overcome by a constitutional amendment.²³ In addition, scholars found that a few countries explicitly allow for secession in their constitutional document, and even set out the ways to achieve secession.²⁴ That some democracies enable secession in their constitutional documents is used by scholars to show that secession does not necessarily stand in opposition to

¹⁸ See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 449 (William Rehg trans., 1996).

¹⁹ Monahan et al., *supra* note 13, at 21.

²⁰ Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.). The Court decided that Quebec has no constitutional right to unilateral secession “under the Constitution,” but if a “clear majority” of the Quebec people on a “clear question” voted in favor of secession, the other participants in the confederation would be required to engage in good-faith negotiations to achieve that goal. *Id.* at 263–69. However, it made clear that the negotiations might fail and the Court cannot truly supervise the process. *Id.* at 270–72. It is in the domain of the political branches. *Id.*

²¹ Norman, *Ethics*, *supra* note 13, at 55.

²² Monahan and Bryant with Coté found that when it comes to banning secession, only five European and Western constitutions do so, namely the constitutions of Australia, France, Bulgaria, Romania, and Panama. They further suggest that “[i]n most cases, the constitution is simply silent on the matter.” Monahan et al., *supra* note 13, at 7; *see also* Coggins, *supra* note 2, at 37 (“Few states throughout history have included legal provisions for secession within their constitutions, and only a slightly larger number explicitly outlaw secession.”).

²³ *See, e.g.*, Peter Radan, *Secession in Constitutional Law*, in *THE ASHGATE RESEARCH COMPANION TO SECESSION* 333, 334–335 (Aleksandar Pavković & Peter Radan eds., 2011) (“[S]uch stipulations themselves can be deleted or rendered inoperative by the relevant state’s constitutional amendment procedures, thereby clearing the path for a constitutionally legal secession to take place.”).

²⁴ Thus, for example, Monahan and Bryant with Coté found in 1996 that out of both present and past countries, only seven out of eighty-nine constitutions included procedures that enabled secession. Monahan et al., *supra* note 13, at 8.

constitutionalism, and they argue that other democracies should follow these examples.²⁵

In contrast to the prevailing approach, this Article's interpretation of constitutional provisions suggests that democratic constitutions are not silent about secession at all. Rather, they regulate it rigorously in explicit but indirect ways. I demonstrate how prominent democracies that typically serve as role models for other countries include in their constitutional documents extremely potent tools intended to prevent secessionist movements from achieving their goals. Consociational or consensus democracies that are supposedly based on consensus and veto powers to minority groups are no different than majoritarian democracies in this respect.²⁶ The two tools this Article highlights are banning secessionist political parties and treating the territorial integrity

²⁵ Mancini, *supra* note 13, at 575–76, 578–79; *see also* Miodrag A. Jovanović, *To Constitutionalize or Not? Secession as Materiae Constitutionis*, in *THE ASHGATE RESEARCH COMPANION TO SECESSION* 345 (Aleksandar Pavković & Peter Radan eds., 2011).

²⁶ Consociationalism is about power sharing between elites to stabilize and rule divided societies. It is characterized by grand coalitions of elites, proportionality in representation, veto powers to the various minority groups, and cultural autonomy-group arrangements. The consociationalist model prefers closed-list proportional representation election systems with not too large election districts over majoritarian electoral systems, because the former enables representation to minorities according to their share of the population. Federal systems are preferable over unitary systems, because they enable semi-autonomy for the various regions. Coalition governments are advantageous to concentration of power in one elected president. AREND LIJPHART, *THINKING ABOUT DEMOCRACY: POWER SHARING AND MAJORITY RULE IN THEORY AND PRACTICE* 3–9 (2008). Later, Lijphart developed a more quantitative analysis of democracies in which he used the term “consensus” democracies rather than consociationalist democracies. There is a great overlap between the two terms, though they are not identical, with consociationalism including more informal practices. *Id.* at 6–9. Lijphart mapped thirty-six democracies to four groups based on two axes: one axis represents the unitary-federal dimension and the other the executives-parties dimension. The first group of seven democracies represents the values of consensus democracy along both axes and includes: Austria, Belgium, Japan, Netherlands, Switzerland, Germany, and India (the consensus democracies). The second group of twelve democracies represents the values of majoritarian democracies along both axes and include: the United Kingdom, New Zealand, Costa Rica, France, Trinidad and Tobago, Jamaica, Botswana, Barbados, Malta, Bahamas, Greece, and South Korea (the majoritarian democracies). The third group of twelve democracies is “unitary” but consensual along the executives-parties dimension, and includes: Denmark, Finland, Luxembourg, Norway, Iceland, Italy, Ireland, Sweden, Israel, Mauritius, Portugal, and Uruguay (the unitary/consensus democracies). The last group includes five democracies that are “federalist” but majoritarian along the executive-parties axis and include: Australia, Canada, the United States, Spain, and Argentina (the federalist democracies). *See* AREND LIJPHART, *PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES* 239–54 (2d ed. 2012).

of the state as unamendable (in “eternity clauses”), making secession subject to an “unconstitutional constitutional amendment” doctrine. As scholars have focused on eternity clauses and have not recognized the link between the ban on political parties and eternity clauses, they have concluded that constitutions by and large are silent on secession.²⁷

An examination of 192 constitutions of both democratic and non-democratic states that are members of the U.N. reveals that only 28 countries are silent and do not explicitly protect territorial integrity and national unity.²⁸ Among these countries are Canada, Ireland, Japan, the Netherlands, New Zealand, and the United States.²⁹ Three additional countries provide procedures for territorial change with no conflicting language that protects territorial integrity and thus do not require constitutional amendment to achieve secession.³⁰ There are seven countries that supposedly allow for secession by embodying an explicit secession clause, and Bosnia and Herzegovina, which left the constitutionality of secession to the discretion of its Constitutional Court.³¹ Additionally, the United Kingdom has enabled a referendum on the secession of Scotland and provided for a process for the secession of Northern Ireland.³² Thus, roughly 79% of world constitutions

²⁷ For a general claim on the nexus between ban on parties and eternity clauses, see Rivka Weill, *On the Nexus of Eternity Clauses, Proportional Representation, and Banned Political Parties*, 16 ELECTION L.J. 237 (2017).

²⁸ See generally CONSTITUTE, <https://www.constituteproject.org> (last visited Oct. 10, 2018). I did not examine the San Marino Constitution, which is not included in the Constitute Project and is scattered in different documents enacted at different times. The Constitute Project includes 193 constitutions. A few entities are not yet members of the U.N. and are thus not included in this Study, though they form part of the dataset of the Constitute Project (i.e., Kosovo, Palestine, and Taiwan). This Article examines the constitutions of 192 U.N. member states, including Costa Rica and North Korea that do not appear in the Constitute Project.

²⁹ The full list of countries includes Antigua and Barbuda, Barbados, Botswana, Brunei Darussalam, Canada, Chile, Dominica, Fiji, Grenada, Iraq, Ireland, Jamaica, Japan, Kiribati, the Marshall Islands, Mauritius, Nauru, the Netherlands, New Zealand, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Solomon Islands, Tonga, Trinidad and Tobago, Tuvalu, the United States, and Uruguay. Of this list, only Brunei Darussalam and Iraq are non-democratic. *Id.* The rest of the world protects territorial integrity through bans on secessionist political parties, unamendability provisions, preambles, constitutional duties on army, state organs, and citizens, and special procedures for territorial change as elaborate, *infra* in Parts II, III, and IV.

³⁰ These countries are all democratic/semi-democratic: Denmark, Iceland, and Vanuatu. For their procedures of territorial change, see *infra* Part IV. It is arguable, however, whether these procedural provisions apply to secession as they speak of change of territory alone and may not be relevant for secession that involves the withdrawal of both citizens and territory.

³¹ See *infra* Part IV. Five of these countries are democratic or semi-democratic.

³² See *infra* notes 42 and 242.

explicitly ban secession. The number may be higher were we to include implicit bans on secession. Thus, for example, constitutional silence did not prevent U.S. courts from developing an implicit prohibition against (unilateral) secession.³³ These findings contrast with Zachary Elkins's 2016 study, which suggested that "a full thirty-eight countries have included the prohibition [against secession] across their constitutions dating as far back as the 1850s."³⁴ Moreover, focusing on democracies and semi-democracies, as defined by the Freedom House's Country Scores and the Economist Intelligence Unit's Democracy Index,³⁵ reveals that 74% of democracies and semi-democracies explicitly ban secession.³⁶

I argue that constitutional democracies have successfully created the impression among the democratic world that these unconventional weapons of the constitutional system—ban on political participation and unamendability—are used solely to protect democratic values. But, in fact, democracies also use these tools to prevent secession and for existential—and not so existential—needs, rather than democratic reasons alone.

The Article further argues that secession reveals how both tools—the ban on political participation and eternity clauses—complement each other and should be understood as mirror images of one another. Because there are important theoretical, historical, and methodological links between the two mechanisms, a country that has one of the mechanisms may legitimately infer the implicit existence of the other.

³³ See *infra* Parts III and V.

³⁴ Zachary Elkins, *The Logic and Design of a Low-Commitment Constitution (Or, How to Stop Worrying About the Right to Secede)*, in NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 294, 311 (Sanford Levinson ed., 2016). Elkins included in these numbers non-democratic states and states that no longer have the prohibition in their constitution. His list included eleven countries on the democratic index that are U.N. countries: Bolivia, Ecuador, Ukraine, Georgia, Cambodia, Slovenia, Sri Lanka, Argentina, Paraguay, Lebanon, and Luxembourg.

³⁵ If one or both indexes found a country to be non-democratic (authoritarian or not free), it was counted as non-democratic. The Democracy Index may be found at: <https://infographics.economist.com/2018/DemocracyIndex>. The Freedom House's index may be found at: https://freedomhouse.org/sites/default/files/FH_FIW_2017_Report_Final.pdf [<https://perma.cc/3935-3K92>]. I treat the classification of democracies as based on a continuum rather than binary. The classification itself is debatable and political.

³⁶ There are 133 democracies and semi-democracies examined in this Article. Of the forty states that are silent or supposedly allow for secession and/or territorial change, thirty-five are democratic or semi-democratic.

This is not trivial, as countries often have only one of the mechanisms explicitly incorporated into their respective constitutional systems. Once the courts understand the duality of the two mechanisms, they may develop a more coherent jurisprudence for applying both mechanisms.³⁷

Democracies often conceal their fights against secession through doublespeak and insincerity. They may both ban secession and set the procedures for territorial change. They may ban secessionist parties but offer other convincing explanations for the ban that have nothing to do with secession. They use camouflage because of the unique challenges secessionists pose to democracies—notably, democratic commitments to the rights to self-rule and self-preservation. But democracies might believe that each of these values point to different resolutions in the secessionist context. Democracies might believe that the right to self-rule supports secessionism while the mother country's own right to self-preservation negates it.³⁸ Furthermore, democracies conceal their fights against secession to fare better in both the court of international public opinion and existing international tribunals. Thus, for example, if the European Court of Human Rights prohibits banning peaceful secessionist political parties, as it in fact does, then democracies may ban those parties for non-secessionist reasons.³⁹

When we turn our attention from countries that ban secession to countries that purportedly allow for secession in their constitutions, it turns out that these latter countries, too, try to prevent secession. They say that they allow for secession but set such hurdles that secession becomes all but impossible to achieve in democratic ways. Scholars, who use these countries to illustrate why secession should be allowed, do not acknowledge how the enabling tools are undermined by the country providing them.

Yet, despite the prevalence of constitutional prohibitions against secession, if both the mother and the seceding states reach agreement, we expect the international community to accept their agreement. Why not then have only a constitutional prohibition against unilateral secession? This Article argues that the prevalence of constitutional

³⁷ See *infra* Section III.C.

³⁸ In fact, democratic theory has no satisfying answers to the *a-priori* question of the proper scope and boundaries of the unit within which majority rule should operate. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 193–209 (1989).

³⁹ See *infra* Part II and Section III.D.

prohibitions stems from principled as well as strategic considerations. The Canadian Supreme Court's canonical decision, which interprets constitutional silence as tacit permission for Quebec to secede via a constitutional amendment, may thus have only limited value for the overwhelming majority of world constitutions that are not silent about secession.⁴⁰

This Article proceeds as follows: Part I defines secession and discusses its potency in determining world history. It further explains why there is a rise in secessionist activity in the twentieth and twenty-first centuries. This Part also explains why international law has strategically left ambiguous the question of the right to secede outside colonial or alien rule and its effect on constitutional law. Parts II and III discuss the indirect powerful constitutional tools—the ban and eternity clauses—countries use to prevent secession. They also argue that secession reveals the ways in which both tools complement each other. They further explain that democracies conceal their struggles against secession because secession poses a serious constitutional paradox to democracies. Part IV argues that many countries engage in doublespeak, declaring territorial integrity inviolable yet setting procedures for territorial change. There are also a few countries that permit secession but only through means intended paradoxically to frustrate secession. Part V concludes by suggesting that the prevalence of the total prohibition on secession may stem from strategic as well as principled constitutional law considerations. It argues that constitutions typically require secessionists to resort to extra-constitutional means because secessionists challenge the very identity of the constitution-making body. As such, they may not rely on the constitutional amendment process to achieve their goals. Constitutions' treatment of secession reveals that popular sovereignty is a territorial concept. It then explains why the Canadian *Reference re Secession of Quebec* case has limited bearing as a precedent that other countries may follow.

⁴⁰ This Article does not try to contribute to the vast literature on which “people” are entitled to secede and under what conditions. It rather attempts to expose how constitutions treat secession and what may explain this constitutional treatment. The Article argues that constitutions' treatment of secession should lead us to rethink our most basic understandings of democracy and popular sovereignty. The Article sheds new light on theories of militant democracy, eternity clauses, popular sovereignty, and the consociationalist/consensus model.

I. THE CHALLENGE OF SECESSION

This Part defines secession and argues for its importance in understanding the development of world history and politics. It further explains the factors contributing to the rise in secessionist activity in the twentieth and twenty-first centuries. It then explains the strategic legal considerations in regulating secession by both international and constitutional law and why states seek to resist secession.

A. *Mapping Types of Secession*

Internal autonomous arrangements within existing states that fall short of the creation of a new state are not considered secession. Secessions can be categorized into several types. The *classic* form of secession occurs when a group of people creates a new state in part of the territory of an existing state. As such, the classic secession involves the withdrawal of *both* citizens and land from an existing state.⁴¹ The fact that secession involves both elements is important since a democratic society may recognize a particular people's right to self-determination but deny their claim to a specific territory. In such cases, the society would oppose that people's right to secede. A recent example of an attempt to achieve classic secession was the Scottish referendum on independence in September 2014. If the Scottish people had answered "yes" to independence, it may have led to secession of Scotland from the United Kingdom.⁴² Some international lawyers define secession as a unilateral act alone (distinguished from "negotiated

⁴¹ Allen Buchanan, *Secession*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2017) [hereinafter Buchanan, *Secession*]; see also Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991); Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 31 (1997) [hereinafter Buchanan, *Theories*].

⁴² The referendum was conducted with the agreement of the Westminster government. See Elisenda Casanas Adam, *Self-Determination and the Use of Referendums: The Case of Scotland*, 27 INT'L J. POL. CULTURE & SOC'Y 47 (2014); Adam Tomkins, *Scotland's Choice, Britain's Future*, 130 LAW Q. REV. 215 (2014). Some argue that the United Kingdom is not a unitary but a union state. Those who hold it is a union state argue that Scotland's independence means dissolution of the Union and the return to the old components. Those who hold by the unitary position argue that Scotland's independence would entail the secession of a smaller unit from a larger state. See Neil MacCormick, *Is There a Constitutional Path to Scottish Independence?*, 53 PARLIAMENTARY AFF. 721, 733–36 (2000).

independence”),⁴³ but for constitutional law purposes, it is important to include cases of consent between the rump state and the seceding state.⁴⁴

A second type is *irredentist* secession, in which a portion of the population in an existing state wants to secede with part of the territory in order to join another existing state, typically a neighboring state. Irredentist secession usually occurs when the majority of the people in the seceding area belongs to the same ethno-national community as the majority in the neighboring state or when the seceding area once belonged to the neighboring state and the secessionist movement wants to restore the previous territorial distribution.⁴⁵ Russia tries to portray its 2014 annexation of Crimea as a case of irredentist secession, under which the majority of Russian people living in Crimea wanted to join Russia. But, to most Western eyes, this seems like a case of forceful annexation of Crimea in contravention of international law.⁴⁶ Some scholars do not treat the irredentist case as part of the secessionist phenomenon,⁴⁷ but cases may be blurred where some of the secessionists desire an independent state and others annexation to a neighboring state.⁴⁸ Thus, classic secession may also involve irredentist tendencies.

A third form of secession occurs when an existing state dissolves and new states are formed in its place. The dissolution may reflect an internal agreement among the entities in limine, or it may be imposed by superpowers. For example, when Czechoslovakia divided into the Czech and Slovak republics in 1993, the dissolution resulted from an internal agreement between the leaders and in opposition to the will of

⁴³ See James Crawford & Alan Boyle, *Opinion: Referendum on the Independence of Scotland—International Law Aspects, annexed to* SCOTLAND ANALYSIS: DEVOLUTION AND THE IMPLICATIONS OF SCOTTISH INDEPENDENCE 64, 72 (2013).

⁴⁴ See, e.g., Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 263 (Can.); see also *infra* Part V.

⁴⁵ Buchanan, *Secession*, *supra* note 41.

⁴⁶ See *infra* Section I.B.

⁴⁷ See, e.g., Horowitz, *Self-Determination*, *supra* note 14, at 423–28 (distinguishing irredentas from secessions); Coggins, *supra* note 2, at 23 n.1.

⁴⁸ For example, in Kashmir, some secessionist forces want to join the neighboring Pakistan and others to form an independent state. See Sumit Ganguly & Kanti Bajpai, *India and the Crisis in Kashmir*, 34 ASIAN SURV. 401, 402 (1994). See generally Rekha Chowdhary, *Electoral Politics in the Context of Separatism and Political Divergence: An Analysis of 2009 Parliamentary Elections in Jammu & Kashmir*, 3 S. ASIA MULTIDISCIPLINARY ACAD. J. 1 (2009). Cf. Yossi Shain & Martin Sherman, *Dynamics of Disintegration: Diaspora, Secession and the Paradox of Nation-States*, 4 NATIONS & NATIONALISM 321, 327 (1998).

both populations.⁴⁹ During WWII, Nazi Germany and the Soviet Union partitioned Poland as a result of an external agreement between the two.⁵⁰

In the first two forms of secessions, the classic and the irredentist, the original state remains in a reduced form, while in the third type of secession, the original state completely dissolves. But what all three forms of secession share in common is the combined challenge to the rump state over control of both territory and citizens. This is where secession differs from mere amendments to boundaries of states that do not involve the transfer of citizens to foreign control. I argue that when there is a combined challenge of withdrawal of both citizens and territory, it requires a new self-constituting act on the part of the departing as well as remaining populations.⁵¹ In contrast, for international law purposes, these cases may be distinguished as existing states, in contrast to new states, which would typically not need to renegotiate their international agreements with the world at large nor need to seek the world's recognition for their existence.

B. *Shaping World Events*

Secession continuously shapes world history, whether by dispersing people, as in the Old Testament Tower of Babel,⁵² or by fragmentation, as shown in the fall of the Roman Empire—the largest Empire of classical antiquity—in the fourth and fifth centuries, which left the Western and Eastern Roman Empires;⁵³ whether by defiance, as in the Dutch Republic's secession from the Spanish Empire in the

⁴⁹ See Stephane Dion, *Why is Secession Difficult in Well-Established Democracies? Lessons from Quebec*, 26 BRIT. J. POL. SCI. 269, 270 (1996); see also Robert Henry Cox & Erich G. Frankland, *The Federal State and the Breakup of Czechoslovakia: An Institutional Analysis*, 25 PUBLIUS 71, 84 (1995).

⁵⁰ Cf. Buchanan, *Secession*, *supra* note 41 (differentiating between internally agreed partition and that imposed externally).

⁵¹ See *infra* Part V.

⁵² See Genesis 11: 1–9; see also Theodore Hiebert, *The Tower of Babel and the Origin of the World's Cultures*, 126 J. BIBLICAL LITERATURE 29 (2007).

⁵³ While the Western Roman Empire existed between the fourth and fifth centuries alone, the Eastern Roman Empire (also known as the Byzantine Empire) survived from the fifth century to the fifteenth when it fell to the Ottoman Turks. See Peter Heather, *The Huns and the End of the Roman Empire in Western Europe*, 110 ENG. HIST. REV. 4 (1995); THE OXFORD HISTORY OF BYZANTIUM (Cyril Mango ed., 2002).

sixteenth century,⁵⁴ or by revolution, as in the secession of the American colonies from Great Britain.⁵⁵

In fact, to a great extent, secessionist struggles were the opening shot of both WWI and WWII. The immediate trigger of WWI was the assassination of Archduke Franz Ferdinand, the presumptive heir to the Austro-Hungarian throne, by a Serbian secessionist student in Sarajevo, the capital of Bosnia. The Austro-Hungarian Empire controlled Sarajevo while secessionist forces wanted to secede and join the neighboring state of Serbia.⁵⁶

The same is true with regard to WWII. Among the first major steps taken by Nazi Germany to create a Greater German Reich was to annex Austria (*Anschluss*). Within a month of Nazis' annexation of Austria, the Nazis held a plebiscite that was manipulated to reflect approval by over 99% of the vote.⁵⁷ Hitler next targeted the Sudetenland area of Czechoslovakia, arguing that the majority of its inhabitants were ethnic Germans who belonged with Germany.⁵⁸ While the Munich Pact—signed by the leaders of Britain, France, Italy, and Germany—enabled Hitler to annex Sudetenland in exchange for peace, he did not stop there, as is well-known.

Nor is the immense power of secession a matter for history alone. After Russian armed intervention in Crimea at the end of February 2014, which some regard as the end of the post-Cold War era,⁵⁹ the new Crimean authorities organized a referendum in Crimea.⁶⁰ The new

⁵⁴ See generally J.I. Israel, *A Conflict of Empires: Spain and the Netherlands 1618–1648*, 76 PAST & PRESENT 34 (1977).

⁵⁵ Sanford Levinson, “Perpetual Union,” “Free Love,” and Secession: On the Limits to the “Consent of the Governed”, 39 TULSA L. REV. 457, 460, 463 (2004). See generally Kenneth M. Stamp, *The Concept of a Perpetual Union*, 65 J. AM. HIST. 5, 20 (1978).

⁵⁶ See generally Damir Agičić, *Civil Croatia on the Eve of the First World War (The Echo of the Assassination and Ultimatum)*, 14 POVIJ. PRIL. 301 (1995).

⁵⁷ *Anschluss*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/research/research-in-collections/search-the-collections/bibliography/anschluss> [https://perma.cc/2QQV-KMGJ] (last visited Oct. 10, 2018).

⁵⁸ In fact, Czechoslovakia faced irredentist tendencies of the German population in Sudetenland before the Nazis' invasion. See Karl Loewenstein, *Militant Democracy and Fundamental Rights, II*, 31 AM. POL. SCI. REV. 638, 641–44 (1937) [hereinafter Loewenstein, *Militant Democracy II*]; see also Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, 31 AM. POL. SCI. REV. 417, 420–21 (1937) [hereinafter Loewenstein, *Militant Democracy I*].

⁵⁹ See Lilia Shevtsova, *The Russia Factor*, 25 J. DEMOCRACY 74 (2014).

⁶⁰ See IVANNA BILYCH ET AL., THE CRISIS IN UKRAINE: ITS LEGAL DIMENSIONS 36 (2014). Russia officially announced its military intervention in Crimea on March 1, 2014. Kathy Lally,

authorities included the self-appointed Prime Minister, Mr. Sergei Aksyonov—representing the Russian Unity Party, which received 4% of the popular vote in the 2010 Crimean parliamentary elections—and some Crimean legislators who had been allowed, by “unidentified” gunmen, to enter the building of parliament.⁶¹ According to the new Crimean authorities, “83.1 percent of the eligible population voted . . . and . . . the final result was 96.77 percent in favor of joining Russia and 2.51 percent against.”⁶² Just like Germany, Russia argued that annexation not only reflected the inhabitants’ will but was also justified because the majority of the Crimean population is Russian.⁶³

While the West, including former U.S. Secretary of State Hillary Clinton, drew comparisons to Sudetenland, Putin relied on the precedent set in Kosovo.⁶⁴ Putin portrayed Russia as the protector of the Russian minority in Ukraine, which happens to be the majority in Crimea.⁶⁵ By obfuscating the details of its intervention in Crimea, Russia avoided international scrutiny for what many suspect was an illegal act under international law.⁶⁶ That this was an illegal act may be supported

Will Englund & William Booth, *Russian Parliament Approves Use of Troops in Ukraine*, WASH. POST (Mar. 1, 2014), https://www.washingtonpost.com/world/europe/russian-parliament-approves-use-of-troops-in-crimea/2014/03/01/d1775f70-a151-11e3-a050-dc3322a94fa7_story.html?utm_term=.8556c8321aa8 [https://perma.cc/WK5Y-Z6R6]. On March 6, 2014, the Parliament (Verkhovna Rada) of Crimea decided to hold an all-Crimean referendum within ten days on reunification with Russia. See Judgment of the Constitutional Court of Ukraine on all-Crimean Referendum, No. 1-13/2014 (Mar. 14, 2014) [hereinafter Ukrainian Judgment]. See generally Thomas D. Grant, *Annexation of Crimea*, 109 AM. J. INT’L L. 68 (2015).

⁶¹ See Simon Shuster, *Putin’s Man in Crimea Is Ukraine’s Worst Nightmare*, TIME (Mar. 10, 2014), <http://time.com/19097/putin-crimea-russia-ukraine-aksyonov> [https://perma.cc/MB3G-WAQB]; see also *United States Condemns Russia’s Use of Force in Ukraine and Attempted Annexation of Crimea*, 108 AM. J. INT’L L. 784, 788 (2014).

⁶² See Carol Morello et al., *Crimea’s Parliament Votes to Join Russia*, WASH. POST (Mar. 17, 2014), https://www.washingtonpost.com/world/crimeas-parliament-votes-to-join-russia/2014/03/17/5c3b96ca-adba-11e3-9627-c65021d6d572_story.html?noredirect=on&utm_term=.f4cd990f2582 [https://perma.cc/6HSR-2WFZ].

⁶³ See Shevtsova, *supra* note 59, at 77.

⁶⁴ See Robert Jameson, *Crimea as Kosovo and Sudetenland: The Peril of Historical Narratives in the 2014 Russo-Ukrainian Crisis*, KU SCHOLARWORKS (Aug. 25, 2014), https://kusolarworks.ku.edu/bitstream/handle/1808/14944/Laird%20Essay%20_Jameson.pdf?sequence=1&isAllowed=y [https://perma.cc/T4XB-DG8L].

⁶⁵ See Shevtsova, *supra* note 59, at 76.

⁶⁶ Joshua Stowell, “Plausible Deniability” in *Russia’s Hybrid War in Ukraine*, GLOBAL SECURITY REV. (Mar. 22, 2018), <https://globalsecurityreview.com/plausible-deniability-russias-hybrid-war-ukraine> [https://perma.cc/86E8-SHJU].

by the fact that Russia militarily intervened in Crimea. That this may have been the willing act of the majority of the Russian population in Crimea may be supported by the peculiar history of Crimea's status in Ukraine.

In 1954, the Soviet Union transferred the Crimean peninsula to Ukraine as a "gift" or a "donation." The transfer had mere administrative implications because both Russia and Ukraine were then part of the USSR.⁶⁷ However, Russia argues that it never intended to sever ties with Crimea, as happened when international borders were established in 1991 following Ukraine's independence.⁶⁸ Thus, from the Russian perspective, Crimea is a case of irredentist secession, and Russia was authorized to reverse the change that occurred over half a century ago.

C. *Explaining the Rise in Secessionist Activity*

While secession is part of human history, a few *cumulative* factors may explain the world rise in secessionist activity in the twentieth and twenty-first centuries. First, in the past, borders were drawn according to states' ability to defend themselves from external attack or as a result of allocations of territories between colonial powers.⁶⁹ The colonial powers distributed land among themselves without taking full account of the identity of the people inhabiting the particular territories. They thus tore nations apart. When the U.N. recognized the right to decolonization after WWII, it was granted according to pre-defined territories drawn by the colonies. Thus, it did not remedy colonial injustice. This international doctrine of *uti possidetis*, which means

⁶⁷ Doris Wydra, *The Crimea Conundrum: The Tug of War Between Russia and Ukraine on the Questions of Autonomy and Self-Determination*, 10 INT'L J. MINORITY & GROUP RTS. 111, 113 (2003). See also BILYCH ET AL., *supra* note 60, at 19.

⁶⁸ In fact, the Russian Federal Assembly raised doubts about the legality of this donation soon after Ukraine seceded from the USSR. Wydra, *supra* note 67, at 115. But, later Russia recognized in international agreements that Crimea was part of Ukraine in order to persuade Ukraine to give up its nuclear arsenal. See Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, dated December 5, 1994, *annexed to* joint letter from the Permanent Reps. of the Russian Federation, Ukraine, the United Kingdom of Great Britain and Northern Ireland, and the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. A/49/765 (Dec. 19, 1994). See generally BILYCH ET AL., *supra* note 60, at 33–35.

⁶⁹ See, e.g., Shain & Sherman, *supra* note 48, at 329.

“leav[ing] the place as one received it,” underlies the mismatch between today’s boundaries and ethnic divides.⁷⁰

With the rise of nationalism in the twentieth century, secessionists have sought to redraw the boundaries according to identity classifications, such as religion, ethnicity, language, culture, shared history, and the like. In fact, most modern secessionist attempts are conducted by ethnic minorities within an existing state.⁷¹ Moreover, secession is most threatening to multinational countries, where cultural-ethnic minorities reside in the same geographical area and are not disbursed throughout the country.⁷²

Second, secessionists believe that their desire for self-determination is more feasible today than in the past. While people once felt the need to unite under one state to enjoy *efficiencies of scale* in terms of both national security and economic activity, today secessionists believe that even small states may survive and prosper.⁷³ Globalization has made international trade available to economies of every size, and these economic possibilities have prompted many secessionist movements in European countries—primarily the Catalans in Spain and the Scots in the U.K.—to talk of “independence in Europe.” Some even argue that the E.U.’s success demonstrates that a monetary union may coexist with independent states. The existence of the E.U. may encourage secessionists to splinter states and attempt to join the E.U., as the Czech

⁷⁰ Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT’L L. 590 (1996); Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the U.N. Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT’L L. 1141, 1150 (2008).

⁷¹ “It is surely a significant fact that every serious secessionist movement this century has involved ethno-cultural minorities.” Norman, *Ethics*, *supra* note 13, at 38; *see also* Norman, *Domesticating*, *supra* note 13, at 195. Mancini argues that she is not aware of a single secession attempt that is not linked to ethnic/nationalist claims. Mancini, *supra* note 13, at 573. But actually, ideological rifts have splintered states to two or more sovereign states. “The divisions of East and West Germany, North and South Vietnam and North and South Korea, are all instances of largely uniform ethnic states breaking up into independent political units, not because of rivalry over ethno-cultural dominance, but over paradigms of politico-socio-economic organisation.” Shain & Sherman, *supra* note 48, at 328.

⁷² *See* Joel Selway & Kharis Templeman, *The Myth of Consociationalism? Conflict Reduction in Divided Societies*, 45 COMP. POL. STUD. 1542, 1548–49 (2011). *See generally* WILL KYMLICKA, *FINDING OUR WAY: RETHINKING ETHNOCULTURAL RELATIONS IN CANADA* (1998).

⁷³ *See* Donald Wittman, *The Wealth and Size of Nations*, 44 J. CONFLICT RESOL. 868, 883 (2000). *Cf.* David Friedman, *A Theory of the Size and Shape of Nations*, 85 J. POL. ECON. 59 (1977) (arguing that increased trade leads to larger nations).

Republic and Slovakia did, and Scotland attempted to do.⁷⁴ At the same time, the fading memory of WWII, the collapse of the Soviet Union, and the end of the Cold War have led to the belief that the world is a safer place for new independent countries than in previous eras. It is further assumed that the spread of democracy in recent decades translates into fewer wars between states, which in turn feeds this feeling of relative international security even for small, vulnerable entities.⁷⁵

Third, secessionists feel that they can exploit the language of human rights to promote their agenda. After WWI, President Wilson promoted the idea of a nation's right to self-determination to promote world peace. U.S. presidents emphasized this self-determination principle in international treaties following WWII in the context of decolonization.⁷⁶ The United Nations Charter explicitly includes decolonization as part of the U.N. agenda.⁷⁷ In 1960, the U.N. General Assembly adopted Resolution 1514 titled the "Declaration on the Granting of Independence to Colonial Countries and Peoples."⁷⁸ The "external" right to self-determination in the form of statehood exists in cases of colonial or alien occupation.⁷⁹ At the same time, international bodies promoted the imperatives of social and cultural rights, devolution, and autonomy arrangements within existing states to protect minority rights. This is a manifestation of the "internal" right to self-determination within democratic states.⁸⁰ Secessionists have used

⁷⁴ See Christopher K. Connolly, *Independence in Europe: Secession, Sovereignty, and the European Union*, 24 DUKE J. COMP. & INT'L L. 51, 67–73 (2013). But Europe is not giving them this assurance. See Tomkins, *supra* note 42, at 231.

⁷⁵ Kenneth Benoit, *Democracies Really Are More Pacific (in General): Reexamining Regime Type and War Involvement*, 40 J. CONFLICT RESOL. 636 (1996); see also Bruce Bueno de Mesquita et al., *An Institutional Explanation of the Democratic Peace*, 93 AM. POL. SCI. REV. 791 (1999). Cf. Raymond Cohen, *Pacific Unions: A Reappraisal of the Theory that 'Democracies Do Not Go to War with Each Other'*, 20 REV. INT'L STUD. 207, 207–08 (1994).

⁷⁶ Fazal & Griffiths, *supra* note 2, at 201.

⁷⁷ See U.N. Charter arts. 73, 74.

⁷⁸ See G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960), [http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1514\(XV\) \[https://perma.cc/XF8M-FKR4\]](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1514(XV) [https://perma.cc/XF8M-FKR4]) [hereinafter G.A. Res. 1514]. The United States and other Colonial Powers abstained in the vote. See Richard Falk, *Self-Determination Under International Law: The Coherence of Doctrine Versus the Incoherence of Experience*, in THE SELF-DETERMINATION OF PEOPLES: COMMUNITY, NATION, AND STATE IN AN INTERDEPENDENT WORLD 31, 43 n.9 (Wolfgang Danspeckgruber ed., 2002).

⁷⁹ See G.A. Res. 1514, *supra* note 78.

⁸⁰ See generally ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995). Under the League of Nations regime, new member states had to recognize

the international community's prioritization of both self-determination and group/minority rights to push these agendas even further. Secession is thus demanded even outside of decolonization processes and even when the parent state makes every effort to accommodate group rights, as was evident in Quebec.⁸¹

Fourth, immigration policies may affect secessionist movements as well. This is especially true in the E.U., with its open-border policy among member states.⁸² Western countries in general have seen an increase of migrants since 1945. As mobilization has become easier and globalization has expanded, so too has migration in all regions of the world. In 1960, 76 million people migrated; by 2005, there were 191 million migrants.⁸³ It is typically assumed that immigrants do not lead secessionist movements, since immigrants have no established connections to their territorial destinations.⁸⁴ But, this observation does not capture the entire story. An influx of immigrants may threaten the dominance of indigenous inhabitants over a particular region and thus strengthen the desire of indigenous or local secessionists to secede.⁸⁵

and protect minority rights to be accepted as a state with recognized borders. Mancini, *supra* note 13, at 555–56. The E.U. requires as part of the Copenhagen criteria, which sets the preconditions to join it, that states protect minority rights. See *Accession Criteria*, EUR-LEX, http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhagen_en.htm [<https://perma.cc/M8JD-LJFP>] (last visited Oct. 10, 2018). Though the International Court of Justice tried to leave it vague whether international law recognizes a remedial right to secede when states treat minorities in a discriminatory manner consistently and systematically over time, it made clear that one way to address secessionists' desires is to grant internal group rights to minorities within existing borders. Connolly, *supra* note 74, at 67–73.

⁸¹ Norman, *Domesticating*, *supra* note 13, at 205–07. Canadian prime ministers and cabinet ministers typically come from Quebec. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 286 (Can.).

⁸² The Schengen Agreement of 1985 and the subsequent Schengen Convention of 1990 abolished border controls between participating countries and enables free movement of E.U. citizens as a matter of fundamental right.

⁸³ See STEPHEN CASTLES & MARK J. MILLER, *THE AGE OF MIGRATION: INTERNATIONAL POPULATION MOVEMENTS IN THE MODERN WORLD* 5 (4th ed. 2009).

⁸⁴ See Norman, *Domesticating*, *supra* note 13, at 195; Shain & Sherman, *supra* note 48, at 329 (“[I]t will rarely give rise to secessionist pressures”).

⁸⁵ Dion, *supra* note 49, at 277 (discussing the fear of French-speaking Quebecers regarding the immigration of English-speaking people); see also Allen Buchanan, *Federalism, Secession, and the Morality of Inclusion*, 37 ARIZ. L. REV. 53, 56 (1995) (“A group intent on having its own independent state would have reason to attempt to concentrate in a particular federal unit, displace or overwhelm nongroup members residing there, and then hold a plebiscite on independence. . . . In Kansas the prospect of a plebiscite on slavery led to bloody conflicts in which pro-slavery and antislavery factions attempted to drive each other out of the territory.”).

The desire to maintain the “British” way of life and control immigration may be one of the main factors explaining the British people’s decision to leave the E.U. in the 2016 Brexit referendum.⁸⁶

The assertion that immigrants do not *lead* secessionist movements should also be refined. When Crimea became part of Russia in the eighteenth century, 99% of the population was Crimean Tatars. Through Russian migration, their percentage declined to 34% at the beginning of the twentieth century. In 1944, Stalin deported masses of Tatars, under the pretext that they collaborated with German troops. By the time the Soviets handed over Crimea to Ukraine in 1954, 99% of the population was Russian.⁸⁷ In fact, Russia intentionally moved its population to various parts of the USSR to have better control over the territory.⁸⁸ According to the 2001 Ukraine census, Russians comprised roughly 58% of the population in Crimea.⁸⁹ To the extent there was an identifiable support at all,⁹⁰ it was the Russian population that supported the Crimean secession in 2014, while the remaining Crimean Tatar population opposed and even banned the referendum.⁹¹ Similarly, in 1975 the Turkish Cypriot administration proclaimed the existence of the Turkish Federated State of Cyprus. Most of the Turkish Cypriots resettled in the North, and Turkey encouraged additional Turkish settlers to move there to affect a change in the composition of the population.⁹² In 1983, this northern part declared independence as the

⁸⁶ See, e.g., David Coleman, *A Demographic Rationale for Brexit*, 42 POPULATION & DEV. REV. 681 (2016).

⁸⁷ For a discussion on the decline in the number of Tatars in Crimea, see Wydra, *supra* note 67, at 112–13, 120.

⁸⁸ This was evident for example also in Latvia. BUCHANAN, *supra* note 13, at 142. Buchanan goes as far as suggesting that the colonial population should not have a voice in a secession referendum. *Id.* at 143.

⁸⁹ The Ukrainians consisted of about 24% and the Crimean Tatars 12% of the Crimean population in that census. See State Statistics Committee of Ukraine, *About Number and Composition Population of Autonomous Republic of Crimea by Data All-Ukrainian Population Census*, ALL-UKRAINIAN POPULATION CENSUS '2001, <http://2001.ukrcensus.gov.ua/eng/results/general/nationality/Crimea> [<https://perma.cc/FP67-APXW>] (last visited Oct. 10, 2018).

⁹⁰ Not only was the referendum conducted under supervision of the Russian troops but the referendum also did not give the option of the status quo. See BILYCH ET AL., *supra* note 60, at 22.

⁹¹ *Id.* (“Crimean Tatars largely boycotted the referendum on March 16, 2014, but authorities did not even provide voting booths in Tatar regions.”).

⁹² Tozun Bahcheli, *Searching for a Cyprus Settlement: Considering Options for Creating a Federation, a Confederation, or Two Independent States*, 30 PUBLIUS 203, 208 (2000). See

Turkish Republic of Northern Cyprus.⁹³ That shifting populations may lead to a change in the nature of the populace controlling the territory is one of the reasons international law treats population transfers by conquering powers as a war crime.⁹⁴

D. *Opposing Secession*

If there is such a strong demand for secession, why not allow it? Secessionists pose a threat simultaneously to the interests of two different groups—the majority population of the rump state who may object to the secession of one of its parts, and the minority population who will be caught in the region after it gains independence. The parent state may have legitimate objections to secession, such as its need to control the region to protect economic resources, to preserve legal and social order, to protect human rights, and to defend itself. Secession may sometimes threaten the very viability of the remaining state.⁹⁵ The minority may object to secession for fear of the persecution that may follow or because it prefers to remain part of the parent state. Since secession poses a threat to crucial interests of the parent state and its citizens, it is typically accompanied by violence and even civil war.⁹⁶

Moreover, while secessionists often promote their cause in the name of their right to ethnic-national-self-determination, the resulting new state's boundaries are usually not drawn according to the traits of the populace. Instead, they are usually drawn according to earlier sub-

generally Gillian M. White, *The Turkish Federated State of Cyprus: A Lawyer's View*, 37 WORLD TODAY 135 (1981).

⁹³ BILYCH ET AL., *supra* note 60, at 24. Similarly, Philippines claimed that the Sabah state of Malaysia belonged to it after there was an influx of Filipinos into the area. Shain & Sherman, *supra* note 48, at 329.

⁹⁴ Population transfers were defined as war crimes at the Nuremberg trials. *See id.* at 341 n.6. *See also generally* Alfred M. de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L.J. 207 (1975).

⁹⁵ *See* Buchanan, *Theories*, *supra* note 41, at 45–61; *see also* James Ker-Lindsay, *Understanding State Responses to Secession*, 2 PEACEBUILDING 28 (2014). In Sudan, for example, both the North and the South wanted to control the oil reserves located in the South and along the North-South border. *See* Khalid Mustafa Medani, *Strife and Secession in Sudan*, 22 J. DEMOCRACY 135, 136–37 (2011).

⁹⁶ *See* Buchanan, *Theories*, *supra* note 41, at 33; Coggins, *supra* note 2, at 32. The American civil war involved “the slaughter of two percent of the total American population.” Levinson, *supra* note 55, at 482.

national administrative borders.⁹⁷ Thus, ironically, ethnic groups may become new minorities in the newly created state.⁹⁸ The legitimacy for secession is thus weakened. Secessionism may, in fact, become an ongoing process where countries liberated through secession become subject to secessionist demands as well.⁹⁹ Thus, for example, Bangladesh seceded in 1971 from Pakistan—which itself had won independence in 1947 after being ruled by Britain.¹⁰⁰ East Timor seceded from Indonesia in 2002, which itself had been a Dutch colony until WWII.¹⁰¹ This potentially endless process of secession may threaten the idea of self-determination and statehood.¹⁰²

To prevent this endless cycle of secessionism, secessionist movements seem to have their own interpretation of the international norm of protection of the “territorial integrity” of the state, which is codified in the U.N. Charter.¹⁰³ They do not see the international norm of territorial integrity as a barrier to their claim to independence since

⁹⁷ See generally David B. Carter & H.E. Goemans, *The Making of the Territorial Order: New Borders and the Emergence of Interstate Conflict*, 65 INT’L ORG. 275 (2011). See also BUCHANAN, *supra* note 13, at 139–41.

⁹⁸ See Levinson, *supra* note 55, at 473–74; Horowitz, *Self-Determination*, *supra* note 14, at 444 (“[N]ine times out of ten, the creation of a new set of minority problems is a ‘risk’ that will come to pass.”).

⁹⁹ See Fazal & Griffiths, *supra* note 2, at 202; David Miller, *Secession and the Principle of Nationality*, in NATIONAL SELF-DETERMINATION AND SECESSION 62 (Margaret Moore ed., 1998).

¹⁰⁰ In 1947, India and Pakistan partitioned, and Bangladesh became part of Pakistan. See YASMIN KHAN, *THE GREAT PARTITION: THE MAKING OF INDIA AND PAKISTAN* (2017). For a British perspective of these events, see *Independence and Partition, 1947*, NAT’L ARMY MUSEUM, <https://www.nam.ac.uk/explore/independence-and-partition-1947> [https://perma.cc/YB4K-VTL9] (last visited Nov. 16, 2018). In 1971, Bangladesh won a war of Independence. See Horowitz, *Self-Determination*, *supra* note 14, at 426; Peter Radan, *Case Study 2: Bangladesh: Secession Aided by Military Intervention*, in THE ASHGATE RESEARCH COMPANION TO SECESSION 463, 463–64 (Aleksandar Pavković & Peter Radan eds., 2011).

¹⁰¹ In WWII, the Japanese controlled Indonesia. In 1975, East Timor declared independence but Indonesia conquered it. In 1999, Indonesia relinquished control over East Timor under the direction of the U.N.. Only in 2002 did East Timor become an independent state. See Mark Rolls, *Indonesia’s East Timor Experience*, in ETHNIC CONFLICT & SECESSIONISM IN SOUTH & SOUTHEAST ASIA: CAUSES, DYNAMICS, SOLUTIONS 166–94 (Rajat Ganguly & Ian Macduff eds., 2003). See generally Felix Heiduk, *State Disintegration and Power Politics in Post-Suharto Indonesia*, 35 THIRD WORLD Q. 300, 301 (2014).

¹⁰² Shain & Sherman, *supra* note 48, at 322.

¹⁰³ U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

they are not member states yet and are thus not obligated under the Charter. The International Court of Justice (ICJ) in its 2010 Kosovo case legitimated this one-sided interpretation of the U.N. Charter. It stated: “[T]he scope of the principle of territorial integrity is confined to the sphere of relations between States.”¹⁰⁴ Non-state parties that seek independence should only avoid “unlawful use of force or other egregious violations of norms of general international law, in particular those of a preemptory character (*jus cogens*).”¹⁰⁵ In addition, they should not violate specific international law provisions that apply to them as a result of decisions of the U.N. bodies.¹⁰⁶

At the same time, the secessionists rely on the existence of the norm of territorial integrity to protect their own state once they have seceded. In fact, the very existence of the norm makes their aspirations for independence worthwhile since it increases the likelihood that they will be able to maintain their independence from external and internal attacks.¹⁰⁷ This exposes the double standard that secessionists typically employ. For example, the Quebec government has demanded Canada’s recognition that the region enjoys the right to secede but opposes the secession of its minorities, who have expressed their will to remain part of Canada if Quebec achieves independence.¹⁰⁸ For these reasons, secession disrupts the world order and may threaten global stability, and secessionists’ claims to legitimacy may be contentious.

E. *Regulating Secession*

How does the law deal with secession? Secession is traditionally thought to be regulated solely under international law. But, in fact, it lies at the intersection between the constitutional law of a given country and international law. Secession remains part of the “internal affairs” of the state so long as the state does not abrogate its duties under international law to properly treat the minority wishing to secede. But, if the state mishandles the affair, the situation might deteriorate into a conflict that

¹⁰⁴ Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 437 ¶ 80 (July 22) [hereinafter Kosovo Case].

¹⁰⁵ *Id.* at 437, ¶ 81.

¹⁰⁶ *Id.* at 440, ¶¶ 88–89; *id.* at 442, ¶ 93.

¹⁰⁷ Fazal & Griffiths, *supra* note 2, at 206.

¹⁰⁸ Monahan et al., *supra* note 13, at 30–31, 35.

places it in the province of international law. A great conflict of wills between the state and the secessionists regarding the application of international law is implied in secession. While those wishing to secede may seek external intervention and the world's recognition that a change in the boundaries of an existing state is warranted, the parent state may ferociously defend its territorial integrity.¹⁰⁹

Given that national boundaries are at stake, it may be surprising that international law is vague on when secession is justified and how the international community should view “newly” self-declared states. International law clearly legitimizes secession only in the case of decolonization or alien domination.¹¹⁰ It is not even clear whether international law recognizes a remedial right to secede when the parent state persecutes minorities or seriously abuses their human rights.¹¹¹ In 2009, Serbia led the General Assembly to ask for an advisory opinion of the ICJ regarding the question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”¹¹² The ICJ distinguished the issue before it from that decided by the Canadian Supreme Court in the Quebec case. The Canadian case dealt with the question of whether there is a right under international law to unilaterally secede.¹¹³ The ICJ defined the issue before it as whether Kosovo’s unilateral declaration of independence violated international law.¹¹⁴

Nor did it discuss the legal consequences of the unilateral declaration of independence.¹¹⁵ The ICJ did state that “[d]uring the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.”¹¹⁶ This language is identical to article 1 of the Declaration on the Granting

¹⁰⁹ See Jack M. Balkin & Sanford Levinson, *To Alter or Abolish*, 89 S. CAL. L. REV. 399, 411–412 (2016).

¹¹⁰ See G.A. Res. 1514, *supra* note 78. Cf. Dion, *supra* note 49, at 274 n.20; Coggins, *supra* note 2, at 39 (“[T]he U.N. is hesitant to outline consistent standards for external legitimacy.”).

¹¹¹ See Buchanan, *Theories*, *supra* note 41, at 34–37 (defining remedial right theory); see also Connolly, *supra* note 74, at 72–73.

¹¹² Kosovo Case, 2010 I.C.J. at 407, ¶ 1.

¹¹³ See *id.* at 425, ¶ 55.

¹¹⁴ See *id.* at 425–26, ¶ 56.

¹¹⁵ See *id.* at 423–24, ¶ 51.

¹¹⁶ *Id.* at 436, ¶ 79.

of Independence to Colonial Countries and Peoples. Article 1 states, “The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.”¹¹⁷ This language is thus open to conflicting interpretations. One possible interpretation is that when people do not have a right to vote for the governing institutions, they are subject to alien domination and are entitled to an external right to self-determination.

Another possible reading of this language is in light of its historical context. The Declaration on the Granting of Independence to Colonial Countries and Peoples also guarantees territorial integrity,¹¹⁸ as does the U.N. Charter.¹¹⁹ Thus, the external right to self-determination that it promises is limited to “colonial countries and people” recognized as such when the declaration took place. The U.N. has an official list of seventeen Non-Governing Territories, that all but one date back to 1946, the year after the U.N. Charter was adopted.¹²⁰ In addition, the external right to self-determination, under this interpretation, extends to people who became subject to belligerent occupation after the adoption of the U.N. Charter and as a result of a violation of the norm of territorial integrity. The ICJ explicitly stated that it is not deciding whether, outside decolonization or alien domination, there is a right under international law to secede.¹²¹

Rather than recognizing a remedial right to secede, international law is geared toward establishing internal protections for minorities as a way to avoid secession. International law defines what countries *should* do, rather than the consequences of *failing* to do what they should.¹²² International law thus forces democracies to face an untenable dilemma. If they fail to accommodate group rights of minorities, they may face

¹¹⁷ G.A. Res. 1514, *supra* note 78, at 67, ¶ 1.

¹¹⁸ *See id.* at 67, ¶¶ 6–7.

¹¹⁹ *See* U.N. Charter art. 2, ¶ 4.

¹²⁰ *See The United Nations and Decolonization*, UNITED NATIONS, <https://web.archive.org/web/20180822055720/http://www.un.org/en/decolonization/nonselgvtterritories.shtml> [<https://perma.cc/2EEE-PMCC>] (last visited Oct. 10, 2018).

¹²¹ Kosovo Case, 2010 I.C.J. at 438, ¶¶ 82–83.

¹²² Thus, for example, from 1920–1921, the League of Nations directed Finland to protect Åland Islanders’ cultural rights but rejected the inhabitants’ will to unite with Sweden, which stemmed from their ancestral, as well as linguistic, commonalities with Sweden. *See* Connolly, *supra* note 74, at 68–69.

charges that they are violating human rights—which in turn may lead to secessionist claims for remedial secession to end the injustices inflicted by the parent state. On the other hand, if democracies foster minorities' separate identities by promoting group rights, including an official recognition of the minorities' language, culture, religion, etc., they may actively support the separation of these minorities from the existing state. Democracies may find themselves providing the very resources and fostering the separate identities that allow minorities to embark on secession. For example, ironically, in Eastern Europe, secessionist movements arose when the protection of rights improved.¹²³ This is a lose-lose situation for the states, and the solution requires a delicate, almost unachievable, balance: states must enable group identity to be formed without enabling minorities to overreach their status or undermine the unity of the state.¹²⁴ This may partly explain this Article's findings that even consociationalist and consensus democracies ban secession.¹²⁵

It is also unclear under international law which groups should be "entitled" to secede in non-decolonization contexts.¹²⁶ Should the right to secede be limited to groups sharing ascriptive characteristics (that is, characteristics of "being" rather than those of "achieving," such as ethnicity),¹²⁷ or should the right be widened to include majorities that share only the will to secede?¹²⁸ International law fails to define what "people" are entitled to self-determination.¹²⁹

¹²³ Sunstein, *supra* note 14, at 658. Cf. Weinstock, *Proceduralist Theory*, *supra* note 13, at 255.

¹²⁴ See, e.g., Karlo Basta, *The State Between Minority and Majority Nationalism: Decentralization, Symbolic Recognition, and Secessionist Crises in Spain and Canada*, 48 PUBLIUS: J. FEDERALISM 51 (2017) (arguing in favor of power concessions to minorities without symbolically recognizing them as separate nations to avoid hostile politics by both the majority and minority populations).

¹²⁵ See *infra* Section III.C.

¹²⁶ Fazal & Griffiths, *supra* note 2, at 203–04.

¹²⁷ See, e.g., Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHILOSOPHY 439 (1990) (recognizing encompassing cultures' right to secede).

¹²⁸ Buchanan, *Theories*, *supra* note 41, at 38–41.

¹²⁹ There is no agreed international definition or practice of recognition of "people" entitled to self-determination. Mancini, *supra* note 13, at 555. After WWI, the international community defined people in ethnic/national terms; after WWII, the international community defined people in territorial/political terms. *Id.* at 555–56. Minorities that are entitled to protection under the United Nations Commission on Human Rights are not automatically recognized as "people" for self-determination purposes. *Id.* at 558. Even the 2007 United Nations Declaration

But can international law afford to be vague on non-decolonization secession? In contrast to decolonization, a phenomenon that peaked in the late 1950s and early 1960s, contiguous secession involves territory that is no more than 100 miles away from the mother state. Contiguous secession peaked in the early 1990s with the breaking apart of the Soviet Union and Yugoslavia.¹³⁰ Decolonization accounts for only about 35% of the total number of secessionist movements since 1931, the rest being contiguous.¹³¹ When considering the breadth of the contiguous secessionist phenomenon, it seems that there is a demand for clear international law on the subject. On the other hand, the fact that international law is vague about non-decolonization secession may indirectly hinder successful movements and minimize world unrest. We know that the success rate of secessionist movements is highly correlated to the nature of secessionism: while decolonization enjoys a 77% success rate, only 16% of contiguous secessionist movements succeed.¹³²

Thus, strategic considerations are as important as substantive normative considerations, both of which invite discussion among constitutional law scholars. While many share the assumption that secession should be prevented, these scholars dispute the best approach to prevention. Sunstein believes that constitutional law should outlaw secession;¹³³ others, like Norman and Weinstock, believe that setting an arduous procedure for secession in the constitution may be a more effective way to prevent secession.¹³⁴ A constitutional secession clause may set substantive requirements as a precondition for achieving secession, or mere procedural hurdles, or it may be a hybrid of both.¹³⁵

on the Rights of Indigenous People fails to define the “people” entitled to such treatment. Wiessner, *supra* note 70, at 1163–64.

¹³⁰ Fazal & Griffiths, *supra* note 2, at 202–03.

¹³¹ *Id.* at 203.

¹³² *Id.* at 203. Cf. Coggins, *supra* note 2, at 32 (the success rate of an anti-colonial secessionist movement in the 1970s was 75% whereas non-colonial movements had a success rate of 18.5%). At any given year, secessionist movements have an estimated success rate of 2%. *Id.*

¹³³ Sunstein, *supra* note 14.

¹³⁴ Weinstock, *Constitutionalizing*, *supra* note 13, at 197–203; Norman, *Domesticating*, *supra* note 13, at 210.

¹³⁵ BUCHANAN, *supra* note 13, at 127–48. “Other things being equal . . . the more stringent the substantive criteria, the lower the procedural hurdles should be,” and vice versa. *Id.* at 138.

The intermediate position of Jackson applauds silence as a means of maintaining strategic vagueness on the subject of secession.¹³⁶

II. BAN ON POLITICAL PARTICIPATION

The prevailing scholarly view is that most constitutional democracies simply ignore secession, and scholars argue whether this is the desirable approach to the subject.¹³⁷ Contrary to this widespread view, I argue that the overwhelming majority of world constitutions, including many prominent constitutional democracies, set robust indirect mechanisms to prevent secession. The two most powerful tools used are: (1) the prohibition against secessionist political parties from participating at elections; and (2) the grant of eternity status to the unitary or federal nature of the state, including its territorial integrity. Furthermore, it is important to study both mechanisms in tandem to appreciate the extent of democracies' fight against secession.

A. *The Misperception Regarding Militant Democracy and the Prevalence of a Ban on Secessionist Political Parties*

For democracies, one of the most important sources of legitimacy is majority rule, by which every adult citizen has one vote, and by and large, the majority determines election results. If citizens wish to change the governing law, they are expected to use political means, rather than resort to violence. Citizens may petition their representatives, hold public demonstrations, or even run for office to change the governing law from within.

At the same time, it is widely accepted among democracies that they must take a more militant stand to protect democracy from internal threats. This lesson of WWII¹³⁸ is being tested in Europe today, as extremist representatives compete in elections at all levels of

¹³⁶ Jackson, *supra* note 16.

¹³⁷ See *supra* Introduction.

¹³⁸ See Edward McWhinney, *The German Federal Constitutional Court and the Communist Party Decision*, 32 IND. L.J. 295, 302 (1957). On the expression "militant democracy," see Loewenstein, *Militant Democracy II*, *supra* note 58. See generally Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1 (1995).

government.¹³⁹ Democracies learned that, when every citizen and party may run for office, democratic processes might ultimately enable those who seek to destroy a government's democratic character to win office. As Joseph Goebbels, the Reich Minister of propaganda in Nazi Germany, famously said, "[t]his will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed."¹⁴⁰ As a result, it is customary among constitutional democracies to include a constitutional ban on political parties that threaten democracy itself.¹⁴¹ In fact, many European states have banned at least one political party at some point since WWII.¹⁴²

The general perception is that militant democracy is used only to protect democratic values. In fact, the oxymoron of militant democracy—banning political participation in the name of democracy—has been accepted because militant democracy is thought to be used sparingly to defend only the democratic nature of the system. However, an examination of 192 constitutions of both democratic and non-democratic countries reveals that one-hundred and three countries (54%) have a ban on political participation of secessionist political parties.¹⁴³ When looking at democracies and semi-democracies, sixty-two countries (47% of democracies and semi-democracies) have such a ban in their constitution.

These one-hundred and three countries may be divided as follows. Fifty-six countries have an explicit ban on political parties that threaten

¹³⁹ Gregor Aisch et al., *How Far is Europe Swinging to the Right?*, N.Y. TIMES, https://www.nytimes.com/interactive/2016/05/22/world/europe/europe-right-wing-austria-hungary.html?_r=0 [<https://perma.cc/L6BV-YJ58>] (last updated Oct. 23, 2017).

¹⁴⁰ Fox & Nolte, *supra* note 138, at 1.

¹⁴¹ Even the European Convention on Human Rights allows restricting freedom of association by law, if necessary, "in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others." Convention for the Protection of Human Rights and Fundamental Freedoms art. 11, ¶ 2, *opened for signature* Nov. 4, 1950, E.T.S. No. 005 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights].

¹⁴² ANGELA K. BOURNE & FERNANDO CASAL BÉRTOA, *PRESCRIBING DEMOCRACY? PARTY PROSCRIPTION, MILITANT DEMOCRACY AND PARTY SYSTEM INSTITUTIONALIZATION* 6 (2014), <https://whogoverns.eu/wp-content/uploads/2014/10/ECPR-2014-Salamanca.pdf> [<https://perma.cc/WZK8-KCHQ>] (paper presented at the European Consortium for Political Research Joint Sessions, which occurred on Apr. 10–15, 2014) [hereinafter BOURNE & BÉRTOA, *PRESCRIBING DEMOCRACY*].

¹⁴³ See *infra* notes 144 (enumerating 56 countries), 145 (enumerating 34 countries), and 149 (enumerating 13 countries).

prohibit political parties that are regionally, religiously, and/or racially-based or require them to be nationalist in scope and character. Among these countries are the Czech Republic, Macedonia (the former Yugoslav Republic), Poland, and Sweden.¹⁴⁵ For example, Ghana's Constitution provides that "[e]very political party shall have a national character."¹⁴⁶ For registration purposes, the party must satisfy the following requirements:

Constitution (2001) (rev. 2016), CONSTITUTE, *supra*, art. 4; *Sri Lanka Constitution (1978) (rev. 2015)*, CONSTITUTE, *supra*, art. 157A, § 1; *Suriname Constitution (1987) (rev. 1992)*, CONSTITUTE, *supra*, art. 53(2); *United Republic of Tanzania Constitution (1977) (rev. 2005)*, CONSTITUTE, *supra*, art. 20, § 2; *Togo Constitution (1992) (rev. 2007)*, CONSTITUTE, *supra*, art. 8; *Turkey Constitution (1982) (rev. 2017)*, CONSTITUTE, *supra*, art. 68; *Ukraine Constitution (1996) (rev. 2016)*, CONSTITUTE, *supra*, art. 37; *Uzbekistan Constitution (1992) (rev. 2011)*, CONSTITUTE, *supra*, art. 57; *Zambia Constitution (1991) (rev. 2016)*, CONSTITUTE, *supra*, art. 60.

¹⁴⁵ *Afghanistan Constitution (2004)*, CONSTITUTE art. 35, <https://www.constituteproject.org/search?lang=en> [<https://perma.cc/5QVG-JM57>] (last visited Oct. 10, 2018); *Albania Constitution (1998) (rev. 2016)*, CONSTITUTE, *supra*, art. 9, § 2; *Bahrain Constitution (2002) (rev. 2017)*, CONSTITUTE, *supra*, art. 27; *Bangladesh Constitution (1972) (rev. 2014)*, CONSTITUTE, *supra*, art. 38; *Belarus Constitution (1994) (rev. 2004)*, CONSTITUTE, *supra*, art. 5; *Burkina Faso Constitution (1991) (rev. 2012)*, CONSTITUTE, *supra*, art. 13; *Burundi Constitution (2005)*, CONSTITUTE, *supra*, art. 78; *Cambodia Constitution (1993) (rev. 2008)*, CONSTITUTE, *supra*, art. 42; *Colombia Constitution (1991) (rev. 2015)*, CONSTITUTE, *supra*, art. 1; *id.* art. 2; *id.* art. 107; *Czech Republic Constitution (1993) (rev. 2013)*, CONSTITUTE, *supra*, art. 25, § 1; *Djibouti Constitution (1992) (rev. 2010)*, CONSTITUTE, *supra*, art. 6; *Ecuador Constitution (2008) (rev. 2015)*, CONSTITUTE, *supra*, art. 109; *Egypt Constitution (2014)*, CONSTITUTE, *supra*, art. 74; *Equatorial Guinea Constitution (1991) (rev. 2012)*, CONSTITUTE, *supra*, art. 9; *Gabon Constitution (1991) (rev. 2011)*, CONSTITUTE, *supra*, art. 1, § 13 (especially in conjunction with art. 116); *id.* art. 116; *Gambia Constitution (1996) (rev. 2004)*, CONSTITUTE, *supra*, art. 60, § 2(a); *Ghana Constitution (1992) (rev. 1996)*, CONSTITUTE, *supra*, art. 55, § 4; *Honduras Constitution (1982) (rev. 2013)*, CONSTITUTE, *supra*, art. 48 (especially in conjunction with art. 19); *id.* art. 19; *Israel's Constitution*, Basic Law: The Knesset § 7A (1958) (rev. 2018), CONSTITUTE, *supra*; *Kyrgyzstan Constitution (2010) (rev. 2016)*, CONSTITUTE, *supra*, art. 4, §§ 3, 5; *Liberia Constitution (1986)*, CONSTITUTE, *supra*, art. 79, § d; *Republic of Macedonia Constitution (1991) (rev. 2011)*, CONSTITUTE, *supra*, art. 20; *Malaysia Constitution (1957) (rev. 2007)*, CONSTITUTE, *supra*, art. 10, § 2(c); *Niger Constitution (2010) (rev. 2017)*, CONSTITUTE, *supra*, art. 9; *Nigeria Constitution (1999) (2011)*, CONSTITUTE, *supra*, art. 222(e); *Panama Constitution (1972) (rev. 2004)*, CONSTITUTE, *supra*, art. 139; *Poland Constitution (1997) (rev. 2009)*, CONSTITUTE, *supra*, art. 13; *Serbia Constitution (2006)*, CONSTITUTE, *supra*, art. 5; *Singapore Constitution (1963) (rev. 2016)*, CONSTITUTE, *supra*, art. 14, § 2(c) (especially in conjunction with art. 6, § 1(a)); *id.* art. 6, § 1(a); *Sweden Constitution (1974) (rev. 2012)*, CONSTITUTE, *supra*, art. 24; *Arab Republic of Syrian Constitution (2012)*, CONSTITUTE, *supra*, art. 8, § 4; *Tajikistan Constitution (1994) (rev. 2003)*, CONSTITUTE, *supra*, art. 8; *Turkmenistan Constitution (2008) (rev. 2016)*, CONSTITUTE, *supra*, art. 44; *Uganda Constitution (1995) (rev. 2017)*, CONSTITUTE, *supra*, art. 71, § 1(a)-(b).

¹⁴⁶ *Ghana Constitution*, *supra* note 145, art. 55, § 4.

a. there is ordinarily resident, or registered as a voter, in each district of Ghana, at least one founding member of the party; b. the party has branches in all the regions of Ghana and is, in addition, organised in not less than two-thirds of the districts in each region; and c. the party's name, emblem, colour, motto or any other symbol has no ethnic, regional, religious or other sectional connotation or gives the appearance that its activities are confined only to a part of Ghana.¹⁴⁷

Members of the national executive committee must also be “chosen from all the regions of Ghana.”¹⁴⁸ Thirteen countries protect territorial integrity in their constitution, and require political parties to respect the constitution, compared to countries that allow the promotion of non-violent agendas to amend the constitution. Or they may ban political parties that pursue aims that are forbidden under criminal law. Thus, these parties may not seek to change criminal laws that protect the territorial integrity of the state.¹⁴⁹ Among these countries are Argentina, Italy, and Spain.¹⁵⁰

¹⁴⁷ *Id.* art. 55, § 7.

¹⁴⁸ *Id.* art. 55, § 9.

¹⁴⁹ *Argentina Constitution (1853) (rev. 1994)*, CONSTITUTE art. 38, <https://www.constituteproject.org/search?lang=en> [<https://perma.cc/5QVG-JM57>] (last visited Oct. 9, 2018); *Plurinational State of Bolivia Constitution (2009)*, CONSTITUTE, *supra*, art. 26.II. and art. 2; *Costa Rica Constitution (1949) (rev. 2011)*, CONSTITUTE art. 98, 149, § 1, https://www.constituteproject.org/constitution/Costa_Rica_2011.pdf?lang=en (last visited Dec. 2, 2018); *Cyprus Constitution (1960) (rev. 2013)*, CONSTITUTE, *supra*, art. 21, § 4; *Dominican Republic Constitution (2015)*, CONSTITUTE, *supra*, art. 216; *Italy Constitution (1947) (rev. 2012)*, CONSTITUTE, *supra*, art. 18; *Jordan Constitution (1952) (rev. 2016)*, CONSTITUTE, *supra*, art. 16, § 2; *Lithuania Constitution (1992) (rev. 2006)*, CONSTITUTE, *supra*, art. 35; *Philippines Constitution (1987)*, CONSTITUTE, *supra*, art. II, § 5; *Slovakia Constitution (1992) (rev. 2017)*, CONSTITUTE, *supra*, art. 129, § 4 and art. 34, § 3; *South Sudan Constitution (2011) (rev. 2013)*, CONSTITUTE, *supra*, art. 25, § 3(b); *Spain Constitution (1978) (rev. 2011)*, CONSTITUTE, *supra*, art. 6; *id.* art. 22, § 2; *Yemen Constitution (1991) (rev. 2016)*, CONSTITUTE, *supra*, art. 58 and art. 61.

¹⁵⁰ The Argentina Constitution provides: “The Argentine Nation ratifies its legitimate and everlasting sovereignty over the Malvinas, South Georgia and Sandwich Islands and the corresponding maritime and insular areas, because they are an integral part of the National territory. The regaining of said territories and the full exercise of sovereignty, while respecting the lifestyle of their inhabitants, and in conformity with principles of international law, constitute a permanent and unwaivable objective of the Argentine people.” *Argentina Constitution*, *supra* note 149, transitional provision 1. “[Political parties’] creation and the exercise of their activities are free, so long as they respect this Constitution.” *Id.* art. 38. The Italian Constitution states that “The Republic is one and indivisible.” *Italy Constitution*, *supra* note 149, art. 5. “The form of Republic shall not be a matter for constitutional amendment.” *Id.* art. 139. “Citizens have the right to form associations freely and without authorization for those

B. *The Practice of Banning Secessionist Political Parties*

Even when scholars acknowledge that a few countries include an explicit constitutional ban on secessionist political parties, they argue that these textual provisions are treated as dead letters. Scholars point to the existence of numerous secessionist political parties around the world as proof that democracies allow for secession. They theorize that it is unjustified for a democracy to ban political parties to prevent secession, if secessionists pursue their goals in democratic and peaceful ways. Taking this to its logical conclusion, scholars suggest that, since democracy allows for secessionist political parties, there is no reason not to establish a constitutional procedure for achieving secession.¹⁵¹

But the reality is different. In recent years, the banning of secessionist political parties has occurred in major European and Asian countries. It should also be noted that regional political parties are often the ones leading the secessionist movements on the national level,¹⁵² and they are the ones that are typically banned.¹⁵³

Democracies selectively target and ban political parties *because* of their secessionist agendas, under the pretext of preventing the promotion of undemocratic values such as racism, violence, and terrorism. Even when the constitutional text of a given country allows for the banning of a political party based on secession, authorities often prefer to justify their actions in the name of a broader cause of protecting democracy. In this way, democracies obfuscate, and even use subterfuge, in their fight against secession. This is also where the

ends that are not forbidden by criminal law. Secret associations and associations that, even indirectly, pursue political aims by means of organisations having a military character shall be forbidden." *Id.* art. 18. With regards to Spain, see *infra* notes 156–57 and accompanying text.

¹⁵¹ See, e.g., Norman, *Domesticating*, *supra* note 13, at 207–08; Jovanović, *supra* note 25, at 357–58.

¹⁵² See, e.g., John Nagle, *From Secessionist Mobilization to Sub-state Nationalism? Assessing the Impact of Consociationalism and Devolution on Irish Nationalism in Northern Ireland*, 23 REGIONAL FED. STUD. 461, 471 (2013) ("The hope that devolution would cool secessionist mobilization appeared to have been dealt a grievous blow in 2007. The elections across the U.K. that year witnessed the rise of the Scottish National Party (Scotland), Plaid Cymru (Wales) and Sinn Féin (Northern Ireland), all of whom entered their respective regional governments on the basis of promoting, to different degrees, independence, albeit with qualifications.").

¹⁵³ See, e.g., Angela K. Bourne & Fernando Casal Bértoa, *Mapping 'Militant Democracy': Variation in Party Ban Practices in European Democracies (1945–2015)*, 13 EUR. CONST. L. REV. 221, 231 (2017) [hereinafter Bourne & Bértoa, *Mapping*].

banning of secessionist parties differs from the more general phenomenon of banning political parties to protect democracy. When your only motive is to protect democracy, there is no need to conceal your motivations.

I open with recent examples of democratic countries that have banned secessionist parties without having an explicit, direct constitutional provision that allows for a ban to protect the state's territorial integrity. In these cases, it is easier to understand why a democracy would want to conceal its aim to ban secessionist parties *per se*. These examples deal with Spain and Belgium, who are both struggling with activist secessionist movements. The Spanish Constitution provides that political parties' "creation and the exercise of their activities are free in so far as they respect the Constitution and the law."¹⁵⁴ It further states, in a different section, that it "is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards."¹⁵⁵ Thus, the Spanish Constitution indirectly prevents political parties from pursuing the disintegration of the state's unity. Based on this constitutional provision, and an amended Law on Political Parties (enacted in 2002), the Spanish Supreme Court banned the Batasuna (which means "unity" in the Basque language) from participating in Spanish or European parliamentary elections in 2003,¹⁵⁶ after the Batasuna had continuously participated for twenty years preceding the ban.¹⁵⁷ The Batasuna party was targeted because it shared the objectives of the Basque separatist ETA insurgents, whose militant activity had been escalating.¹⁵⁸ Since it was difficult to find real evidence against the Batasuna, the party's dissolution turned on its refusal to

¹⁵⁴ *Spain Constitution*, *supra* note 149, art. 6.

¹⁵⁵ *Id.* art. 2.

¹⁵⁶ See Thomas Ayres, *Batasuna Banned: The Dissolution of Political Parties Under the European Convention of Human Rights*, 27 B.C. INT'L & COMP. L. REV. 99, 101 (2004); Tim Bale, *Are Bans on Political Parties Bound to Turn Out Badly? A Comparative Investigation of Three 'Intolerant' Democracies: Turkey, Spain, and Belgium*, 5 COMP. EUR. POL. 141, 142 (2007); Angela Bourne, *The Proscription of Political Parties and "Militant Democracy": The Problem with Militant Democracy*, 7 J. COMP. L. 196, 202 (2012). On the meaning of the name Batasuna, see *Basque Nationalist Party Shut Down*, GUARDIAN (Aug. 26, 2002), <https://www.theguardian.com/world/2002/aug/26/spain> [<https://perma.cc/9R4H-M7WT>].

¹⁵⁷ See Carlos Vidal Prado, *Spain*, in THE 'MILITANT DEMOCRACY' PRINCIPLE IN MODERN DEMOCRACIES 243, 248 (Markus Thiel ed., 2009).

¹⁵⁸ *ETA: Long Campaign of Violence*, CNN (Mar. 22, 2006), <http://edition.cnn.com/2006/WORLD/europe/03/22/eta.background> [<https://perma.cc/5MDM-T9YJ>].

condemn acts of violence by the ETA.¹⁵⁹ In fact, the amended Spanish law allows for the banning of political parties *inter alia* for “excusing assaults against life . . . legitimizing violence . . . giving express or tacit political support, legitimizing terrorist actions or excusing and minimizing their significance.”¹⁶⁰ Later, the Spanish authorities banned successor parties to the Batasuna.¹⁶¹ In 2017, the Spanish central authorities quashed Catalonia’s secessionist forces, after the Catalan Parliament unilaterally declared independence. They did this by dismantling Catalonia’s legislature and executive branches and calling for renewed elections; all while jailing central figures of the Catalan independence parties on charges of sedition and rebellion and misuse of public funds.¹⁶²

The Belgium Constitution does not explicitly provide for the banning of political parties.¹⁶³ Yet, in 2004, the Belgium courts prohibited funding and media access for the Vlaams Blok (Flemish Block)—a secessionist party supporting the independence of Flanders. The courts held that Vlaams Blok’s agendas were racist because the party’s associated non-profit organizations promoted anti-immigration agendas found discriminatory.¹⁶⁴ The prohibition was based on a 1981 anti-racism statute that makes incitement to racism and segregation

¹⁵⁹ Ayres, *supra* note 156, at 101, 109; Bale, *supra* note 156, at 148–49; Prado, *supra* note 157, at 251. Cf. Gur Bligh, *Defending Democracy: A New Understanding of the Party-Banning Phenomenon*, 46 VAND. J. TRANSNAT’L L. 1321, 1356 (2013) (describing more substantial acts of identification with the ETA).

¹⁶⁰ Ayres, *supra* note 156, at 102 and n.20.

¹⁶¹ See Bale, *supra* note 156, at 148 (“Batasuna and over 200 electoral lists set up to get around its dissolution were prevented from contesting municipal elections in May 2003.”); Bligh, *supra* note 159, at 1323 n.2. The European Court of Human Rights affirmed these banning decisions. See *Batasuna v. Spain*, nos. 25803/04 and 25817/04, Eur. Ct. H.R. (2009).

¹⁶² See S.T.C., Nov. 8, 2017 (No. 4386-2017) (Spain). The Spanish Constitutional Court found the Catalanian Parliament Law 20/2017 declaring Catalonia as a Republic and the Catalanian people as a sovereign independent people unconstitutional. See generally Aritz Parra & Ciaran Giles, *Spain Cracks Down Hard After Catalonia Declares Independence*, U.S. NEWS (Oct. 27, 2017, 4:50 PM), <https://www.usnews.com/news/business/articles/2017-10-27/spain-on-tenterhooks-ahead-of-catalan-crisis-sessions>; Owen Bowcott & Sam Jones, *Catalan Independence Leaders to Appeal to U.N. over ‘Unlawful Imprisonment’*, GUARDIAN (Feb. 1, 2018, 10:44 AM), <https://www.theguardian.com/world/2018/feb/01/catalan-independence-leaders-unlawfully-imprisoned-say-lawyers> [<https://perma.cc/Q4YD-T7N9>].

¹⁶³ See Eva Brems, *Belgium: The Vlaams Blok Political Party Convicted Indirectly of Racism*, 4 INT’L J. CONST. L. 702, 702 (2006) [hereinafter Brems, *Belgium*].

¹⁶⁴ See, e.g., Bligh, *supra* note 159, at 1339–40.

illegal.¹⁶⁵ The Vlaams Blok was the second largest faction in the Flemish Parliament at that time, winning around 24% of the vote in the year it was restrained.¹⁶⁶ Even before the judicial decision, there was agreement among the other factions never to include the Vlaams Blok in a coalition government because of its extreme right wing agenda.¹⁶⁷ The Court based its decision *inter alia* on the fact that the party did not disapprove of the discriminatory speech of its local branches.¹⁶⁸ The Court did not discuss more recent evidence that the party tried to distance itself from extremists.¹⁶⁹

Even more interesting are the cases in which the nation's constitution explicitly and openly allows a ban of secessionist political parties, but officials nonetheless use the pretext of protecting democracy. For example, the Bulgarian Constitution of 1991 grants freedom of association, but organizations' activities "shall not be contrary to the country's sovereignty and national integrity, or the unity of the nation."¹⁷⁰ In 2000, the Bulgarian Constitutional Court banned the United Macedonian Organization *Linden-Pirin*, which advocated that Bulgaria's Pirin region should belong to Macedonia, because the party's separatist agenda threatened the state's security, even though it was a marginal, non-influential organization.¹⁷¹

The Indian Constitution grants the constitutional right to form associations subject to reasonable restrictions, which may be enacted by law "in the interests of the sovereignty and integrity of India."¹⁷² In India, a politician who campaigns "on the ground of his religion, race, caste, community, or language or the use of, or appeal to, religious symbols"¹⁷³ may not run for office and, if elected, may be removed. This

¹⁶⁵ Bale, *supra* note 156, at 142; Bligh, *supra* note 159, at 1339; *see also* Eva Brems, *Freedom of Political Association and the Question of Party Closures*, in *POLITICAL RIGHTS UNDER STRESS IN 21ST CENTURY EUROPE* 120, 132 n.29 (Wojciech Sadurski ed., 2006) [hereinafter Brems, *Freedom*].

¹⁶⁶ Bourne & Bértoa, *Mapping*, *supra* note 153, at 232.

¹⁶⁷ BOURNE & BÉRTOA, *PRESCRIBING DEMOCRACY*, *supra* note 142, at 6–7; Bale, *supra* note 156, at 152; Bligh, *supra* note 159, at 1355.

¹⁶⁸ Brems, *Belgium*, *supra* note 163, at 706.

¹⁶⁹ David Art, *The Organizational Origins of the Contemporary Radical Right: The Case of Belgium*, 40 *COMP. POL.* 421, 435 (2008).

¹⁷⁰ *Bulgaria Constitution*, *supra* note 144, art. 44, § 2.

¹⁷¹ Resh. No. 1 ot 29 fevruari 2000 g. po konstitutsionno delo No. 3 ot 1999 g. (Bulg. Const. Ct. 2000); Bligh, *supra* note 159, at 1343.

¹⁷² *India Constitution*, *supra* note 144, art. 19, § 4.

¹⁷³ Samuel Issacharoff, *Fragile Democracies*, 120 *HARV. L. REV.* 1405, 1425 (2007).

prohibition is actively enforced.¹⁷⁴ As a result of the ban, any secessionist movement in India that is based on community identity—and this is the flag secessionist movements raise—may be banned based on racism rather than separatism. Thus, for example, the Indian government imposed bans on the activity of Sikh separatist movements in the 1980s.¹⁷⁵ In Kashmir, the central government has intervened in the conduct of elections, dissolved assemblies, arrested elected politicians, and imposed president's rule for prolonged periods to combat separatism.¹⁷⁶

The Turkish Constitution includes an explicit textual clause in its preamble stating that “no protection shall be accorded to an activity contrary to Turkish national interests, Turkish existence and the principle of its indivisibility with its State and territory.”¹⁷⁷ The Constitution further explicitly authorizes the banning of parties that threaten the territorial integrity of the State.¹⁷⁸ Implementing these constitutional provisions, the Turkish Constitutional Court has repeatedly upheld bans on political parties advocating Kurdish separatism or independence on the grounds that they threaten state unity and public order, violate the territorial integrity of the state, and refuse to denounce the PKK—the Kurdistan Workers' Party—in spite of its terrorist attacks.¹⁷⁹ In fact, “half of the 18 parties banned since 1980 [and until 2007] have been Kurdish.”¹⁸⁰ In these cases, the Court did mention separatism, but only as one cause of the ban among many.

Banning political parties to oppose secessionism has been used at least twice in Ukraine. The Ukrainian Constitution prohibits the establishment of political parties “if their programme goals or actions are aimed at the . . . violation of the sovereignty and territorial

¹⁷⁴ *Id.* at 1425–27.

¹⁷⁵ See, e.g., SEAN K. ANDERSON & STEPHEN SLOAN, HISTORICAL DICTIONARY OF TERRORISM 628–31 (3d ed. 2009) (dictionary entry for “Sikh Militants”); Andrew Major, *From Moderates to Secessionists: A Who's Who of the Punjab Crisis*, 60 PAC. AFF. 42 (1987). See generally JUGDEP S. CHIMA, THE SIKH SEPARATIST INSURGENCY IN INDIA: POLITICAL LEADERSHIP AND ETHNONATIONALIST MOVEMENTS (2010).

¹⁷⁶ Chowdhary, *supra* note 48. See generally Altaf Hussain, *Kashmir's Flawed Elections*, BBC (Sept. 14, 2002, 2:05 PM), http://news.bbc.co.uk/1/hi/world/south_asia/2223364.stm [https://perma.cc/S4QL-D4B8].

¹⁷⁷ *Turkey Constitution*, *supra* note 144, pmbl.

¹⁷⁸ *Id.* art. 68; *id.* art. 69.

¹⁷⁹ Bale, *supra* note 156, at 142, 145–46; Brems, *Freedom*, *supra* note 165, at 166; Issacharoff, *supra* note 173, at 1439–40.

¹⁸⁰ Bale, *supra* note 156, at 146.

indivisibility of the State.”¹⁸¹ Within days of Ukrainian independence from the Soviet Union in 1991, a legislative committee banned the Communist Party of Ukraine and confiscated its assets, thus substantially diminishing its ability to return Ukraine to Russia’s rule.¹⁸² After the recent Russian annexation of Crimea, Ukrainian authorities banned the extant Communist Party and brought charges of treason against its leaders on the grounds that they supported Russian annexation and were supporting the terrorist tactics of Eastern Ukrainian separatists.¹⁸³

These examples of bans of secessionist political parties are even more significant in light of the fact that bans on political parties are a last resort tool that should rarely be employed. Moreover, the effect of the constitutional prohibitions on secessionist political parties goes beyond the cases that involved actual exercise of the ban. Rather, the very existence of the prohibition affects politics and public discourse in ways that are difficult to measure. Parties may be deterred from openly pursuing secessionist agendas. The authorities may target individuals and groups by the use of criminal law that protects the territorial integrity of the state. The prohibition is intended more to chill formation of such organizations than to deal with them after they exist. And even when the state does not apply the ban and turns a blind eye to secessionist organizations, these organizations know that they exist at the mercy of authorities rather than by right.

C. *The Difficulty to Identify the Ban on Secessionists*

These are examples of a handful of prominent democratic countries that banned secessionist political parties in recent years. Why

¹⁸¹ *Ukraine Constitution*, *supra* note 144, art. 37. This article exists under the 1996, as well as the 2004 Constitution.

¹⁸² After ten years, the Ukrainian Constitutional Court struck down the ban, finding that the current Communist Party was a new one and not the continuation of the party that represented the Soviet regime. See Alexei Trochev, *Ukraine: Constitutional Court Invalidates Ban on Communist Party*, 1 INT’L J. CONST. L. 534 (2003). Critics argued that the Court became a “guardian of the Soviet-era Constitution”, and a “communist Politburo [executive].” *Id.* at 539.

¹⁸³ *Ukraine Seeks to Ban Communist Party*, NDTV, <http://www.ndtv.com/article/world/ukraine-seeks-to-ban-communist-party-555179> [<https://perma.cc/4GME-5U9T>] (last updated July 9, 2014); *SBU Chief: Communist Party Ban Important for National Security*, INTERFAX-UKRAINE (Nov. 10, 2014), <http://en.interfax.com.ua/news/general/233543.html> [<https://perma.cc/RJ5Y-84X9>].

is it so difficult to identify this phenomenon? Why do scholars often believe no ban on secessionist political parties takes place in democracies? Democracies seem to have succeeded in creating an acoustic separation, where the secessionists understand that they are persecuted for their secessionist activities while the wider audience believes that they are banned because of their racist or militant agendas.¹⁸⁴

While scholars point to the fact that there are dozens of secessionist political parties across the democratic world,¹⁸⁵ in fact, there is an ongoing game between democratic states and secessionist forces. In many constitutional systems, the ban leads to a game of “whack-a-mole,” in which the ban is tailored to the circumstances, allowing a rebirth of the same secessionist party under a different name.¹⁸⁶ Thus, for example, in Turkey, the Peace and Democracy Party (BDP) succeeded the Democratic Society Party (DTP) after the DTP was closed for its alleged connections with the PKK.¹⁸⁷ Similarly, the Belgium far-right Vlaams Blok party “rechristened itself as the Vlaams Belang [Flemish interest]” one week after the judicial decision to restrain it.¹⁸⁸ In fact, this phenomenon is so widespread that Angela Bourne and Fernando Bértoa called it a “lapsed ban” phenomenon, which means “a ban that has been undermined by the failure of the state to prevent a successor from taking on the mantle of a banned party.”¹⁸⁹ At times, the ban extends only to campaigning, while other political activity is allowed. Thus, for example, in India there are multiple political organizations that promote secessionist causes with varying degrees of openness about their aims.¹⁹⁰ Bans may be applied for limited periods, after which secessionist activity re-emerges. In this chaste process,

¹⁸⁴ On the phenomenon of acoustic separation in law, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

¹⁸⁵ See sources cited *supra* note 12.

¹⁸⁶ Bale, *supra* note 156, at 146.

¹⁸⁷ Büşra Ersanlı & Günay Göksu Özdoğan, *Obstacles and Opportunities: Recent Kurdish Struggles for Political Representation and Participation in Turkey*, 35 SOUTHEASTERN EUR. 62, 90 (2011).

¹⁸⁸ Hilde Coffé, *The Adaptation of the Extreme Right's Discourse: The Case of the Vlaams Blok*, 12 ETHICAL PERSP. 205, 216 (2005); Bale, *supra* note 156, at 152–53.

¹⁸⁹ BOURNE & BÉRTOA, *PRESCRIBING DEMOCRACY*, *supra* note 142, at 3.

¹⁹⁰ See *Separatist*, CONSTITUTION SOCIETY, *supra* note 12; see also Jean-Luc Racine, *Secessionism in Independent India: Failed Attempts, Irredentism, and Accommodation*, in *SECESSIONISM AND SEPARATISM IN EUROPE AND ASIA: TO HAVE A STATE OF ONE'S OWN* 147 (Jean-Pierre Cabestan & Aleksandar Pavković eds., 2013).

democracies try to sap secessionists' energy and resources by confiscating assets, with an endgame of coercing these secessionist forces to soften and rephrase their agendas.¹⁹¹

At the same time, democracies do not target every secessionist political party. Democracies try to target secessionist political parties that are neither too small to be bothered with nor too big to be dismantled. Thus, in some constitutional democracies, the ban on political participation is dormant as far as secessionists are concerned. For example, Germany's Basic Law provides that a court may ban a political party if its aims or behavior seek "to endanger the existence of the Federal Republic of Germany."¹⁹² Nonetheless, the Christian Social Union (CSU), which seeks to strengthen Bavaria's autonomy within Germany and even establish it as an independent state, has been allowed to participate at regional elections since the 1940s, without so far posing a serious threat to Germany's federation.¹⁹³ Systems ban only secessionist political parties that they feel threatened by and allow others to flourish. Thus, while Batasuna was banned, there are other secessionist political parties still operating in Spain. The same is true for Belgium.¹⁹⁴ Allowing non-threatening secessionist parties to exist provides a steam valve for their frustration within the confines of regular politics.¹⁹⁵

In addition, it is a rather easy task for democracies to justify their ban against secessionist political parties based on democratic values alone. One may argue that the secessionist phenomenon is racist by definition in the sense that the secessionists often seek separate treatment from others based on ethnicity. Usually, secessionist political parties will also maintain some kind of relationship with their militant counterparts, which helps to cast the parties as terrorists. Overall,

¹⁹¹ Bale, *supra* note 156, at 146, 148 (describing that the Batasuna's ban was "a huge blow, given that the 60-plus councils controlled by the party were a major source of income and patronage").

¹⁹² *Germany Basic Law*, *supra* note 144, art. 21, § 2.

¹⁹³ See Eve Hepburn, *The Neglected Nation: The CSU and the Territorial Cleavage in Bavarian Party Politics*, 17 GERMAN POL. 184 (2008).

¹⁹⁴ See *Separatist*, CONSTITUTION SOCIETY, *supra* note 12; see also *Political Autonomist and Secessionist Parties in the E.U.*, ASS'N ACCREDITED PUB. POL'Y ADVOCS. TO E.U. (Oct. 22, 2017), <http://www.aalep.eu/political-autonomist-and-secessionist-parties-eu> [<https://perma.cc/588T-AP6Q>].

¹⁹⁵ See, e.g., Ayres, *supra* note 156, at 112.

democracies are reluctant to admit that they are against secessionist parties *per se*.

D. *The Roots of Militant Democracy Theory*

In fact, banning secessionist political parties is not a phenomenon of the twenty-first century. It dates back to the beginning of the twentieth century. In May 1918, almost all leaders of Sinn Féin were arrested by British authorities for allegedly conspiring with the Germans, which was never proven.¹⁹⁶ Northern Ireland banned Sinn Féin between 1956 and 1974, covering the period of the Irish Republican Army border campaign.¹⁹⁷ Later, the U.K. restricted the broadcasts of Sinn Féin and its members, thus restricting free speech to protect territorial integrity.¹⁹⁸ Similarly, in France, the Constitution states that “France shall be an indivisible . . . Republic.”¹⁹⁹ Political parties must “respect the principles of national sovereignty.”²⁰⁰ A statute from 1936—which survived the establishment of the Fifth Republic—authorizes the President of the Republic to dissolve groups *inter alia* if their goal is the dismemberment of the territorial state.²⁰¹ Over the years, France banned more than 100 organizations, including some separatists.²⁰² In fact, the Conseil d’Etat has on a few occasions affirmed the dissolution of secessionist political parties.²⁰³ When France occupied Saarland after WWII, the French High Commissioner banned the Democratic Party of

¹⁹⁶ *German Plot*, BREWER’S DICTIONARY OF IRISH PHRASE & FABLE (Sean McMahon & Jo O’Donoghue eds., 2006), <http://www.oxfordreference.com/view/10.1093/acref/9780199916191.001.0001/acref-9780199916191-e-2242>.

¹⁹⁷ Clive Walker, *Political Violence and Democracy in Northern Ireland*, 51 MOD. L. REV. 605, 609 (1988).

¹⁹⁸ See Richard Mullender, *United Kingdom*, in THE ‘MILITANT DEMOCRACY’ PRINCIPLE IN MODERN DEMOCRACIES 311 (Markus Thiel ed., 2009).

¹⁹⁹ *France Constitution*, *supra* note 144, art. 1.

²⁰⁰ *Id.* art. 4.

²⁰¹ Issacharoff, *supra* note 173, at 1432. For the text of the statute, see Loi du 10 janvier 1936 sur les groupes de combat et milices privées, available at https://www.legifrance.gouv.fr/affichTexte.do?sessionId=3CFAD2B681F1BDB366E7E67A1539770A.tpdjo12v_1?cidTexte=JORFTEXT000000325214&dateTexte [<https://perma.cc/UWW8-WG2X>].

²⁰² BOURNE & BÉRTOA, PRESCRIBING DEMOCRACY, *supra* note 142, at 4.

²⁰³ See Claire-Lise Buis, *France*, in THE ‘MILITANT DEMOCRACY’ PRINCIPLE IN MODERN DEMOCRACIES 75, 90 (Markus Thiel ed., 2009); Fox & Nolte, *supra* note 138, at 28 and n.141 (mentioning cases of groups that challenged French sovereignty, including its sovereignty over foreign territories); see also Bourne, *supra* note 156, at 200–01.

the Saarland (DPS) because of its aspirations to reunite with West Germany.²⁰⁴ Germany banned the Communist Party in the 1950s, not only because it perceived communism as an ideological threat to democracy, as commonly perceived, but probably also as a bulwark against irredentist secessionist forces. The effects of the ban on the potential for German reunification were the subject of thorough oral arguments before the German Federal Constitutional Court.²⁰⁵

In fact, while democracies disguise their fight against secessionist political parties, the origins of the concept of “militant democracy” have always been tied to the war against secessionism. When Karl Loewenstein advocated for militant democracy to fight against fascism in 1937, from his exile in the United States, he explicitly discussed the fact that such an approach is warranted to protect against “the political activities of foreigners or alien emissaries on the national territory.”²⁰⁶ He gave the example of the militant democracy used by Czechoslovakia to protect against irredentist secessionist forces in Sudetenland.²⁰⁷ Similarly, the European Convention on Human Rights from 1950 allows for the restriction of freedom of expression to protect territorial integrity.²⁰⁸

III. ETERNITY CLAUSES AND THE “UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT”

So far, I have shown that, contrary to the prevailing perception that democracies allow for secessionist political parties and even forbid banning them, democratic constitutions commonly authorize bans on secessionist political parties. I have further offered an interpretation of

²⁰⁴ STEFAN WOLFF, *DISPUTED TERRITORIES: THE TRANSNATIONAL DYNAMICS OF ETHNIC CONFLICT SETTLEMENT* 95 (2004).

²⁰⁵ West Germany desired reunification of East and West Germany. This may have explained why it took the Court a few years to deliver its decision regarding the German Communist Party (KPD). The KPD argued that banning it will impair its ability to be elected under a unified Germany, but the same was true of democratic parties that were banned in East Germany under Soviet rule. The KPD further argued that its banning might impair the chances of reunification, but that was dismissed by the Court as within the province of the political branches. Those branches decided to request the banning of the KPD. *See* McWhinney, *supra* note 138.

²⁰⁶ Loewenstein, *Militant Democracy II*, *supra* note 58, at 656.

²⁰⁷ *Id.* at 641–43, 656.

²⁰⁸ European Convention on Human Rights, *supra* note 141, art. 10.

the practice under which democracies camouflage their exercise of the ban, not admitting openly that they are targeting secession *per se*. This Part examines the tool of “eternity,” “intangibility,” or “immutable” clauses, and the accompanying judicial doctrine of the “unconstitutional constitutional amendment” as a mechanism to combat secession.

A. *The Use of Eternity Clauses*

Another lesson democracies attribute to WWII is that they should set limits on the power to amend the constitution.²⁰⁹ Arguably, the Nazis could overtake power in a legal way and transform the Weimar Republic from a democratic to a totalitarian system because there was no concept of an unalterable democratic core to prevent this type of transformation.²¹⁰ Such limits on the amendment power are known as constitutional “eternity clauses.” Eternity clauses grant absolute entrenchment status to certain constitutional values and rights to ensure that they remain eternal, and are not amended.

To protect this eternal status, courts developed the doctrine of the “unconstitutional constitutional amendment.” This accompanying judicial doctrine means that, even if eternity clauses are violated by a constitutional amendment, the courts may declare such an amendment unconstitutional, and, thus, invalid. The eternity clauses may be codified expressly or read implicitly into the constitutional document by the constitutional courts.

Scholars customarily associate eternity clauses with the protection of constitutional rights. A well-known example that stems directly from the lessons of WWII is found in Germany’s treatment of human dignity as eternal and unamendable under its Basic Law.²¹¹ It is less known that eternity clauses originally developed as a way to protect the federal or

²⁰⁹ See Fox & Nolte, *supra* note 138, at 19; Ulrich K. Preuss, *The Implications of “Eternity Clauses”: The German Experience*, 44 *ISR. L. REV.* 429, 439 (2011).

²¹⁰ It is arguable whether Hitler took power in a legal manner and even more arguable whether his rise may be attributable to a misuse of amendment power. See Preuss, *supra* note 209, at 440–41. On unamendability, see CARL SCHMITT, *CONSTITUTIONAL THEORY* 125–66 (Jeffrey Seitzer ed. & trans., 2008). Scholars debate whether one can separate Carl Schmitt’s work from his support for Nazism. See Peter C. Caldwell, *Controversies over Carl Schmitt: A Review of Recent Literature*, 77 *J. MOD. HIST.* 357 (2005).

²¹¹ *Germany Basic Law*, *supra* note 144, art. 79, § 3.

unitary structure of the state, and in particular, prevent secession.²¹² States treated their territorial integrity as an existential value and a prerequisite for attainment of all other constitutional values and rights. Only later did eternity clauses become a tool also used to protect constitutional rights. In fact, the German Basic Law itself protects the federal structure of Germany from being amended.²¹³ Thus, the German Constitutional Court ruled in 2016 that Bavaria could not hold a referendum on independence, as secession is not allowed under the Basic Law.²¹⁴ The Italian Constitutional Court issued a similar decision in 2015 preventing Veneto from holding a consultative referendum on independence based on the reasoning that such a referendum would violate the constitutional principle of territorial integrity and unity of the state.²¹⁵

Contrary to conventional wisdom, constitutional democracies *often* treat their federal structure, unitary status, and territorial integrity as unamendable. These constitutional clauses are intended to deter secession, and if deterrence fails, to trigger the “unconstitutional constitutional amendment” doctrine. Forty-three constitutions, which represent 22% of world constitutions, include an explicit eternity clause protecting the territorial integrity of the state from amendment. These include the constitutions of Brazil, France, Germany, Italy, Portugal, Romania, Turkey, and Ukraine.²¹⁶ Sixty-five constitutions do not have

²¹² The U.K. Acts of Union from 1707 may serve as prime examples. See discussion *infra* notes 238–39 and accompanying text.

²¹³ *Germany Basic Law*, *supra* note 144, art. 79, § 3.

²¹⁴ BVerfG, 2 BvR 349/16, Dec. 16, 2016, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/12/rk20161216_2bvr034916.html [<https://perma.cc/Y9QM-6VG2>].

²¹⁵ Corte Cost., 29 aprile 2015, n.118, 2015 (It.), https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S118_2015_en.pdf.

²¹⁶ *Algeria Constitution*, *supra* note 144, art. 212; *Angola Constitution*, *supra* note 144, art. 236; *Azerbaijan Constitution*, *supra* note 144, art. 158; *Benin Constitution*, *supra* note 144, art. 156; *Brazil Constitution*, *supra* note 144, art. 60; *Burkina Faso Constitution*, *supra* note 145, art. 165; *Burundi Constitution*, *supra* note 145, art. 299; *Cameroon Constitution*, *supra* note 144, art. 64; *Cape Verde Constitution*, *supra* note 144, art. 290, § 1, cl. a; *Chad Constitution*, *supra* note 144, art. 233; *Central African Republic Constitution*, *supra* note 144, art. 152; *Congo Constitution*, *supra* note 144, art. 240; *Comoros Constitution*, *supra* note 144, art. 42; *DRC Constitution*, *supra* note 144, art. 220; *Côte d’Ivoire Constitution*, *supra* note 144, art. 178; *Cuba Constitution (1976) (rev. 2002)*, CONSTITUTE, arts. 11, 137, <https://www.constituteproject.org/search?lang=en> [<https://perma.cc/5QVG-JM57>] (last visited Oct. 10, 2018); *Djibouti Constitution*, *supra* note 145, art. 92; *El Salvador Constitution (1983) (rev. 2014)*, CONSTITUTE, *supra*, art. 248; *Equatorial Guinea Constitution*, *supra* note 145, art. 3, 134; *France Constitution*,

an explicit eternity clause but nonetheless identify in their preamble and/or fundamental principles and state duties the imperative to protect territorial integrity and/or national unity as a permanent, eternal, and unchangeable value.²¹⁷ These include the constitutions of Argentina, Australia, Bulgaria, China, Czech Republic, Cyprus, Finland, Luxembourg, Macedonia (former Yugoslav Republic), Mexico, Norway, South Africa, and Spain.²¹⁸ The Cambodian Constitution, for example,

supra note 144, art 89; *Gabon Constitution*, *supra* note 145, art. 116; *Germany Basic Law*, *supra* note 144, art. 79, § 3; *Guinea Constitution*, *supra* note 144, arts. 4, 153; *Guinea-Bissau Constitution*, *supra* note 144, art. 130; *Honduras Constitution*, *supra* note 145, art. 374; *Indonesia Constitution (1945) (rev. 2002)*, CONSTITUTE, *supra*, art. 37, § 5; *id.* art. 139, § 5; *Italy Constitution*, *supra* note 149, art. 139; *Kazakhstan Constitution*, *supra* note 144, art. 91, § 2; *Madagascar Constitution*, *supra* note 144, art. 163; *Mauritania Constitution*, *supra* note 144, art. 99; *Mozambique Constitution*, *supra* note 144, art. 292, § 1(a); *Nepal Constitution*, *supra* note 144, art. 274, § 1; *Niger Constitution*, *supra* note 145, art. 175; *Portugal Constitution*, *supra* note 144, art. 288, § A; *Qatar Constitution (2003)*, CONSTITUTE, *supra*, art. 2; *id.* art. 145; *Romania Constitution*, *supra* note 144, art. 152 § 1; *Sao Tome and Principe Constitution*, *supra* note 144, art. 154, § a; *Somalia Constitution (2012)*, CONSTITUTE, *supra*, art. 132, § 1; *Tajikistan Constitution*, *supra* note 145, art. 100; *Togo Constitution*, *supra* note 144, art. 144; *Turkey Constitution*, *supra* note 144, art. 4; *Ukraine Constitution*, *supra* note 144, art. 11; *id.* art. 137; *Timor-Leste Constitution (2002)*, CONSTITUTE, *supra*, art. 4, § 3; *id.* art. 156 § 1(a).

²¹⁷ There are many more countries that enumerate in their preambles and/or state duties the duty to protect territorial integrity but do not explicitly refer to territorial integrity as an inviolable principle. Thus, I did not include these countries in this category.

²¹⁸ *Albania Constitution*, *supra* note 145, arts. 1(2), 3; *Argentina Constitution*, *supra* note 149, art. 6; *id.* Transitional Provisions 1; *Austria Constitution (1920) (rev. 2013)*, CONSTITUTE art 9A, <https://www.constituteproject.org/search?lang=en> [<https://perma.cc/5QVG-JM57>] (last visited Oct. 10, 2018); *id.* art. 100; *Bahamas Constitution (1973)*, CONSTITUTE, *supra*, pmb.; *Bhutan Constitution*, *supra* note 144, pmb.; *id.* art. 1(3); *Australia Constitution (1901) (rev. 1985)*, CONSTITUTE, *supra*, pmb.; *Bahrain Constitution*, *supra* note 145, art. 1, § a; *Belarus Constitution*, *supra* note 145, art. 9; *Bulgaria Constitution*, *supra* note 144, art. 2, § 1; *Cambodia Constitution*, *supra* note 145, art. 2; *id.* art. 55; *id.* art. 92; *People's Republic of China Constitution (1982) (rev. 2004)*, CONSTITUTE, *supra*, art. 4 (“All the national autonomous areas are inalienable parts of the People’s Republic of China.”); *Cyprus Constitution*, *supra* note 149, art. 185; *Czech Republic Constitution*, *supra* note 145, art. 11; *Dominican Republic Constitution*, *supra* note 149, art. 9; *Ecuador Constitution*, *supra* note 145, art. 4; *Egypt Constitution*, *supra* note 145, art. 1; *id.* art. 151; *Estonia Constitution (1992) (rev. 2015)*, CONSTITUTE, *supra*, art. 1; *id.* art. 2; *Finland Constitution (1999) (rev. 2011)*, CONSTITUTE, *supra*, art. 4; *Georgia Constitution*, *supra* note 144, art. 1; *id.* art. 2; *Guyana Constitution*, *supra* note 144, pmb., *id.* art. 1; *Haiti Constitution*, *supra* note 144, art. 8, § 1; *Iran Constitution*, *supra* note 144, art. 9; *id.* art. 78; *Kuwait Constitution (1962) (reinst. 1992)*, CONSTITUTE, *supra*, art. 1; *Kyrgyzstan Constitution*, *supra* note 145, art. 8, § 1; *Laos Constitution*, *supra* note 144, art. 1; *Lebanon Constitution (1926) (rev. 2004)*, CONSTITUTE, *supra*, art. 2; *Lithuania Constitution*, *supra* note 149, art. 3; *Luxembourg Constitution (1868) (rev. 2009)*, CONSTITUTE, *supra*, art. 1; *Macedonia Constitution*, *supra* note 145, art. 3; *Mexico Constitution (1917) (rev. 2015)*, CONSTITUTE, *supra*, art. 2; *id.* art. 27; *Federated States of Micronesia Constitution (1978) (rev. 1990)*, CONSTITUTE,

not only declares that its territorial integrity “shall never be violated,”²¹⁹ but provides that any treaty or decision of the legislature to the contrary shall be annulled.²²⁰ Another example is Ecuador, which provides that its territory is “unalienable”²²¹ and “[u]nder no circumstances shall the exercise of autonomy allow for secession from the national territory.”²²² Sri Lanka’s Constitution prohibits any individual, including officials and Members of Parliament (MPs), from promoting separatism. Anyone who violates this prohibition not only loses his office but may forfeit his property and civic rights, including the right to a passport and the right to pursue an occupation that requires a license from the state.²²³ The Tanzania Constitution clarifies that “No person shall have the right to sign an act of capitulation and surrender of the nation.”²²⁴ Overall, 108

supra, pmb.; *Moldova Constitution*, *supra* note 144, art. 3, § 1; *id.* art. 32, § 3; *Monaco Constitution (1962) (rev. 2002)*, CONSTITUTE, *supra*, art. 1; *id.* art. 78; *Mongolia Constitution (1992) (rev. 2001)*, CONSTITUTE, *supra*, art. 4, § 1; *Montenegro Constitution*, *supra* note 144, art. 3; *Myanmar Constitution*, *supra* note 144, art. 10; *Nicaragua Constitution (1987) (rev. 2014)*, CONSTITUTE, *supra*, art. 5; *id.* art. 6; *Nigeria Constitution*, *supra* note 145, art. 2; *Norway Constitution (1814) (rev. 2016)*, CONSTITUTE, *supra*, art. 1; *Panama Constitution*, *supra* note 145, art. 3; *id.* art. 290; *Papua New Guinea Constitution (1975) (rev. 2016)*, CONSTITUTE, *supra*, art. 2, § 2; *id.* art. 187E.1; *Paraguay Constitution*, *supra* note 144, art. 155; *Peru Constitution (1993) (rev. 2009)*, CONSTITUTE, *supra*, art. 43; *id.* art. 54; *Russian Federation Constitution*, *supra* note 144, art. 4, § 3; *Senegal Constitution*, *supra* note 149, pmb.; *id.* arts. 3, 5; *Serbia Constitution*, *supra* note 145, art. 8; *Slovenia Constitution (1991) (rev. 2016)*, CONSTITUTE, *supra*, art. 4; *id.* art. 124; *Slovakia Constitution* *supra* note 149, art. 3 § 1; *South Africa Constitution (1996) (rev. 2012)*, CONSTITUTE, *supra*, art. 1; *id.* art. 41, § 1(A); *id.* art. 143; *Democratic People’s Republic of Korea*, CONSTITUTE art. 84, https://www.constituteproject.org/constitution/Peoples_Republic_of_Korea_1998.pdf?lang=en (last visited Dec. 2, 2018); *Seychelles Constitution (1993) (rev. 2017)*, CONSTITUTE, *supra*, pmb.; *Spain Constitution*, *supra* note 149, art. 2; *Sri Lanka Constitution*, *supra* note 144, art. 3; *id.* art. 157A; *Sweden Constitution*, *supra* note 145, ch. 15, part 7, art. 9; *id.* part 5, art. 7; *Syria Constitution*, *supra* note 145, pmb.; *id.* art. 1; *Thailand Constitution (2017)*, CONSTITUTE, *supra*, art. 1; *Turkmenistan Constitution*, *supra* note 145, art. 1; *Uganda Constitution*, *supra* note 145, art. IV, § i; *Tanzania Constitution*, *supra* note 144, art. 28; *Uzbekistan Constitution*, *supra* note 144, art. 3; *Bolivarian Republic of Venezuela Constitution (1999) (rev. 2009)*, CONSTITUTE, *supra*, art. 1; *id.* art. 4; *id.* art. 13; *Vietnam Constitution (1992) (rev. 2013)*, CONSTITUTE, *supra*, art. 11; *Yemen Constitution*, *supra* note 149, art. 1; *Zambia Constitution*, *supra* note 144, art. 4, pmb.; *Zimbabwe Constitution (2013) (rev. 2017)*, CONSTITUTE, *supra*, ch. 1, art. 3, § (2)(h), ch. 2, art. 10, ch. 14, art. 264, § (2)(c), art. 265, § (1)(e).

²¹⁹ *Cambodia Constitution*, *supra* note 145, art. 2.

²²⁰ *Id.* art. 55; *id.* art. 92.

²²¹ *Ecuador Constitution*, *supra* note 145, art. 4.

²²² *Id.* art. 238.

²²³ *Sri Lanka Constitution*, *supra* note 144, art. 157A.

²²⁴ *Tanzania Constitution*, *supra* note 144, art. 28.

constitutions, which represent 56% of world constitutions, rigorously protect territorial integrity to the point of declaring it an unamendable value. When looking at democracies and semi-democracies, sixty-four countries (roughly 48% of democracies and semi-democracies) treat territorial integrity as eternal.

Many countries command their armies to protect territorial integrity as a constitutional duty and often treat a potent threat to territorial integrity as justifying an emergency regime. It is also very common to require the heads of state—typically the executive branch, but sometimes the judicial branch—to take an oath to defend the territorial integrity of the state. The Indian Constitution even makes it an explicit oath of office of ministers, parliamentary candidates, MPs, justices, comptrollers and auditors general, candidates to state legislatures, ministers of state, members of state legislatures, and judges of high courts.²²⁵ Constitutions sometimes even explicitly state that it would be high treason for the president to allow the territorial integrity of the state to dismember.²²⁶ Some constitutions explicitly entrust the executive branch to dismantle regional assemblies and governments if they act against the territorial integrity of the state.²²⁷ This is the interpretation offered by the Spanish central government to article 155 of the Spanish Constitution in its struggle against Catalonia's separatism. The Spanish central government acted upon this interpretation when it dismantled the Catalan governing institutions and called for early, extraordinary elections at the end of 2017.²²⁸ All

²²⁵ *India Constitution*, *supra* note 144, schedule III; *Yemen Constitution*, *supra* note 149, art. 160.

²²⁶ See, e.g., *Benin Constitution*, *supra* note 144, art. 74; *Burundi Constitution*, *supra* note 145, art. 117; *Chad Constitution*, *supra* note 144, art. 173; *DRC Constitution*, *supra* note 144, art. 165; *Guinea Constitution*, *supra* note 144, art. 119; *Honduras Constitution*, *supra* note 145, art. 19; *Niger Constitution*, *supra* note 145, art. 142.

²²⁷ See, e.g., *Cameroon Constitution*, *supra* note 144, art. 59; *id.* art. 60; *Nepal Constitution*, *supra* note 144, art. 232, § 3; *Pakistan Constitution*, *supra* note 144, art. 234.

²²⁸ The article states:

If an Autonomous Community does not fulfill the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failed to receive satisfaction therefore, may, following approval granted by the overall majority of the Senate, take the measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests.

Spain Constitution, *supra* note 149, art. 155, § 1.

these measures, like the ban, are intended to prevent secession from gaining momentum to the point that courts will need to apply the “unconstitutional constitutional amendment” doctrine.

A full forty-four constitutions, which represent 23% of world constitutions, even impose a constitutional duty upon the citizen, and not only the state, to protect the territorial integrity of the state.²²⁹ This is a special feature, since we traditionally perceive constitutions as imposing duties on the government while bestowing rights on the people. Further, if every citizen has a constitutional duty to protect the territorial integrity of the state, it is much harder to advance a goal of separation from the state. Citizens will find it difficult to rely on other constitutional rights, such as freedom of speech and association, to promote separation when these rights conflict with their constitutional obligation to protect territorial integrity.

Moreover, the lack of an explicit eternity clause did not prevent courts from implying territorial integrity as an unamendable constitutional value. The American Civil War was fought over the

²²⁹ *Afghanistan Constitution*, supra note 145, art. 59; *Algeria Constitution*, supra note 144, art. 75; *Benin Constitution*, supra note 144, art. 32; *Bhutan Constitution*, supra note 144, art. 8, § 1; *Bolivia Constitution*, supra note 149, art. 108, § 13; *Burkina Faso Constitution*, supra note 145, art. 10; *Burundi Constitution*, supra note 145, art. 72; *Chad Constitution*, supra note 144, art. 51; *China Constitution*, supra note 218, pmbl. (regarding Taiwan); *Colombia Constitution*, supra note 145, art. 95, § 3; *DRC Constitution*, supra note 144, art. 63; *Côte d’Ivoire Constitution*, supra note 144, art. 39; *Gambia Constitution*, supra note 145, art. 213, § 1; *Guinea-Bissau Constitution*, supra note 144, art. 35; *Iran Constitution*, supra note 144, art. 9; *Laos Constitution*, supra note 144, art. 31; *Mauritania Constitution*, supra note 144, art. 18; *Morocco Constitution*, supra note 144, art. 38; *Mozambique Constitution*, supra note 144, art. 267, § 1; *Myanmar Constitution*, supra note 144, art. 385; *Niger Constitution*, supra note 145, art. 38; *Panama Constitution*, supra note 145, art. 310; *Pakistan Constitution*, supra note 144, art. 5; *Sao Tome and Principe Constitution*, supra note 144, art. 64, § 1; *Sri Lanka Constitution*, supra note 144, art. 157A; *Sudan Constitution (2005)*, CONSTITUTE, art. 23, § 1, <https://www.constituteproject.org/search?lang=en> [<https://perma.cc/5QVG-JM57>] (last visited Oct. 10, 2018); *Syria Constitution*, supra note 145, pmbl.; *id.* art. 46; *Timor-Leste Constitution*, supra note 216, art. 49, § 1; *Togo Constitution*, supra note 144, art. 43; *Uganda Constitution*, supra note 145, art. 17, § 2; *Ukraine Constitution*, supra note 144, art. 17; *id.* art. 65; *Tanzania Constitution*, supra note 144, art. 28; *Venezuela Constitution*, supra note 218, art. 130; *see also Belize Constitution (1981) (rev. 2011)*, CONSTITUTE, supra, art. 29, § 3; *Ecuador Constitution*, supra note 145, art. 4; *Equatorial Guinea Constitution*, supra note 145, art. 3; *id.* art. 21; *India Constitution*, supra note 144, art. 51A(c); *Jordan Constitution*, supra note 149, art. 6, § 2; *Maldives Constitution (2008)*, CONSTITUTE, supra, art. 67(d); *Seychelles Constitution*, supra note 218, art. 40; *Somalia Constitution*, supra note 216, art. 42, § 2(i); *Swaziland Constitution (2005)*, CONSTITUTE, supra, art. 63; *Yemen Constitution*, supra note 149, art. 61; *Zimbabwe Constitution*, supra note 218, art. 10.

protection of the Union no less than the abolition of slavery, and its aftermath may stand for the proposition that in the United States, secession amounts to an “unconstitutional constitutional amendment.”²³⁰ In fact, Chief Justice Chase seemed to have found a constitutional text that prohibits secession. In *Texas v. White*, based on the Constitution’s preamble, he stated “It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?”²³¹ He further suggested that territorial integrity was part of (what we would term today) the basic structure of the Constitution. “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”²³² He also seemed to rely on Article IV of the U.S. Constitution to empower the national authorities to prevent secession by guaranteeing to each state a republican form of government.²³³ This was no mere dicta. It led to the majority decision that the Court enjoyed jurisdiction over the case since Texas never ceased to be part of the Union, though it was not yet represented in Congress during the time the case was heard (the Reconstruction era).²³⁴ The Court held that Texas never achieved secession though a majority of its population supported secession in a referendum that led to its departure from the Union and its membership in the Confederation during the Civil War.²³⁵ In India, Justices of the Supreme Court identified territorial integrity as unamendable.²³⁶ There are Swiss constitutional scholars who suggest that the federal structure is so fundamental to Switzerland that courts should recognize it as an unamendable value.²³⁷

²³⁰ *Texas v. White*, 74 U.S. 700, 726 (1868); see also Radan, *supra* note 23, at 335. Cf. *Coleman v. Miller*, 307 U.S. 433 (1939) (leaving the question of constitutionality of amendments to the political branches).

²³¹ *White*, 74 U.S. at 725.

²³² *Id.*

²³³ *Id.* at 727–28.

²³⁴ *Id.* at 726, 738–39.

²³⁵ *Id.* at 704–05, 726.

²³⁶ *Kesavananda Bharati v. Kerala*, AIR 1973 SC 1461 (India).

²³⁷ The Swiss Constitution allows internal secession in the form of redrawing of cantons. *Switzerland Constitution (1999) (rev. 2014)*, CONSTITUTE art. 53, <https://www.constituteproject.org/search?lang=en> [<https://perma.cc/5QVG-JM57>] (last visited Oct. 10, 2018). It enabled the creation of the new Jura canton that seceded from the Berne canton. THOMAS FLEINER & LIDIJA R. BASTA FLEINER, *CONSTITUTIONAL DEMOCRACY IN A MULTICULTURAL AND GLOBALISED WORLD* 626 (Katy Le Roy trans., 2009). Some Swiss constitutional scholars suggest that the federative nature of Switzerland should be treated as unamendable. See Giovanni

We can trace the idea of unamendability also in the U.K. The Acts of Union between the English and Scottish Kingdoms that created Great Britain in 1707 stipulated that the Union, being irrevocable and indissoluble, will endure “in all time coming.”²³⁸ The Union with Ireland Act 1800 contemplated that the Union between Great Britain and Ireland will “have effect for ever.”²³⁹ There is judicial support for the proposition that these Acts should be treated as enjoying special constitutional status, such that they could not be repealed implicitly, requiring full accountability of parliament for any deviation from them.²⁴⁰ Furthermore, Dicey, the most renowned British constitutional scholar of the nineteenth and early twentieth century, treated the Acts of Union as amounting to a constitutional document that may only be amended via a *national* referendum.²⁴¹ In fact, the Union with Ireland did not last, and was amended via extra-constitutional politics.²⁴² Further, since the 1970s, it is an established practice in the U.K. to hold referenda before effecting major change in the U.K.’s relationship with its constituent parts or with the E.U., if the change is likely to affect sovereignty.²⁴³ If Britain is viewed as based on the principle of parliamentary sovereignty, it means that issues affecting national

Biaggini, *Switzerland*, in *HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY* 303, 317 (Dawn Oliver & Carlo Fusaro eds., 2011). Cf. FLEINER, *supra*, at 569 (suggesting that article 53 could arguably be used in the event of a major crisis also for external secession).

²³⁸ Following the Act of Union and until the devolution Act, there was also no continuation of distinct Scottish state offices that could lead to the dissolution of the Union. See McCormick, *supra* note 42, at 732.

²³⁹ Union with Ireland Act 1800, 39 and 40 Geo. 3 c. 67 (Gr. Brit.).

²⁴⁰ See, e.g., *Thoburn v. Sunderland City Council*, [2002] 3 WLR 247 (QB) at 279–81 (Eng.). According to Scottish law, the Union Act should be treated as fundamental law. See McCormick v. Lord Advocate (1953) SC 396 (Scot.).

²⁴¹ A.V. Dicey, *The Referendum and Its Critics*, 212 Q. REV. 538, 554 (1910); see also Rivka Weill, *Dicey Was Not Diceyan*, 62 CAMBRIDGE L.J. 474 (2003).

²⁴² See generally MICHAEL HOPKINSON, *THE IRISH WAR OF INDEPENDENCE* (2004). The Union with Ireland did not survive, and the U.K. has further committed in the Northern Ireland Act of 1998 that the majority of the people in Northern Ireland might vote to join the Irish Republic. See Northern Ireland Act 1998, c. 47, § 1 (Gr. Brit.); see also Horowitz, *Cracked Foundations*, *supra* note 14, at 13. This was done to soothe Northern Ireland’s concern that Britain will give it up out of its own free will rather than to accommodate irredentists’ desires. On the concern of possible British withdrawal, see, e.g., John Coakley, *Adjusting to Partition: From Irredentism to “Consent” in Twentieth-Century Ireland*, 25 IRISH STUD. REV. 193, 198–203 (2017); Adrian Guelke & Frank Wright, *The Option of a “British Withdrawal” from Northern Ireland: An Exploration of its Meaning, Influence, and Feasibility*, CONFLICT Q. 51 (1990).

²⁴³ Rivka Weill, *Centennial to the Parliament Act 1911: The Manner and Form Fallacy*, PUB. L. 105, 121–23 (2012).

sovereignty cannot be amended via a regular constitutional amendment, but require instead an extra-constitutional act of the People.

B. *The Doublespeak of Democratic Constitutions*

If territorial integrity is protected under the “unconstitutional constitutional amendment” doctrine in various countries, why did scholars interpret constitutional declarations of indivisibility to allow for regular constitutional amendment?²⁴⁴ We find the same doublespeak and underhanded usage of eternity clauses as we did with bans on secessionist political parties. Many constitutions contain seemingly contradictory provisions: on one hand, they protect the inalienability of the territory, the entrenched nature of the federal system, or the indivisibility of its unitary nature; and on the other hand, some of them include clauses that set arduous procedures for territorial change. For example, the Ukrainian Constitution article 2 states, “The territory of Ukraine within its present border is indivisible and inviolable.”²⁴⁵ Furthermore, article 157 states that “[t]he Constitution of Ukraine shall not be amended, if the amendments . . . are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.”²⁴⁶ Nonetheless, article 73 declares that “[i]ssues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum.”²⁴⁷ This presents a contradiction in terms.

Similarly, article 2 of the Spanish Constitution proclaims, “The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards.” Article 8 further requires “the Armed Forces . . . to guarantee the sovereignty and independence of Spain and to defend its territorial integrity.” But article 168 enables amendments to these provisions through a special process—one that is also used for a total revision of the Constitution.²⁴⁸ This

²⁴⁴ See *supra* Introduction.

²⁴⁵ *Ukraine Constitution, supra* note 144, ch. I, art. 2.

²⁴⁶ *Id.* art. 157.

²⁴⁷ *Id.* art. 73.

²⁴⁸ *Spain Constitution, supra* note 149, art. 2; *id.* art. 8; *id.* art. 168. It requires that the amendment be approved by a two-thirds majority of the members of each House, and the Cortes Generales shall immediately be dissolved thereafter. The Houses elected thereupon must ratify the decision and proceed to examine the new constitutional text, which must be passed by

stance of the Spanish Constitution to allow revision of every article but to make the revision of some articles impossible to achieve has been termed “political schizophrenia.”²⁴⁹ This doublespeak phenomenon is found in forty-two constitutions or 22% of world constitutions, including Bulgaria, Finland, France, Luxembourg, Spain, and South Africa.²⁵⁰ All of these countries have a ban on secessionist political

a two-thirds majority of the members of each House. Once the amendment has been passed by the Cortes Generales, it shall be submitted to ratification by referendum. *Id.* art. 168.

²⁴⁹ Prado, *supra* note 157, at 247.

²⁵⁰ The doublespeak phenomenon exists in the following constitutions: *compare Albania Constitution, supra* note 145, art. 1(2), *and id.* art. 9(2), *with id.* art. 121; *compare Australia Constitution, supra* note 218, pmb., *with id.* art. 123; *compare Austria Constitution, supra* note 218, art. 9A, *with id.* art. 3(4); *compare Bahrain Constitution, supra* note 145, art. 1(a), *with id.* art. 37; *compare Benin Constitution, supra* note 144, art. 74, *and id.* art. 156, *with id.* art. 145; *compare Bhutan Constitution, supra* note 144, art. 15, § 4(f), *with id.* art. 1, § 3; *compare Bulgaria Constitution, supra* note 144, art. 2, *and id.* art. 11, § 4, *with id.* art. 158, § 2, *and id.* art. 159, § 2; *compare Burundi Constitution, supra* note 145, art. 2, *and id.* art. 78, *and id.* art. 299, *with id.* art. 295; *compare Central African Republic Constitution, supra* note 144, art. 14, *and id.* art. 152, *with id.* art. 91; *compare Chad Constitution, supra* note 144, pmb., *and id.* art. 4, *and id.* art. 223, *with id.* art. 219; *compare Comoros Constitution, supra* note 144, art. 6, *and id.* art. 7.1, *and id.* art. 42, *with id.* art. 10; *compare DRC Constitution, supra* note 144, art. 6, *and id.* art. 63, *and id.* art. 165, *and id.* art. 220, *with id.* art. 214; *compare Republic of Congo Constitution, supra* note 144, art. 61, *and id.* art. 240, *with id.*, art. 217, *and id.* art. 219; *compare Costa Rica Constitution, supra* note 149, art. 98, *and id.* art. 149, § 1, *with id.* art. 7; *compare Djibouti Constitution, supra* note 145, art. 6, *and id.* art. 92, *with id.* art. 62; *compare El Salvador Constitution, supra* note 216, art. 84, *and id.* art. 146, *and id.* art. 248, *with id.* art. 147; *compare Equatorial Guinea Constitution, supra* note 145, art. 3, *and id.* art. 9, § 2, *and id.* art. 134, *with id.* art. 81(a); *compare Guinea Constitution, supra* note 144, art. 3, *and id.* art. 4, *and id.* art. 153, *with id.* art. 149; *compare Finland Constitution, supra* note 218, art. 4, *with id.* art. 95; *compare France Constitution, supra* note 144, art. 1, *and id.* art. 4, *and id.* art. 89, *with id.* art. 53; *compare Gabon Constitution, supra* note 145, art. 1, § 13, *and id.* art. 116, *with id.* art. 114; *compare Georgia Constitution, supra* note 144, art. 1, art. 2, § 1, *and id.* art. 24, § 4, *and id.* art. 26, § 3, *with id.* art. 2 § 2, *and id.* art. 65, § 2 (c); *compare Ghana Constitution, supra* note 145, art. 55, §§ 4, 7, 9, *with id.* art. 290, §§ 1, 4; *compare Honduras Constitution, supra* note 145, art. 19, *and id.* art. 374, *with id.* art. 20, *and id.* art. 245, § 13; *compare Basic Law: The Knesset, supra* note 145, § 7A *with id.* Basic Law: Referendum; *compare Kenya Constitution, supra* note 144, art. 91, *with id.* art. 255; *compare Luxembourg Constitution, supra* note 218, art. 1, *with id.* art. 37; *compare Mali Constitution, supra* note 144, art. 28, *with id.* art. 115; *compare Mauritania Constitution, supra* note 144, art. 11, *and id.* art. 18, *and id.* art. 99, *with id.* art. 78; *compare Moldova Constitution, supra* note 144, art. 3, § 1, *with id.* art. 142, § 1; *compare Qatar Constitution, supra* note 216, art. 2, *and id.* art. 5, *with id.* art. 68; *compare Rwanda Constitution, supra* note 144, art. 56, *with id.* art. 167, *and id.* art. 175; *compare Senegal Constitution, supra* note 149, pmb., art. 5, *with id.* art. 96; *compare Singapore Constitution, supra* note 145, art. 6, § 1(a), *with id.* art. 14, § 2; *compare Slovakia Constitution, supra* note 149, art. 3 § 1, *with id.* art. 93, § 1; *compare South Africa Constitution, supra* note 218, art. 41, § 1(a), *with id.* art. 235; *compare Spain Constitution, supra* note 149, art. 2, *and id.* art. 8, *with id.* art.

parties and/or eternity clauses, and they also provide a procedure for territorial change, thus the doublespeak.²⁵¹

The number of countries engaging in doublespeak is higher were we to also include constitutional provisions that provide procedure for changes in boundaries (as distinguished from territories).²⁵² Additionally, many more countries engage in doublespeak if we include those that impose constitutional duties on state organs to protect territorial integrity on the one hand and provide a procedure for territorial change on the other hand.²⁵³

The same ambiguity arises from judicial decisions. As we have seen, the constitutions of both Ukraine and Spain include eternity clauses preventing secession. In both countries, the constitutional courts intervened before secessionist referenda were held in the seceding area and declared them unconstitutional because only the national political bodies could hold a national referendum on the subject. Secession was a national rather than a regional matter.²⁵⁴ In both cases, the courts knew that secession was not supported at the national level, and the

168; compare *Thailand Constitution*, *supra* note 218, art. 1, with *id.* art. 178; compare *Togo Constitution*, *supra* note 144, art. 138, with *id.* art. 7, and *id.* art. 8, and *id.* art. 144; compare *Uganda Constitution*, *supra* note 145, arts. 3, 5, 17, 99, 209 with *id.* art. 260, § 1; compare *Ukraine Constitution*, *supra* note 144, arts. 2, 17, 34, 37, 132, 157 with *id.* art. 73.; compare *Uzbekistan Constitution*, *supra* note 144, art. 3, and *id.* art. 57, with *id.* art. 74.

²⁵¹ Israel provides an interesting case study. In the 1960s, the Israeli Supreme Court authorized the banning of a political party to protect the territorial integrity of the state. EA 1/65 Yardor v. Chairman of Central Election Committee for the Sixth Knesset, 19(3) PD 365 (1965) (Isr.). See Ron Harris, *State Identity, Territorial Integrity and Party Banning: The Case of a Pan-Arab Political Party in Israel*, 4 SOCIO-LEGAL REV. 19 (2008). At the time, there was no textual anchor for such a ban in Israel's constitutional law. In the 1980s, the emerging Kach right-wing racist political party prompted the Knesset to enact section 7A of Basic Law: the Knesset. Weill, *supra* note 27, at 244. This section grants authority to ban political parties who negate Israel's Jewish and democratic identity and who are racists or terrorists.

²⁵² See, e.g., compare *Portugal Constitution*, *supra* note 144, art. 5, § 3, with *id.* art. 10, § 2, and *id.* art. 288(a)

²⁵³ E.g., compare *Belgium Constitution (1831) (rev. 2014)*, CONSTITUTE art. 167, <https://www.constituteproject.org/search?lang=en> [<https://perma.cc/5QVG-JM57>] (last visited Oct. 10, 2018), with *id.* art. 91; compare *Belize Constitution*, *supra* note 229, pmbl., and *id.* art. 29, § 3, with *id.* art. 61A, § 2; compare *Bosnia and Herzegovina Constitution (1995) (rev. 2009)*, CONSTITUTE, *supra*, pmbl., with *id.* art. VI, § 3(a); compare *Brazil Constitution*, *supra* note 144, art. 17, I, and *id.* art. 60, with *id.* art. 48, V.

²⁵⁴ See *Ukrainian Judgment*, *supra* note 60; S.T.C., Oct. 17, 2017, No. 4334-2017 (Spain); M.R., *Why the Referendum on Catalan Independence is Illegal*, ECONOMIST (Sept. 26, 2017), <https://www.economist.com/the-economist-explains/2017/09/26/why-the-referendum-on-catalan-independence-is-illegal> [<https://perma.cc/LZ4F-W2E8>].

requirement to hold a national referendum effectively meant that secession could not be brought about by constitutional means.²⁵⁵

These court decisions do not amount to an application of the “unconstitutional constitutional amendment” doctrine because no amendment was adopted and none was abolished. Moreover, the courts refrained from stating that territorial change could not be brought about by amendment. Rather, the decisions reflect the courts’ understanding that it is better to intervene early in the process of secession. By the time the “unconstitutional constitutional amendment” could be applied, the seceding area would no longer be subject to the jurisdiction of the constitutional court of the parent state. In a successful secession, the new state would be bound only by its own new legal system, established through revolution. In the Ukrainian case, even though the court’s decision preceded the referendum, it was too late in the game.

It is uncommon to find a court invalidating secession based on the doctrine of the “unconstitutional constitutional amendment.”²⁵⁶ Secessions do not usually occur through the staid process of a constitutional amendment; they are usually achieved by force and in illegal and extra-constitutional ways.²⁵⁷ And, if there is no applicable constitutional amendment passed according to the procedures prescribed in the constitution, then there is no amendment that can be declared unconstitutional. In this context, as in others, the “unconstitutional constitutional amendment” doctrine serves more as a threat than a reality. Yet the doctrine’s existence may suggest to secessionists that they have no way to achieve their aims other than by forceful, extra-constitutional means.

C. *On the Nexus of Eternity Clauses and Bans on Political Parties*

What theoretical basis may be offered to support the concept of eternity clauses? Why differentiate between the amending power and

²⁵⁵ Mancini argues that, in general, if the procedure “imposes the obligation to hold a referendum in the whole state, then democracy may be saved, in theory, but secession will be legally impossible.” Mancini, *supra* note 13, at 580.

²⁵⁶ *Cf.* *Texas v. White*, 74 U.S. 700, 726 (1868) (declaring the secession of Texas during the civil war illegal); *Madzimbamuto v. Lander-Burke* [1969] 1 AC 645 (UK) (declaring Rhodesia’s unilateral declaration of independence ineffective); *see also* R. A. Mayer, *Legal Aspects of Secession*, 3 MANITOBA L.J. 61 (1968).

²⁵⁷ *See supra* Section I.D.

the constitution-making power? Two theories may be offered to answer these questions. Under one theory, the amendment power is inferior to the original constituent power that created the constitution in the first place. Constitutional amendment power is a constituted power and a derivative power from the constitutional text. In contrast, the original constituent power is above the constitutional text and is not limited by it. Constitutional theories usually add that, while the amending power is entrusted to representative bodies, the original constituent power belongs to the People alone. Thus, we want the People, rather than their representatives, to decide the most basic features protected under eternity clauses.²⁵⁸

Under another theory, even if both the amending power and the original constituent power belong to the same body, any change to the most fundamental characteristics of the constitution must be done by replacing the constitution as a whole. This will guarantee that the change is not done lightly, but with full accountability. It will lead to greater awareness of and deliberation by the People about the consequences of the change.

Under both theories, the foundational idea is that constitutional amendment may lead to a *partial change* of the constitution, not a *replacement* of it. The amending power may only “amend” but not “destroy” the constitution. A revision of its most basic identifying features or basic structure requires that a new constitution be adopted, since, without them, the constitution would lack coherence.²⁵⁹

There is a deep connection between the two mechanisms that constitutional democracies use to prevent secession. While banning secessionist political parties obstructs attempts to amend the constitution through the legislature, the eternity clause with its concomitant “unconstitutional constitutional amendment” doctrine is intended to void secessionist constitutional amendments that do get through the political branches. The former prevents secession *a priori*, and the latter frustrates secession after the fact. The ban on political participation at elections is the *front guard* of the constitutional system. It prevents those challenging the basic values and structure of government from even reaching power. But, if the ban fails and those contenders reach political power, the “unconstitutional constitutional

²⁵⁸ SCHMITT, *supra* note 210, at 97–167.

²⁵⁹ See *Kesavananda Bharati v. Kerala*, AIR 1973 SC 1461, ¶ 1198 (India).

amendment” doctrine serves as the *rear guard* preventing their constitutional amendment from being valid. Both are mechanisms that express an absolute commitment to the territorial integrity of the state.²⁶⁰

In fact, when reflecting on these two mechanisms, it becomes apparent that countries that adopt one of them (ban or eternity) may legitimately implicitly infer the existence of the other in their constitutional system. This is important because often a constitution may embody only one of the mechanisms. Thus, for example, only thirty-seven out of 192 constitutions (19%) have both a ban and an explicit unamendability clause to protect territorial integrity.²⁶¹ Sixteen of the thirty-seven states are democratic or semi-democratic. The number may rise to seventy-seven (40%) constitutions if we include not only explicit unamendable clauses but also declarations of unamendability.²⁶² Forty-three out of the seventy-seven states are democratic or semi-democratic.

Roughly 70% of the constitutions have at least one of the mechanisms. When looking at democracies and semi-democracies, forty-three democracies and semi-democracies have both mechanisms (32%), while eighty-three democracies and semi-democracies (62%) have at least one of the mechanisms. France, Germany, Italy, Turkey, Ukraine, and Spain are among the democracies/semi-democracies that adopted both a ban on political participation and unamendability to protect territorial integrity.

Why do I claim that these unconventional weapons are twinned in this way? The two mechanisms are both justified under the theory of

²⁶⁰ For a general argument about the connection between the two mechanisms beyond the secession context, see Weill, *supra* note 27.

²⁶¹ These include Algeria, Angola, Azerbaijan, Benin, Brazil, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Republic of Congo, Côte d'Ivoire, Djibouti, Equatorial Guinea, France, Gabon, Germany, Guinea, Guinea Bissau, Honduras, Italy, Kazakhstan, Madagascar, Mauritania, Mozambique, Nepal, Niger, Portugal, Romania, Sao Tome and Principe, Tajikistan, Togo, Turkey, and Ukraine. For support and sources, see *supra* Sections II.A, III.A.

²⁶² In addition to those enumerated in note 261, *supra*, we may add Albania, Argentina, Bahrain, Belarus, Bhutan, Bulgaria, Cambodia, Cyprus, Czech Republic, Dominican Republic, Ecuador, Egypt, Georgia, Guyana, Haiti, Iran, Kyrgyzstan, Laos, Lithuania, Macedonia (former Yugoslav Republic), Moldova, Montenegro, Myanmar, Nigeria, Panama, Paraguay, Russian Federation, Senegal, Serbia, Slovakia, Spain, Sri Lanka, Sweden, Syrian Arab Republic, Tanzania, Turkmenistan, Uganda, Uzbekistan, Yemen, and Zambia. For support and sources see *supra* Sections II.A, III.A.

militant democracy and as a prominent lesson of WWII. Though the literature identifies militant democracy with the ban on political parties alone, Karl Loewenstein, in his seminal articles, advocated the use of both mechanisms. He advocated the ban: “Calculating adroitly that democracy could not, without self-abnegation, deny to any body [sic] of public opinion the full use of the free institutions of speech, press, assembly, and parliamentary participation, fascist exponents systematically discredit the democratic order and make it unworkable by paralyzing its functions until chaos reigns.”²⁶³ In the same article, he later also hinted at unamendability to deal with the same problem: “Constitutions are dynamic to the extent that they allow for peaceful change by regular methods, but they have to be stiffened and hardened when confronted by movements intent upon their destruction.”²⁶⁴ But scholars equated militant democracy with a ban on political participation alone since Loewenstein mentioned unamendability only briefly and in passing.

Both tools share common historical roots. They became increasingly prevalent around the world after WWII as an antidote to anti-democratic forces. Also, they use the same method of absolute entrenchment. The ban serves eternity clauses, since typically to amend a constitution one needs the consent of both elites (through the legislature) and the People (through a referendum or the like). If the system blocks the reformers’ access to the legislature, they will also typically not be able to embark on constitutional amendment. The reverse is also true: while theoretically a system may opt to amend the ban on political parties, the amendment could and should not run against the basic values of the system as expressed in eternity clauses.

The two mechanisms are also problematic in similar ways. Systems that resort to these tools too often or too casually may undermine their own democratic legitimacy. How democratic is a country when it prevents peaceful competition by citizens to change policies through prescribed procedures?²⁶⁵ The same is true with regard to eternity clauses. Supreme constitutions with the accompanied power of judicial review raise a counter-majoritarian difficulty. Why should a

²⁶³ Loewenstein, *Militant Democracy I*, *supra* note 58, at 423–24.

²⁶⁴ *Id.* at 432.

²⁶⁵ On the problematic nature of eternity clauses, see Rivka Weill, *The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-Making*, 62 AM. J. COMP. L. 127, 161–62 (2014). Cf. Fox & Nolte, *supra* note 138, at 9–14.

constitution, adopted in a bygone era, prevail over the will of the current majority as it is properly expressed in legislation? Why should a judicial interpretation of the constitution override the representative branches' interpretation?²⁶⁶ To these penetrating questions, constitutional systems provide a ready answer. The supreme authority of the constitution—protected by the judiciary—maintains the supremacy of the will of the People, which cannot be eroded by regular legislation.²⁶⁷ If the People disagree with the courts' interpretation of the constitution, they may amend the constitution to express their will. Thus, the constitutional amendment process resolves the counter-majoritarian problem, or so the claim goes.²⁶⁸ But, under eternity clauses and the doctrine of the “unconstitutional constitutional amendment,” the amendment path is closed, and thus the counter-majoritarian difficulty intensifies.

Since both constitutional tools—the ban and an eternity clause—raise pressing and self-sabotaging legitimacy challenges, constitutional systems are wise to treat these tools as last resorts. They should serve as a potent threat against extreme forces but rarely be utilized. Just like nuclear weapons, their force is in their threat rather than their deployment. Even weapons of self-defense can destroy the user.

Understanding both tools as a mirror of one another may constrain courts when developing either an implied ban or an implied eternity clause. The courts may develop an implied tool to serve only the values identified in the explicit tool already provided for in the constitutional system. Understanding them as complementary may also offer a textual basis for courts when developing an implied tool as long as the other tool is explicitly present in the constitutional system. This may address some of the criticisms raised against the courts for developing an implied ban or an implied eternity clause.²⁶⁹ Of course, a constitutional system may avert these threats and opt not to expand its militant tools.²⁷⁰ But, if a system does decide to imply the existence of one of the

²⁶⁶ See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

²⁶⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803).

²⁶⁸ See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

²⁶⁹ For such criticism, see, e.g., Po Jen Yap, *The Conundrum of Unconstitutional Constitutional Amendments*, 4 *GLOBAL CONSTITUTIONALISM* 114 (2015).

²⁷⁰ To clarify, I do not advocate an expansion of militant democracy tools in a given democracy. I rather argue that if courts decide to expand their tools, it is legitimate for them to derive unamendability from the ban on political parties and vice versa.

tools, it has strong theoretical justifications to do so if the other tool exists in its system. It will also develop a coherent identity if the values protected under both mechanisms are the same.

The data may reveal another important nexus. The general ratio between Proportional Representation (PR) and First Past the Post (FPTP) election systems is 60% to 40%, respectively.²⁷¹ However, when looking at the countries that do not protect territorial integrity, the ratio is reversed: 58% (FPTP) to 42% (PR).²⁷² This may suggest that PR countries feel a greater need to protect territorial integrity than do FPTP countries. PR systems must confront the challenge of extreme political parties and instability of government rule in parliamentary systems.²⁷³ To meet these challenges, they use not only constructive votes of no confidence and electoral thresholds, they also enable carryover of pending bills from a previous legislature, rather than treat elections as requiring discontinuity of parliamentary debate.²⁷⁴ They, furthermore, adopt militant democracy tools. There may be a tradeoff between the type of an election system and the need to resort to militant democracy tools.²⁷⁵ While militant democracy is traditionally perceived as a substantive doctrine, this Article reveals its “structural” nature as a tool in greater need in proportional representation election systems.

Similarly, when examining the democratic countries enumerated in Lijphart’s study,²⁷⁶ we find that “consensus” democracies protect territorial integrity no less than majoritarian democracies. The majority of the countries that may serve as an archetype of consensus

²⁷¹ There are ninety-six countries that use proportional representation election systems (based on a party list or mixed-member proportional or Single Transferable Vote). There are sixty-four countries that use FPTP election system. *What Is the Electoral System for Chamber 1 of the National Legislature?*, ACE PROJECT: ELECTORAL KNOWLEDGE NETWORK, COMPARATIVE DATA, <http://aceproject.org/epic-en> (last visited Oct. 10, 2018).

²⁷² I examined the countries that are silent on territorial integrity, or enable secession and/or territorial change, without using doubletalk. In addition to the countries listed *supra*, notes 29 and 30, these also include the U.K., Bosnia and Herzegovina, Ethiopia, Liechtenstein, and St. Kitts and Nevis. I also examined from this list only those that use either PR (as defined *supra* in note 271) or FPTP.

²⁷³ On the instability of government rule in PR systems, see Rivka Weill, *Constitutional Transitions: The Role of Lame Ducks and Caretakers*, 2011 UTAH L. REV. 1087 (2011).

²⁷⁴ See Rivka Weill, *Resurrecting Legislation*, 14 INT’L J. CONST. L. 518 (2016).

²⁷⁵ See Weill, *supra* note 27.

²⁷⁶ LIJPHART, PATTERNS OF DEMOCRACY, *supra* note 26.

democracies ban secession. Only two are silent on the topic.²⁷⁷ In fact, only three of the twelve in Lijphart's group of majoritarian democracies prohibit secession via a ban and/or unamendability. Almost half are silent on the topic, with the United Kingdom allowing it.²⁷⁸ In the unitary/consensus democracies group, seven of the twelve countries adopted a ban and/or unamendability to fight secession.²⁷⁹ Of the five federalist countries that have mixed features, two are silent and three ban secession.²⁸⁰ If we take out the majoritarian democracies, thirteen out of twenty-five "consensus" democracies ban secession via the unconventional constitutional tools. An examination of Lijphart's list of existing consociationalist democracies that are members of the U.N. reveals that the overwhelming majority of these countries prohibit secession via a ban and/or unamendability as well.²⁸¹ When juxtaposing consensus and/or consociationalist democracies with majoritarian systems, the former may even protect territorial integrity more rigorously than the latter to compensate for their policies of accommodation.

²⁷⁷ Austria, Germany, and India have a ban and/or eternity clause. Japan and the Netherlands are silent on the topic. See *infra* Appendix that is based on the data in this Article. Belgium fights secession, as elaborated *supra* in Section II.B. Switzerland's Constitution states: "The Confederation shall protect the existence and territory of the Cantons." Switzerland Constitution, *supra* note 237, art. 53, § 1.

²⁷⁸ Costa Rica, France, and Bahamas have a ban and/or eternity clause. Greece, Malta, and South Korea impose duties upon state organs to protect territorial integrity in their constitution. The United Kingdom permits secession. New Zealand, Jamaica, Trinidad and Tobago, Botswana, and Barbados are silent on the topic. For support, see *infra* Appendix.

²⁷⁹ Finland, Luxembourg, Norway, Italy, Sweden, Israel, and Portugal ban secession via a ban on political parties and/or an eternity clause. Ireland, Mauritius, and Uruguay are silent on the topic. For support, see *infra* Appendix. Denmark and Iceland set in their constitution a procedure for territorial change with no conflicting language, which protects territorial integrity. See *supra* note 30 and accompanying text.

²⁸⁰ The United States and Canada are silent while Spain, Australia, and Argentina ban secession via an eternity clause and/or a ban on political parties. For support, see *infra* Appendix.

²⁸¹ Lijphart enumerates his list of consociationalist democracies in THINKING DEMOCRACY, *supra* note 26, at 5. Thirteen states ban secession via a ban and/or unamendability, including Luxembourg, Austria, Lebanon, Nigeria, Colombia, Malaysia, Cyprus, Suriname, Burundi, Israel, India, Macedonia, and Afghanistan. Two states—Belgium and Switzerland—protect territorial integrity in their constitution. Four states are silent on the topic, including the Netherlands, Uruguay, Canada, and Fiji. Only two states explicitly permit secession—South Africa and Bosnia and Herzegovina, but South Africa "doublespeaks" on the topic as further elaborated *infra* Part IV. See *infra* Appendix to support the data.

D. *Constitutional Paradox*

When it comes to the tools used to combat secession, why do constitutional democracies create this gap between what is said and what is done? Why do they have a ban on the book, yet use a different rationale? Why do they obfuscate their stance on secessionism? Democratic states are hampered by a constitutional paradox. Their existence and legitimacy are grounded on the consent of the governed, which lends support to their right to self-determination and self-rule.²⁸² Yet, when secessionists argue for their right of exit and entitlement to separate existence based on the same principles, democracies deny their claims. Otherwise democracies would undermine their own unity and form, perhaps even their own existence.²⁸³ The dilemma is whether denying the right to secession is a greater compromise of democratic values than is compromising the state's territory and cohesion.²⁸⁴

Moreover, democracies use the most unconventional constitutional weapons to fight secession. These weapons are traditionally justified to protect democracy, but in the secessionist context they are used to protect existential needs of the state. To justify the use of unconventional constitutional weapons to protect the territorial integrity of the state, democracies disguise the fight as a fight for democracy.

Another limitation on the use of these constitutional tools is the "peer pressure" of the international community. For example, the European Court of Human Rights overturned decisions of both Turkish and Bulgarian courts that banned secessionist political parties, based on its policy that a secessionist agenda alone does not provide legitimate grounds for a ban, unless the parties' agendas are antidemocratic or they are associated with violence.²⁸⁵ The court, in its 2005 decision regarding Bulgaria, stated:

²⁸² See HABERMAS, *supra* note 18, at 449.

²⁸³ See *supra* Section I.D.

²⁸⁴ *But see* DAHL, *supra* note 38.

²⁸⁵ For the decision regarding Turkey, see, e.g., *Case of the Socialist Party of Turk. (STP) and Others v. Turk.*, App. No. 26482/95, Eur. Ct. H.R. Rep. (2003). For the decision regarding Bulgaria, see *Case of the United Macedonian Organisation Ilinden—Pirin and Others v. Bulgaria*, App. No. 59489/00, Eur. Ct. H.R. Rep. (2005) [hereinafter Bulgaria ECHR Decision]. "[I]n all cases involving pro-Kurdish parties, the [European Court of Human Rights] found the evidence concerning support of violence lacking and overturned the banning decisions." Bligh,

In a democratic society based on the rule of law, political ideas which challenge the existing order without putting into question the tenets of democracy, and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression through, inter alia, participation in the political process. However shocking and unacceptable the statements of the applicant party's leaders and members may appear to the authorities or the majority of the population and however illegitimate their demands may be, they do not appear to warrant the impugned interference. . . . It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.²⁸⁶

The European Court of Human Rights' attitude encourages states to propound rationales other than self-preservation when banning secessionist activities. Otherwise, they may be accused of totalitarian impulses, operating behind a façade of democracy only to retain power and oppress the opposition.

IV. SUPPOSEDLY ENABLING MECHANISMS: REFERENDA

So far, this article has shown that constitutional democracies often prohibit secession in their constitutional document, yet conceal their fight against secession because of the constitutional paradox that secession poses to them. This Part discusses those countries that supposedly permit secession and even set the procedures to achieve it in their constitution.

Scholars argue that constitutional provisions that authorize secession "are extremely rare."²⁸⁷ Monahan and Bryant found only five existing countries that have adopted them: Austria,²⁸⁸ Ethiopia,²⁸⁹

supra note 159, at 1341; *id.* at 1343, 1370 and n.288; *see also* Ayres, *supra* note 156, at 106–08; Bale, *supra* note 156, at 145.

²⁸⁶ Bulgaria ECHR Decision, *supra* note 285, § 61.

²⁸⁷ Monahan et al., *supra* note 13, at 5. Monahan and Bryant with Coté in their 1996 study of eighty-nine constitutions found that only seven countries allow secession, and among the seven are two countries that no longer exist. *Id.* at 10.

²⁸⁸ The Austrian Constitution treats any amendment of the federal character of the state as a total revision, which requires the people's consent in a referendum. *See Austria Constitution*, *supra* note 218, art. 44, § 3. For an interpretation of what amounts to a total revision, see

France (regarding its overseas territories),²⁹⁰ Singapore,²⁹¹ and St. Kitts and Nevis.²⁹² The former Soviet Union,²⁹³ the former Czech and Slovak Federative Republic,²⁹⁴ and the former State Union of Serbia and Montenegro also allowed secession.²⁹⁵ Other studies add to the list the European Union²⁹⁶ and Canada because of its Supreme Court decision regarding Quebec that allows for secession by agreement.²⁹⁷ Some constitutional scholars argue that these rare examples demonstrate that secession is not alien to constitutional law and can be achieved through lawful procedures. They recommend the adoption of constitutional

MANFRED STELZER, *THE CONSTITUTION OF THE REPUBLIC OF AUSTRIA: A CONTEXTUAL ANALYSIS* 23–37 (2011); *see also* Andreas Auprich, *Austria*, in *THE ‘MILITANT DEMOCRACY’ PRINCIPLE IN MODERN DEMOCRACIES* 37–58 (Markus Thiel ed., 2009) (arguing that there is no unalterable core of the Austrian Constitution).

²⁸⁹ *Ethiopia Constitution (1994)*, CONSTITUTE art. 39, <https://www.constituteproject.org/search?lang=en> [<https://perma.cc/5QVG-JM57>] (last visited Oct. 10, 2018).

²⁹⁰ “By virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development.” *France Constitution, supra* note 144, pmb1.

²⁹¹

There shall be no surrender or transfer, either wholly or in part, of the sovereignty of the Republic of Singapore as an independent nation, whether by way of merger or incorporation with any other sovereign state or with any Federation, Confederation, country or territory or in any other manner whatsoever.

Singapore Constitution, supra note 145, art. 6, § 1(a). However, the Constitution qualifies the prohibition in the same article: “unless such surrender, transfer or relinquishment has been supported, at a national referendum, by not less than two-thirds of the total number of votes cast by the electors registered under the Parliamentary Elections Act (Cap. 218).” *Id.* art. 8, § 1. I classify Singapore differently. *See infra* note 306 and accompanying text; *see also infra* Appendix.

²⁹² *Saint Kitts and Nevis Constitution (1983)*, CONSTITUTE, <https://www.constituteproject.org/search?lang=en> [<https://perma.cc/5QVG-JM57>] (last visited Oct. 10, 2018).

²⁹³ *See infra* notes 311, 314–19 and accompanying text.

²⁹⁴ *See Mancini, supra* note 13, at 581.

²⁹⁵ Coggins, *supra* note 2, at 37 (the Union of Serbia and Montenegro formed in 2003 and dissolved peacefully in 2006 following a referendum on Montenegro’s independence. The union was a temporary arrangement to begin with); Mancini, *supra* note 13, at 575.

²⁹⁶ *See Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* art. 50, June 7, 2016, 2016 O.J. (C 202) [hereinafter E.U. Treaty] (“Any Member State may decide to withdraw from the Union.”).

²⁹⁷ Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.); *see, e.g.*, Coggins, *supra* note 2, at 37 (“[M]any legal scholars suggest that Canada now permits legal secession.”).

provisions that enable secession if the process conforms to rule-of-law principles.²⁹⁸

My examination of 192 constitutions reveals that there are many more countries that address changes of territory in their constitutions. Seven countries (3.65%), including Ethiopia, Liechtenstein, St. Kitts and Nevis, Sudan, Uzbekistan, Slovakia, and arguably South Africa, explicitly recognize the right to secede and provide the procedure for achieving it in their constitution. But, three of these countries (South Africa, Slovakia, and Uzbekistan) also declare their territorial integrity indivisible, and Uzbekistan and Slovakia further ban secessionist political parties.²⁹⁹ This list differs from the one provided by Monahan and Bryant.³⁰⁰ In addition, Bosnia and Herzegovina is unique in

²⁹⁸ See *supra* Introduction.

²⁹⁹ See *supra* Section II.A.

³⁰⁰ See *Ethiopia Constitution*, *supra* note 289, art. 39 (“1. Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession. . . . 4. The right to self-determination, including secession, of every Nation, Nationality and People shall come into effect: a. When a demand for secession has been approved by a two-thirds majority of the members of the Legislative Council of the Nation, Nationality or People concerned; b. When the Federal Government has organized a referendum which must take place within three years from the time it received the concerned council’s decision for secession; c. When the demand for secession is supported by a majority vote in the referendum; d. When the Federal Government will have transferred its powers to the Council of the Nation, Nationality or People who has voted to secede; and e. When the division of assets is effected in a manner prescribed by law.”); *Liechtenstein Constitution (1921) (rev. 2011)*, CONSTITUTE art. 4, <https://www.constituteproject.org/search?lang=en> [<https://perma.cc/5QVG-JM57>] (last visited Oct. 10, 2018) (“1. Changes in the boundaries of the territory of the State may only be made by a law. Boundary changes between communes and the union of existing ones also require a majority decision of the citizens residing there who are entitled to vote. 2. Individual communes have the right to secede from the State. A decision to initiate the secession procedure shall be taken by a majority of the citizens residing there who are entitled to vote. Secession shall be regulated by a law or, as the case may be, a treaty. In the latter event, a second ballot shall be held in the commune after the negotiations have been completed.”); *Saint Kitts and Nevis Constitution*, *supra* note 292, art. 113 (“1. The Nevis Island Legislature may provide that the island of Nevis shall cease to be federated with the island of Saint Christopher and accordingly that this Constitution shall no longer have effect in the island of Nevis. 2. A bill for the purposes of subsection (1) shall not be regarded as being passed by the Assembly unless on its final reading the bill is supported by the votes of not less than two-thirds of all the elected member of the Assembly and such a bill shall not be submitted to the Governor-General for his assent unless a. there has been an interval of not less than ninety days between the introduction of the bill in the Assembly and the beginning of the proceedings in the Assembly on the second reading of the bill, b. after it has been passed by the Assembly, the bill has been approved in a referendum held in the island of Nevis by not less than two-thirds of all the votes validly cast on that referendum; and c. full and detailed proposal for the future

explicitly authorizing the Constitutional Court to decide “[w]hether an Entity’s decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina.”³⁰¹

Fifteen countries require the approval of both the executive and the legislature to bring about change in territory, leaving open to dispute whether they apply to secession. Territorial changes may not amount to secession if no transfer of population is involved. These provisions intend to clarify that, even though the executive is oftentimes in charge of foreign relations, when treaties or international agreements involve change of territory, the executive must obtain the legislature’s approval.³⁰² Six countries require the approval of a supermajority,

constitution of the island of Nevis (whether as a separate states or as part of or in association with some other country) have been laid before the Assembly for at least six months before the holding of the referendum and those proposals, with adequate explanations of their significance, have been made available to the persons entitled to vote on the referendum at least ninety days before the holding of the referendum.”); *Sudan Constitution, supra* note 229, art. 222 (“1. Six months before the end of the six-year interim period, there shall be an internationally monitored referendum, for the people of Southern Sudan organized by Southern Sudan Referendum Commission in cooperation with the National Government and the Government of Southern Sudan[.] 2. The people of Southern Sudan shall either: a. confirm unity of the Sudan by voting to sustain the system of government established under the Comprehensive Peace Agreement and this Constitution, or b. vote for secession.”); *Uzbekistan Constitution, supra* note 144, art. 74 (“The Republic of Karakalpakstan shall have the right to secede from the Republic of Uzbekistan on the basis of a nation-wide referendum held by the people of Karakalpakstan”); *Slovakia Constitution, supra* note 149, art. 93, § 1 (“A constitutional law on joining a union with other states or the secession from it, shall be confirmed by a referendum.”); *South Africa Constitution, supra* note 218, art. 235 (includes very ambiguous language to that effect) (“The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.”).

³⁰¹ *Bosnia and Herzegovina Constitution, supra* note 253, art. VI, § 3(a).

³⁰² See *Albania Constitution, supra* note 145, art. 121; *Bahrain Constitution, supra* note 145, art. 37 (requires law); *Belgium Constitution, supra* note 253, art. 167 (requires law); *Belize Constitution, supra* note 229, art. 61A, § (2)(a); *Bulgaria Constitution, supra* note 144, art. 158(2); *Comoros Constitution, supra* note 144, art. 10; *Denmark Constitution (1953), CONSTITUTE* art. 19, § 1, <https://www.constituteproject.org/search?lang=en> [<https://perma.cc/5QVG-JM57>] (last visited Oct. 10, 2018); *Equatorial Guinea Constitution, supra* note 145, art. 181(a); *Georgia Constitution, supra* note 144, art. 65(2)(c); *Iceland Constitution (1944) (rev. 2013), CONSTITUTE, supra*, art. 21; *Luxembourg Constitution, supra* note 218, art. 37 (requires law); *Qatar Constitution, supra* note 216, art. 68 (requires law); *Spain Constitution, supra* note

ranging from two-thirds to three-fourths of the entire legislature (not just those voting), for territorial change.³⁰³ Thus, twenty-one countries (11%) leave the decision regarding territorial change to their representative bodies.³⁰⁴

Thirteen countries require the approval of both the legislature and a national approval for territorial change.³⁰⁵ Seven countries require approval by enactment of law and a supermajority ratification in a national referendum.³⁰⁶ Seven countries require the approval through

149, art. 94, § 1(c); *Thailand Constitution*, *supra* note 218, art. 178; *Vanuatu Constitution (1980) (rev. 2013)*, CONSTITUTE, *supra*, art. 26(e).

³⁰³ See *Bhutan Constitution*, *supra* note 144, art. 1, § 3 (“[T]hree-fourth of the total number [of MPs.]”); *El Salvador Constitution*, *supra* note 216, art. 147 (three-quarters of legislature); *Finland Constitution*, *supra* note 218, art. 95 (“Two thirds of the votes cast[.]”); *Honduras Constitution*, *supra* note 145, art. 20 (three-fourths of its members); Basic Law: Referendum, *supra* note 145, § 1(a) (two thirds of Members of Knesset [MKs] or majority of MKs plus a referendum); *Maldives Constitution*, *supra* note 229, art. 3 (law enacted by two-thirds).

³⁰⁴ States treat differently change of boundaries and territorial change. Georgia’s Constitution, for example, states: “Alienation/transfer of the territory of Georgia shall be prohibited. The state borders may be changed only by a bilateral agreement with a neighbouring state.” *Georgia Constitution*, *supra* note 144, art. 2, § 2. There are additional countries that address changes in boundaries (as distinguished from territories) alone and require the consent of the legislature or supermajority thereof. See, e.g., *Bangladesh Constitution*, *supra* note 145, art. 143(2) (by law); *Brazil Constitution*, *supra* note 144, art. 48(v) (by legislature plus president); *Czech Republic Constitution*, *supra* note 145, art. 11 (by a constitutional act); *Indonesia Constitution*, *supra* note 216, art. 25a (by law); *Iran Constitution*, *supra* note 144, art. 78 (if changes in boundaries are minor, not unilateral, and approved by four-fifths of members); *Lithuania Constitution*, *supra* note 149, art. 10 (four-fifths of all members); *Macedonia Constitution*, *supra* note 145, art. 74 (two-thirds of members and a referendum); *Serbia Constitution*, *supra* note 145, art. 8 (requires constitutional amendment); *Portugal Constitution*, *supra* note 144, art. 5, § 3.

³⁰⁵ See *Austria Constitution*, *supra* note 218, art. 44(3); *Burundi Constitution*, *supra* note 145, art. 295 (referendum); *Central African Republic Constitution*, *supra* note 144, art. 91 (president plus parliament plus referendum); *Chad Constitution*, *supra* note 144, art. 219 (referendum); *Congo Constitution*, *supra* note 144, arts. 217, 219 (president plus parliament plus referendum); *Djibouti Constitution*, *supra* note 145, art. 62 (plus law); *DRC Constitution*, *supra* note 144, art. 214 (plus law); *Gabon Constitution*, *supra* note 145, art. 114 (plus law); *Kenya Constitution*, *supra* note 144, art. 255, § 2 (simple majority of voters, but only if twenty percent of the registered voters in each of at least half of the counties voted); *Malawi Constitution (1994) (rev. 2017)*, CONSTITUTE art. 196, <https://www.constituteproject.org/search?lang=en> [<https://perma.cc/5QVG-JM57>] (last visited Oct. 10, 2018); *Mali Constitution*, *supra* note 144, art. 115 (plus law); *Rwanda Constitution*, *supra* note 144, art. 167; *Ukraine Constitution*, *supra* note 144, art. 73; *id.* art. 92, § 13.

³⁰⁶ See *Armenia Constitution (1995) (rev. 2015)*, CONSTITUTE art. 205, <https://www.constituteproject.org/search?lang=en> [<https://perma.cc/5QVG-JM57>] (last visited Oct. 10, 2018); *Costa Rica Constitution*, *supra* note 149, art. 7 (“[B]y a vote of no less than the three-

both legislation and a referendum of the “concerned” or “interested” population, which leaves open for interpretation whether they demand a national or a regional referendum.³⁰⁷ In total, twenty-seven (14%) countries require the cooperation of their representative bodies and the people to affect territorial change.

Comoros is candid enough to admit that its procedure for territorial change would not be enough without constitutional amendment,³⁰⁸ but this is true of the overwhelming majority of all the other countries discussed above, as they too provide for territorial integrity as an inviolable principle.³⁰⁹ Similarly, Costa Rica openly requires both “the approval of the Legislative Assembly, by a vote of no less than the three-quarters part of the totality of its members, and that of two-thirds of the members of a Constituent Assembly, convoked to [that] effect.”³¹⁰ It is typically difficult to amend the constitutions in the various countries as amendments need to meet supermajority requirements of both legislative bodies and the people. Moreover, since the constitutional amendment at stake involves an inviolable principle it is not at all clear that the courts of the relevant country would not declare such an attempt unconstitutional.

Only a few countries have explicit constitutional clauses that allow secession, and typically they set such difficult procedural hurdles that

quarters part of the totality of its members, and that of two-thirds of the members of a Constituent Assembly, convoked to [that] effect[.]”); *Ghana Constitution*, *supra* note 145, art. 290 (law plus “unless it has been submitted to a referendum held throughout Ghana and at least forty percent of the persons entitled to vote, voted at the referendum and at least seventy-five percent of the persons who voted cast their votes in favour of the passing of the bill”); *Mauritania Constitution*, *supra* note 144, art. 78 (four-fifths of the suffrage expressed); *Moldova Constitution*, *supra* note 144, art. 142(1) (majority of registered voters); *Singapore Constitution*, *supra* note 145, art. 8, § 1 (two-thirds of voters); *Uganda Constitution*, *supra* note 145, art. 261 (two-thirds of MPs plus “two-thirds of the members of the district council in each of at least two-thirds of all the districts of Uganda”).

³⁰⁷ *Australia Constitution*, *supra* note 250, art. 123 (requires consent of population of the state concerned but it is open to interpretation whether the provision applies to secession or only internal changes within the Commonwealth); *Benin Constitution*, *supra* note 144, art. 145; *France Constitution*, *supra* note 144, art. 53; *Guinea Constitution*, *supra* note 144, art. 149; *Senegal Constitution*, *supra* note 149, art. 96; *Togo Constitution*, *supra* note 144, art. 138. The same applies to the United Kingdom with regard to Northern Ireland: Northern Ireland Act 1998 (Gr. Brit.).

³⁰⁸ See *Comoros Constitution*, *supra* note 144, art. 7.1; *id.* art. 10.

³⁰⁹ The exceptions are Denmark, Iceland, and Vanuatu. See *supra* note 30 and accompanying text.

³¹⁰ *Costa Rica Constitution*, *supra* note 149, art. 7.

secession is all but impossible to achieve under the provisions. They say “yes” to secession as a theoretical matter but mean “no” as a practical matter. It is doubtful whether these countries should and could be used to demonstrate that secession may align with constitutionalism.

In some cases, countries constitutionalize secession only to lure smaller countries to join their federation. Once they enlarge the federation, they renege on their promise to enable secession, and treat the state as unitary or indivisible. This explains the paradoxical situation in which a constitutional secession clause was found in non-democratic countries like the former Soviet Union,³¹¹ Burma,³¹² and China.³¹³ Lenin was braggadocios enough to admit that the Soviet Constitution enabled secession to enlarge the bigger states, not to accommodate the smaller states.³¹⁴ The Soviets left the secession clause intact, despite amending the Constitution a few times over the years,³¹⁵ since it was clear to all that it was never intended to be acted upon.³¹⁶ The Soviet constitutional secession clause did not enumerate the procedure for secession. It stated that “[e]ach Union Republic shall retain the right freely to secede from the USSR[,]”³¹⁷ which could not even theoretically serve as guidance for the secession of the thirteen out of fifteen republics that led to the collapse of the Soviet Union. Gorbachev required 66% support in a referendum, but most secessionist referenda did not abide by this requirement.³¹⁸ Today, the Russian Federation prohibits secession in its Constitution.³¹⁹

The Chinese abolished the constitutional provision for secession once the Communist Party “convinced” ethnic nationalists in Chinese mainland and in surrounding territories to join the republic based on the possibility of secession.³²⁰ The current Chinese Constitution not only protects its inalienable territory, but its preamble also states,

³¹¹ See KONSTITUTSIJA SSSR (1924) [KONST. SSSR] [USSR CONSTITUTION] art. 4; *id.* art. 6 [hereinafter USSR CONST.]; USSR CONST. (1936) art. 17; *id.* art. 18; USSR CONST. (1977) art. 72; *id.* art. 78.

³¹² See *infra* note 322 and accompanying text.

³¹³ See *infra* note 321 and accompanying text.

³¹⁴ Mancini, *supra* note 13, at 568.

³¹⁵ See *supra* note 311 and accompanying text.

³¹⁶ BUCHANAN, *supra* note 13, at 127.

³¹⁷ USSR CONST. (1977) art. 72.

³¹⁸ See Monahan et al., *supra* note 13, at 14.

³¹⁹ See *Russian Federation Constitution*, *supra* note 144, art. 4 § 3.

³²⁰ See Mancini, *supra* note 13, at 567–68.

“Taiwan is part of the sacred territory of the People’s Republic of China. It is the lofty duty of the entire Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.”³²¹ It thus makes clear its intention to (re)gain and maintain control over Taiwan.

In Burma, the right of secession appeared in the 1947 Constitution,³²² but was repealed in 1974 with the imposition of the Constitution of the Socialist Republic of Burma.³²³ In Ethiopia, the secession clause was also intended to enable the formation of the Federation and prevent a repeat of an Eritrean-like secessionist struggle. However, all concerned understand that it is unlikely that the authoritarian regime will allow any state or group to actually secede based on the clause.³²⁴ In Sudan, two civil wars led to the inclusion of the secession clause in the Constitution as part of a Comprehensive Peace Agreement reached between the North and the South in 2005. South Sudan voted for secession in 2011 by an overwhelming majority of 98.8% with almost full participation of the electorate body.³²⁵

In other cases, the constitutional secession clause imposes such burdensome obstacles on the secession process that it becomes impossible to follow. The obstacles come in various forms. They may appear as a supermajority requirement, demanding that, even if a majority of the people approves secession in a referendum, the result will be void because the supermajority requirement is not met. This is not a mere theoretical problem, but has materialized time and again in different settings. For example, the Constitution of St. Kitts and Nevis enables secession of Nevis, but requires the support of two-thirds of the

³²¹ *China Constitution*, *supra* note 144, pmbl.

³²² *Constitution of the Union of Burma Constitution (1947)*, ILO ch. X, §§ 201–06, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/79573/85699/F1436085708/MMR79573.pdf> [<https://perma.cc/9JEN-SMAE>] (last visited Oct. 10, 2018).

³²³ *Myanmar Constitution*, *supra* note 144, art. 385 (“Every citizen has the duty to safeguard independence, sovereignty and territorial integrity of the Republic of the Union of Myanmar.”).

³²⁴ See Alem Habtu, *Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution*, 35 *PUBLIUS* 313, 323–29 (2005); Kathryn Sturman, *Eritrea: A Belated Post-Colonial Secession*, in *THE ASHGATE RESEARCH COMPANION TO SECESSION* 497 (Aleksandar Pavković & Peter Radan eds., 2011). Allen Buchanan personally advised the Ethiopian transitional government to hedge the secession clause. See Jovanović, *supra* note 25, at 358.

³²⁵ Anthony J. Christopher, *Secession and South Sudan: An African Precedent for the Future?*, 93 *S. AFR. GEOGRAPHICAL J.* 125, 127–29 (2011).

votes cast in Nevis at a nationally organized referendum.³²⁶ In 1998, 61.7% of the Nevis electorate approved secession, which meant the failure of secession.³²⁷ The supermajority requirement is also part of the constitutional law of Canada that requires a “clear majority” for secession.³²⁸

Another obstacle to secession may appear in the form of a requirement that the entire populace of the unitary or federated state approve secession, not just the people of the seceding area.³²⁹ The Slovakian Constitution, for example, requires the consent of the national populace.³³⁰ Very often, the national populace will have a different stand than the people in the region that seek to secede.

In addition, secession referenda are typically treated as merely consultative in the sense that they are binding if the result is negative, which then ends the secession process. But, if they are positive, they do not bind the representative bodies. In fact, on more than one occasion, although the secession referendum yielded a positive result, secession

³²⁶ A bill on secession must be approved by “not less than two-thirds of all the elected member of the Assembly.” *Saint Kitts and Nevis Constitution*, *supra* note 292, art. 113, § 2. It must then be “approved in a referendum held in the island of Nevis by not less than two-thirds of all the votes validly cast on that referendum.” *Id.*

³²⁷ Radan, *supra* note 23, at 339. In the 1970s, the British Parliament repealed the Scotland Devolution Act after it gained majority support at a referendum but failed to meet the hurdle of 40% support of the electorate. *See Tomkins*, *supra* note 42, at 216.

³²⁸ Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 265 (Can.). The Canadian parliament passed the Clarity Act after the decision of the Supreme Court regarding Quebec. An Act to Give Effect to the Requirement for Clarity as Set Out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference, S.C. 2000, c 26 (Can.) [hereinafter Clarity Act]. It enumerated its position that it has the power to determine whether the question posed in the referendum was clear. It especially required that secession and independence will be explicitly stated, without any vague formulations of cooperation. *Id.* art. 1, §§ 3–4. It also stated that it will take into account the size of the voting majority as well as its percentage from eligible voters. *Id.* art. 2, § 2. It also stated that it will take into consideration all relevant opinions, including the opinion of aboriginal people. *Id.* art. 1, § 5. Quebec enacted Bill 99 to codify its own interpretation of the decision. An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State, S.Q. 2000 (Can. Que.). It stated that it is sovereign to decide its future. *Id.* art. 1; *id.* art. 2; *id.* art. 3. It further stated that the majority required was a simple majority of the voting people. *Id.* art. 4.

³²⁹ BUCHANAN, *supra* note 13, at 132 (suggesting that, especially when the mother state abuses the right of the seceding group, it might be practically impossible to get its consent to secession).

³³⁰ The Slovakian Constitution provides: “A referendum is used to confirm a constitutional law on entering into a union with other states, or on withdrawing from that union.” *Slovakia Constitution*, *supra* note 149, art. 93, § 1.

did not take place. Western Australia, for example, voted in favor of secession in a referendum, enjoying the support of two-thirds of the voters, but secession was never achieved.³³¹ Referenda are the opening phase of a long process of negotiation, which may or may not culminate in an agreement on secession, as the Supreme Court of Canada openly admitted. If no agreement is met, secession will not be allowed from the constitutional law perspective of the rump state. This lack of agreement will also affect the willingness of the international community to recognize the formation of a new state that runs against the territorial integrity of the rump state.³³² Typically, the central government of the mother state is put in charge of the secession process, deciding the timing and conduct of the referendum, the phrasing of the question, and the interpretation of its results.³³³ Moreover, in 79% of the countries, the culmination of the secession process requires a constitutional amendment that, if not struck down as unconstitutional by the courts, at least grants veto power to the central governing bodies.³³⁴

V. CONCLUDING LESSONS FOR COMPARATIVE CONSTITUTIONAL LAW

While scholars argue that constitutions by and large are silent about secession, and this silence may be interpreted as tacit permission to secede, this Article offers a very different interpretation of the constitutional landscape and practice. It argues that 79% of world's constitutions ban secession. Moreover, the overwhelming majority of countries ban secession by using their most potent unconventional constitutional tools. Many constitutions even treat a consensual secession between the mother state and the seceding part as amounting to treason, and a violation of both constitutional and criminal law on the part of the leaders involved. While providing the unconventional constitutional weapons, constitutional democracies try to conceal their fight against secession for as long as it is possible in a given context because their attitude towards secession is laden with democratic

³³¹ Mayer, *supra* note 256, at 63.

³³² *Secession Reference*, 2 S.C.R. at 270–71, 278, 289–90.

³³³ *See, e.g.*, Clarity Act (the federal government regulates the question and the majority required).

³³⁴ *See supra* Introduction.

paradoxes. To fare better in international tribunals and the international court of public opinion, they prefer to portray their fight against secessionists as an issue of national security, or a defense of citizens against extremities of racism or other bigotry. Once the confrontation becomes too messy to handle, however, the true nature of the struggle may be revealed to all, as in the 2017 Catalanian crisis.

Yet, if both the mother state and the seceding state reach agreement on secession, it will supposedly overcome these constitutional hurdles. Such an agreement would be extra-constitutional but effective. Neither side will challenge the secession in international tribunals, and the international community will most likely accept such agreement. In contrast, when secession is opposed, the international community is expected to assist the mother state by at least delaying or totally preventing the recognition of the new state, as the Canadian Supreme Court suggested.³³⁵ In fact, Nova Scotia in the nineteenth century, and Western Australia in the twentieth century, each gained clear majority support of the people in the region to secede from Canada and Australia respectively. Yet, the U.K.—their ruling colonial empire at the time—refused their request for recognition to protect reliance interests of the mother states' populations.³³⁶

Why then do constitutions ban secession outright even though supposedly an agreement between the rump state and the seceding region will overcome such a prohibition? The answer may lie in both strategic and principled constitutional law considerations. Strategically, a total prohibition may serve as the most effective deterrent against secession. A prohibition may raise the stakes for secessionists and make the path to secession very difficult to achieve. The facts may offer support for this proposition. When secession is legal under international law, as in decolonization, its success rate is 77%. When secession is forbidden, the success rate is only 16%.³³⁷ Secessionists must feel strongly enough about their preferences to bear the costs of violating states' constitutional and criminal laws. The total prohibition supplies the leaders of the mother state with the most potent weapons to quash the rebellion. If the mother state's leaders fail to prevent secession, a total ban may give the mother state an advantage at the negotiation table

³³⁵ *Secession Reference*, 2 S.C.R. at 296.

³³⁶ *Id.* at 243–44.

³³⁷ See *supra* note 132 and accompanying text.

to extract the best deal it can under the circumstances. The constitutional prohibitions matter as the transaction costs of reaching a separation agreement are so substantial that even the Canadian Supreme Court, while recognizing Quebec's right to secede by agreement, admitted that negotiations might fail.³³⁸

But a complementary explanation of total prohibitions may lie in the fact that secession cannot truly be achieved via a constitutional amendment and might require a break with constitutional continuity by populations in the seceding and remaining territories. It is already common wisdom that secession requires at the minimum a self-constituting act by the seceding region. This is why the U.K. held a referendum on independence in Scotland in 2014. This is why the Canadian Supreme Court required the expression of a "clear majority" of the Quebec people before the rest of Canada started negotiating the terms of the divorce with Quebec. This is why Russia/Crimea held a referendum in Crimea on its annexation to Russia (after the fact).

But, my argument is that secession also requires an independent self-constituting act on the part of the remaining regions. While we typically treat popular sovereignty as a population concept, my argument is that "We the People" is a territorial concept composed of the combination of citizens and territory. Thus, the decision to cut the rump state's size and relinquish responsibility for part of its citizens involves a redefinition of the sovereign body in the rump state. In that sense, secession amounts to an "annihilation"³³⁹ of the existing constitutional order and requires a new constitutional start.

When the Canadian Supreme Court in Quebec held that secession may be done via constitutional amendment and did not require a revolution, it simultaneously set the amendment process as composed of negotiations between the seceding part and the rest of Canada.³⁴⁰ Already the negotiations on separation rely on the consent of two separate "We the People" bodies whose birth are attributed to secession. The Canadian Supreme Court may call it a constitutional amendment to preserve the appearance of continuity, but its essence is revolutionary. The same is true of the U.S. Supreme Court decision in *Texas v. White*. Chief Justice Chase suggested that secession may come about through

³³⁸ *Secession Reference*, 2 S.C.R. at 217.

³³⁹ Cf. SCHMITT, *supra* note 210, at 151.

³⁴⁰ *Secession Reference*, 2 S.C.R. at ¶ 93.

revolution or by consent of the remaining states.³⁴¹ The consent of the remaining states is the consent of a new popular sovereignty body, which involves a redefinition of the basic norm of the rump state. When a constitutional amendment attempts to redefine who the constitution-making body is, it requires a new constitutional beginning. The legitimacy for this constitutional amendment comes from without rather than from within the constitutional order, even if the system tries to grant it the appearance of continuity and “constitutional amendment.” It amounts to the birth of a new republic.

In fact, even those who treat constitution-making and constitution-amendment powers as on par and belonging to the same entity,³⁴² may have to come to terms with the fact that the one thing constitutional amendment may not do is redefine the constitution-making power. This must be done by definition through a new constitutional beginning, rather than through amendment.

This is why secession differs from mere massive immigration or even emigration waves or generational changes that involve redefinition of citizenry without the remaking of territory. These do not involve a redefinition of “We the territorial People.” The new members are granted citizenship rights on the social compact terms defined by the existing popular sovereign. This is also why secession differs from mere change of territorial boundaries without the loss of part of the citizenry body. Territorial change alone does not require “We the territorial People” to come to terms and accept that it is no longer responsible for people who used to be part of it. Relinquishment of citizenship on a massive scale, when coupled with the loss of territory, requires the remaining people to come to terms with the separation.

As such, secession requires a new beginning by two new People—the remaining population of the mother state as well as the seceding population.³⁴³ Each must engage in a self-defining act of constitution-making independent of the other in the sense that ultimately, a new

³⁴¹ *Texas v. White*, 74 U.S. 700, 726 (1868).

³⁴² See Rivka Weill, *The New Commonwealth Model of Constitutionalism Notwithstanding*, supra note 265, at 166; Rivka Weill, *Shouldn't We seek the People's Consent? On the Nexus between the Procedures of Adoption and Amendment of Israel's Constitution*, 10 MISHPAT UMEMSHAL 449 (2007) (Isr.) (discussing the nexus between constitution-making and amendment powers in theoretical and comparative terms).

³⁴³ In the case of partition, it is easier to see that the original sovereign is no longer there. But this fact is also true for the other forms of secession.

beginning is a factual matter from a constitutional perspective.³⁴⁴ Thus, the consent of the seceding population in a referendum is insufficient to legitimize secession, as was attempted in Scotland in 2014.³⁴⁵ Nor is it enough to gain the people's consent in a national referendum, as provided in various constitutions.³⁴⁶ The two new People must reach agreement from a constitutional perspective to avoid competing claims to sovereignty over people and territory.

Furthermore, the ICJ decision in the Kosovo case suggests that a unilateral declaration of independence may not necessarily violate international law (though it can, in defined categories).³⁴⁷ Moreover, the Kosovo case stands for the proposition that Kosovo did not violate international law because its declaration of independence was openly extra-legal in international terms.³⁴⁸ It did not try to rely on the interim international arrangements set in Kosovo through U.N. governing bodies' decisions.³⁴⁹ These interim arrangements forbade unilateral acts by both Kosovo and Serbia, as is typical in interim arrangements, to address the concerns of the parties to the conflict.³⁵⁰ Rather, Kosovo's unilateral declaration of independence clearly states that the interim international arrangements failed and that is why Kosovo unilaterally declared independence.³⁵¹ The Kosovo case shows that, in international law as well, secession may require an extra-legal act to succeed and be

³⁴⁴ Cf. N.W. BARBER, *THE CONSTITUTIONAL STATE* 139–42 (2010). My argument may align with political theorists' claim that democratic theory does not supply satisfying answers to the *a priori* question of the proper unit within which majority rule may operate. See DAHL, *supra* note 38, at 193–209. It is thus left to power politics. On a similar claim to Dahl's at the local governments level, see David Schleicher, *The Boundary Problem and the Changing Case Against Deference in Election Law Cases*, 15 *ELECTION L.J.* 247 (2016).

³⁴⁵ See Tomkins, *supra* note 42.

³⁴⁶ While it is not customary in the literature to argue that there is a need for a referendum in the remaining territory to approve secession, one does find the argument that those conducting the negotiations with the seceding territory should not be representatives of the central government since that government represents also the secessionists. See, e.g., Norman, *Ethics*, *supra* note 13, at 53. Also, under the E.U. law, "the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it." See E.U. Treaty, *supra* note 296, art. 50, § 4.

³⁴⁷ See discussion *supra* Section I.E.

³⁴⁸ Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶¶ 108–09 (July 22).

³⁴⁹ *Id.* ¶¶ 105, 109.

³⁵⁰ *Id.* ¶ 66.

³⁵¹ *Id.* ¶¶ 105–07.

accepted as legitimate. But it is not enough to avoid the condemnation of the international community. To gain the international community's acceptance, the seceding part will typically need to reach agreement with the rump state.³⁵²

These principled constitutional considerations may explain the prevalence of total prohibitions on secession throughout the world. It should be clarified that, even if secession oftentimes cannot be achieved via constitutional amendment, that does not mean that secession necessarily requires violence or force. But it may require a “break with the past”—a break with constitutional continuity.

A total prohibition on secession may be less justified from a constitutional perspective when it does not challenge the identity of the popular sovereign body in a given territory. This occurs, for example, when the relationship between the central authorities and the secessionists is governed by a compact or treaty. Some hallmarks of treaty-like relationships (as contrasted with national enterprises) may include the veto right of each member state/region/province over any amendment of the constitutional document; and the right of nullification, so that each member may decide to prevent the application of a federal statute in its territory.³⁵³ In such cases, the withdrawal of a member may not prompt the need of either it or the former confederation to begin anew. This describes the situation in the European Union today,³⁵⁴ and it explains why Brexit is possible via a constitutional amendment, rather than through constitutional revolution.³⁵⁵ In fact, article 50 of the Treaty on European Union, which grants member states the right to secede, originated with the failed Treaty Establishing a Constitution for Europe.³⁵⁶ Under the

³⁵² In terms of international law, international law typically recognizes the original parent state as the continuous entity. Flanders will be an interesting test case, where the majority wants to secede from the minority. In case of partition, both countries will need to be recognized by the international community. See Connolly, *supra* note 74, at 86–92.

³⁵³ See BUCHANAN, *supra* note 13, at 143–47 (regarding nullification); Mancini, *supra* note 13, at 576 (regarding veto rights).

³⁵⁴ See *supra* note 296 and accompanying text.

³⁵⁵ Under article 50(3) of the E.U. Treaty, withdrawal of a member state will automatically occur two years after its notification of withdrawal unless unanimously agreed otherwise by the European Council in agreement with the state concerned. E.U. Treaty, *supra* note 296, art. 50, § 3.

³⁵⁶ Vaughne Miller, Arabella Lang & Jack Simson-Caird, *Brexit: How Does the Article 50 Process Work?* 7 (House of Commons Library Briefing Paper No. 7551, 2017).

Constitutional Treaty, the European Union attempted to further qualify its members' veto power and move to a more manageable qualified-majority regime and integration (*less rights to voice*) while clarifying that each member has an explicit right to secede (*more exit rights*).³⁵⁷ Generally, such treaty-like relationships may exist during the early stages of the formation of a federal state,³⁵⁸ as was the case under the Articles of Confederation in the United States.³⁵⁹ It may also be true during the early phases of an acquisition of a new territory (depending on the circumstances).

The analyses in this Article differ from the stories democracies usually tell themselves about secession in another fundamental way. The Canadian *Reference re Secession of Quebec* case, which is the most renowned decision worldwide on secession, stands for the proposition that secession may be achieved via constitutional amendment. The Court explicitly rejected the proposition that secession must be done extra-constitutionally and in a revolutionary manner.³⁶⁰ Scholars came to expect that the same logic applies globally. They further assumed that most constitutions are silent about secession, as the Canadian Constitution is.

Yet, this Article reveals that the Canadian case must be distinguished on several grounds that limit its precedential nature for world constitutionalism. First, the Canadian Supreme Court interpreted constitutional silence on secession, unlike 79% of world constitutions that explicitly and even vehemently prohibit it.

Second, Canadian constitutional development has been an evolutionary story, even when the changes themselves were revolutionary. Canada evolved from the British North America Act of 1867 through the Westminster Act of 1931 to the Constitution Act of 1982, all without admitting the truly revolutionary nature of each of these milestones. These Acts transformed Canada from a group of

³⁵⁷ See generally Carlos Closa, *Interpreting Article 50: Exit, Voice and... What About Loyalty?*, in SECESSION FROM A MEMBER STATE AND WITHDRAWAL FROM THE EUROPEAN UNION 187 (Carlos Closa ed., 2017).

³⁵⁸ Over time, citizens of federal states may develop nationalist sentiments. SCHMITT, *supra* note 210, at 379–408. This has happened in the United States after the Civil War. See, e.g., 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 30 (2014).

³⁵⁹ See generally 1 ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, *supra* note 268; MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* (1962).

³⁶⁰ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 263 (Can.).

colonies to a dominion in 1867, then to an independent state in 1933 with links to the U.K., and lastly to a full independent state in 1982 that “removed the last vestige of British authority over the Canadian Constitution.”³⁶¹ In contrast, many other countries develop through “break with the past” transformations.³⁶² In keeping with its evolutionary story, it is thus fitting that Canada chooses to treat Quebec’s possible secession as merely a function of constitutional amendments. This pretense serves an important purpose: to lower the stakes of secession and achieve the split in a more peaceful manner. Other states do not necessarily share this desire.

Third, Canada’s constitutional decision must be understood against the unique historical relationship between Quebec and the rest of Canada. Quebec never consented to the Charter.³⁶³

Fourth, on a related point, the Canadian constitutional decision must be understood against the unique Canadian federalist structure. Each province has a “nullification” right to prevent the application of substantial parts of the Charter in its territory via the override power.³⁶⁴ Most importantly, each province enjoys the constitutional power to initiate constitutional change. This was an important consideration in the Canadian Supreme Court’s ruling:

The Constitution Act, 1982 gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces.³⁶⁵

These powers of constitutional initiation and nullification define the identity of the constitution-making body in Canada. Both powers bring Canada closer to a compact model than countries with neither

³⁶¹ *Secession Reference*, 2 S.C.R. at 246. For the evolutionary development, see *id.* at 240–47.

³⁶² See Rivka Weill, *Evolution vs. Revolution: Dueling Models of Dualism*, 54 AM. J. COMP. L. 429 (2006).

³⁶³ Lorraine Eisenstat Weinrib, *Learning to Live with the Override*, 35 MCGILL L.J. 541 (1990).

³⁶⁴ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, § 33 (U.K.).

³⁶⁵ *Secession Reference*, 2 S.C.R. at 257.

mechanisms, like the United States. This may explain the Canadian Court's ruling that if the Quebec people express their will to secede by a "clear majority" on a "clear question" in a referendum, the remaining provinces should negotiate. Even without this consultative referendum (as referenda have no formal constitutional status in Canada), Quebec is entitled to initiate constitutional change under the Canadian Constitution.

The story of constitutions' treatment of secession thus challenges some of our most basic understandings of democratic constitutionalism. Although the *Reference re Secession of Quebec* is viewed as a landmark case for comparative constitutional law, its precedential value may be limited to Canada's unique constitutional context. Although militant democracy has been justified in the name of democracy alone, militant democracy might be more militant than democratic at least when it comes to secession. And eternity clauses might be about naked power no less than constitutional values. Although democracies are typically contrasted with authoritarian regimes, they do share some of their draconian tools when it comes to crushing secession. Even more telling is the fact that consociationalist or consensus democracies ban secession as much or even more than majoritarian democracies. Despite previous assumptions, secession might require revolution rather than mere constitutional amendment. Though we are accustomed to treating popular sovereignty as composed of population alone, constitutions' treatment of secession may reveal that it is a territorial concept. This, along with strategic considerations shared also by international law, may explain the prevalence of absolute constitutional prohibitions on secession. The *Texas v. White* decision held that the state is composed of three major elements—people, territory, and constitutional arrangements.³⁶⁶ Secession reveals that when there is a combined challenge of withdrawal of both citizens and territory, it may require a reworking of the rump state's third component: its constitutional arrangements. Secession may amount to a redefinition of "We the territorial People."

³⁶⁶ *Texas v. White*, 74 U.S. 700, 721 (1868). The interaction between the three components—people, territory, and constitutional arrangements—also play a part in defining the extra-territorial application of constitutions. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008).

APPENDIX

Country	Democratic/Semi-Democratic State	Ban secession in constitutional clauses				Provide Procedure for Territorial Change		Constitutional Silence	Double Speak (militant democracy and/or eternity + procedure for territorial change)
		Militant Democracy against Secessionists	Eternity Clauses protecting territorial integrity		Duties to protect territorial integrity on:	Provide a procedure for Territorial Change	Provide a procedure for Secession		
			Ban on Political Parties	Explicit Eternity					
Afghanistan		√			√				
Republic of Albania	√	√		√	√	√		√	
Algeria		√	√		√				
Andorra	√				√				
Angola		√	√		√				
Antigua and Barbuda	√						√		
Argentina	√	√		√					
Armenia	√				√	√			
Australia	√			√				√	
Austria	√			√	√	√		√	
Republic of Azerbaijan		√	√		√				
Bahamas	√			√					
Bahrain		√		√	√	√		√	
People's Republic of Bangladesh	√	√							
Barbados	√						√		
Republic of Belarus		√		√	√				
Belgium	√				√	√			
Belize	√				√	√			
Republic of Benin	√	√	√		√	√		√	
Kingdom of Bhutan	√	√		√	√	√		√	
Bolivia	√	√			√				
Bosnia and Herzegovina	√				√		√		
Botswana	√						√		
Brazil	√	√	√						
Brunei Darussalam							√		
Republic of Bulgaria	√	√		√	√	√		√	
Burkina Faso	√	√	√		√				
Burundi		√	√		√	√		√	
Kingdom of Cambodia		√		√	√				
Republic of Cameroon		√	√		√				
Canada	√						√		
Republic of Cape Verde	√	√	√		√				
Central African Republic		√	√		√	√		√	
Republic of Chad		√	√		√	√		√	
Chile	√						√		
People's Republic of China				√	√				

Israel	√	√				√		√
Italy	√	√	√					
Jamaica	√						√	
Japan	√						√	
Hashemite Kingdom of Jordan		√			√			
Republic of Kazakhstan		√	√		√			
Kenya	√	√				√		√
Kiribati	√						√	
Democratic People's Republic of Korea (north)				√				
Republic of Korea (South)	√				√			
Kuwait				√	√			
Kyrgyzstan	√	√		√	√			
Lao People's Democratic Republic		√		√	√			
Latvia	√				√			
Lebanon	√			√	√			
Lesotho	√				√			
Republic of Liberia	√	√						
Libya		√			√			
Liechtenstein	√					√		
Republic of Lithuania	√	√		√	√			
Luxembourg	√			√	√	√		√
The Former Yugoslav Republic of Macedonia	√	√		√	√			
Republic of Madagascar	√	√	√		√			
Malawi	√				√	√		
Malaysia	√	√						
Maldives	√				√	√		
Republic of Mali	√	√			√	√		√
Malta	√				√			
Marshall Islands	√						√	
Mauritania		√	√		√	√		√
Mauritius	√						√	
Mexico	√			√				
Federated States of Micronesia	√			√				
Republic of Moldova	√	√		√	√	√		√
Monaco	√				√			
Mongolia	√			√				
Montenegro	√	√		√	√			
Morocco	√	√			√			
Republic of Mozambique	√	√	√		√			
Republic of the Union of Myanmar		√		√	√			
Namibia	√	√			√			
Nauru	√						√	
Nepal	√	√	√		√			
Netherlands	√						√	
New Zealand	√						√	
Nicaragua	√			√	√			

Republic of Niger		√	√		√				
Nigeria	√	√		√	√				
Norway	√			√					
Oman					√				
Pakistan	√	√							
Palau	√				√				
Republic of Panama	√	√		√	√				
Papua New Guinea	√			√	√				
Republic of Paraguay	√	√		√	√				
Peru	√			√	√				
Philippines	√	√			√				
Republic of Poland	√	√			√				
Portugal	√	√	√		√				
Qatar			√			√			√
Romania	√	√	√		√				
Russian Federation		√		√					
Republic of Rwanda		√				√			√
Democratic Republic of Sao Tome and Principe	√	√	√		√				
Saint Lucia	√						√		
Saint Vincent and the Grenadines	√						√		
Samoa	√						√		
Saudi Arabia					√				
Republic of Senegal	√	√		√	√	√			√
Republic of Serbia	√	√		√	√				
Seychelles	√			√	√				
Sierra Leone	√				√				
Republic of Singapore	√	√				√			√
Slovakia	√	√		√			√		√
Slovenia	√			√	√				
Solomon Islands	√						√		
Somalia			√		√				
South Africa	√			√	√		√		√
Republic of South Sudan		√			√				
Spain	√	√		√	√	√			√
Democratic Socialist Republic of Sri Lanka	√	√		√	√				
St. Kitts and Nevis	√						√		
Sudan					√		√		
Suriname	√	√			√				
Swaziland					√				
Sweden	√	√		√	√				
Switzerland	√				√				
Syrian Arab Republic		√		√	√				
Republic of Tajikistan		√	√		√				
Thailand				√		√			√
United Republic of Tanzania	√	√		√	√				
Timor Leste	√		√		√				
Togo		√	√		√	√			√

Tonga	√							√	
Trinidad and Tobago	√							√	
Tunisia	√				√				
Turkey	√	√	√		√				
Turkmenistan		√		√	√				
Tuvalu	√							√	
Uganda		√		√	√	√			√
Republic of Ukraine	√	√	√		√	√			√
United Arab Emirates					√				
United Kingdom	√					√			
United States	√							√	
Uruguay	√							√	
Republic of Uzbekistan		√		√	√		√		√
Vanuatu	√					√			
Venezuela				√	√				
Vietnam				√	√				
Yemen		√		√	√				
Zambia	√	√		√	√				
Zimbabwe				√	√				
	133	103	43	65	126	48	8	28	42