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THE CONSTITUTIONAL RIGHT OF SECESSION IN POLITICAL THEORY AND HISTORY

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Following the fall of communism in Eastern Europe in the early 1990s, smaller, independent, ethnically-based political entities emerged. In the years since, academics from various disciplines have renewed their interest in the topic of secession. A lively discussion in the academic mainstream on the morality and legality of secession has occurred among predominantly liberal democratic political philosophers, a discussion that was non-existent prior to the fall of the Berlin Wall.[1]

The topic of secession has also spurred greater theoretical interest and discussion among libertarian political economists, historians, and philosophers largely affiliated with the Austrian school of economic thought.[2] The work done by these libertarians, which includes the contribution of important historical insights into the treatment of secession during the American War Between the States, both complements and serves as an important counterpoint to the ahistorical, abstract theories of secession constructed by mainstream liberal democrats who

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[1]For an overview of liberal democratic views on secession, see the works listed in the Bibliography by Allen Buchanan, Harry Beran, Wayne Norman, Daniel Philpott, Daniel Weinstock, and Christopher Wellman.

[2]For an overview of Austro-libertarian views on secession, see the collection of essays in David Gordon, ed., *Secession, State, and Liberty* (New Brunswick, N.J.: Transaction, 1998). Some of the scholars with contributions in this series include Austrian economists Murray N. Rothbard, Hans-Hermann Hoppe, and Thomas J. DiLorenzo; philosophers Donald W. Livingston, Steven Yates, and Scott Boykin; and historians Clyde Wilson and Joseph Stromberg.

are heavily influenced by what they perceive to be the arrival of global democracy as marking "the End of History."[3]

Discussion of secession as a political concept requires a firm understanding of what secession is. It is instructive to note the definitions which scholars choose, definitions which are affected by how they perceive the true nature of political authority. For instance, liberal democratic political philosopher Allen Buchanan, quoting legal scholar Lea Brilmayer, defines secession to include not only the "repudiation by a group of persons of their obligation to obey the state's laws," but also "the taking of a part of the territory claimed by an existing state."[4] In addition, Buchanan himself argues that secession includes the "severance of a government's control over territory."[5]

Unlike contemporary liberal democrats, libertarian scholars treat secession more as an act of individual liberation from the hegemonic bonds of the state. In stark contrast to Brilmayer and Buchanan, consider the words of Austrian School economist Jörg Guido Hülsmann:

> [Secession is] commonly understood as a one-sided disruption of bonds with a larger organized whole to which the secessionists have been tied. Thus, secession from a state would mean that a person or a group of persons withdraws from the state as a larger whole to which they have been attached.[6]

Hülsmann concludes that the ultimate purpose of secession is "to break the compulsory ties between the secessionists and a government which they no longer accept."[7]

While arguments concerning the morality of the right of secession will be touched on here, they will be only insofar as they impact the

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[3]For a full treatment of this thesis, see Francis Fukuyama, *The End of History and the Last Man* (New York: Avon Books, 1993).

[4]Allen Buchanan, "Secession—Section 2.1 The right to secede as a right to territory," in *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Stanford, Calif.: Metaphysics Research Lab, Center for the Study of Language and Information, Ventura Hall, 2003), http://plato.stanford.edu/archives/spr2003/entries/secession.

[5]Allen Buchanan, "Theories of Secession," *Philosophy and Public Affairs* 26, no. 1 (1997), p. 35.

[6]Jörg Guido Hülsmann, "Secession and the Production of Defense," in *The Myth of National Defense*, ed. Hans-Hermann Hoppe (Auburn, Ala.: Ludwig von Mises Institute, 2003), p. 372.

[7]Hülsmann, "Secession and the Production of Defense," p. 410.

constitutionality of secession. The purpose of this article is to examine the legal aspects of secession, especially as it relates to the constitutional laws of sovereign states. Accordingly, the right of secession within international law will not be discussed here since a full and fair treatment of this issue would require a separate article.

This article is divided into five main sections. The first section, "The Constitutional Right of Secession in Political Theory," addresses the theoretical justifications for constitutional secession. Should the right of secession be constitutionalized? If so, what should be the nature of such a right? Should the right be unilateral and unlimited? Should the right be heavily qualified so that constitutional democracies can use the rule of law to control the secession process through consensual negotiation? Should there even be any constitutional right of secession at all? To help answer these theoretical questions, an assessment of arguments both for and against constitutionalizing secession will be made within the context of the modern democratic state, primarily because it is within constitutional democracies that most secessionist movements today exist. More specifically, the arguments made by liberal democrats will be compared to arguments made by Austro-libertarians, since liberal democracy and Austro-libertarianism are the two main ideological competitors in the contemporary debate concerning the right of secession.

Section two, "The Historical Constitutional Right of Secession," consists of an investigation into the historical basis for a constitutional right of secession. The purpose of this investigation is to present a historical account of constitutional secession in light of the contemporary theoretical discussion of the subject. The historical investigation is followed by a survey and a categorization of secession rights or provisions that exist in present-day constitutions. The survey of existing constitutional secession provisions is conducted in order to help answer a number of key questions. For instance, what is the true nature of a constitutional right of secession? Is it substantive or procedural? Is the right explicit or implicit? Does a right of secession act to legitimize or to obstruct secession in practice? What does it mean to have a constitutional right of secession? Is it an absolute right or a qualified right? Additionally, how does the existence or non-existence of a constitutional right of secession affect the behavior of centralized state actors and their secessionist counterparts?

The third section, "The Modern Constitutional Right of Secession," explores the explicit and implicit secession rights in the constitutions

of Ethiopia, the European Union, St. Kitts and Nevis, Austria, Singapore, Switzerland, and Canada.

In the fourth and fifth sections, "Problems with the Modern Constitutional Right of Secession," and "Solutions to Problems with the Modern Constitutional Right of Secession," an analysis is made of the procedural problems in constitutional design of these rights, followed by a short (not exhaustive) list of solutions to such problems.

THE CONSTITUTIONAL RIGHT OF SECESSION IN POLITICAL THEORY

To fully comprehend the competing theories of secession as both a moral and legal right entrenched in constitutional law, it is important to understand the political context in which the right of secession exists.

The Place of Secession in the Political Order: Hobbes vs. Althusius

Donald Livingston perceptively grounds the debate over the gradual delegitimization of the right of secession in political theory and history as "the story of a conflict beginning in the seventeenth century between two ideal conceptions of legitimate political order."[8] This conflict involves the competition between the Hobbesian paradigm, as influenced by English philosopher Thomas Hobbes and his seminal political work *Leviathan*, published in 1651, and the Althusian paradigm, as influenced by Dutch philosopher Johannes Althusius and his seminal political work *Politica*, published in 1603.

As Livingston describes it, the Hobbesian paradigm involves a contract among "egoistically motivated individuals" within a state of nature who unanimously consent to transfer their individual sovereign wills to that of a third-party ruler. The sovereign ruler's power over individuals is considered to be "indivisible, infallible, and irresistible."[9]

Alternatively, the Althusian paradigm conceives of political order as federative in nature. No single state institution monopolizes political authority. Rather, government is pluralized, with sovereign power

[8]See Donald Livingston, "The Very Idea of Secession," *Society* 35, no. 5 (July–August 1998), p. 38.

[9]Livingston, "The Very Idea of Secession," p. 39.

shared by multiple social units starting at the lowest level of authority, namely, the family. Families consent to become members of guilds and colleges. Guilds and colleges consent to forming cities and provinces, which consent to uniting in a universal commonwealth. According to Thomas Hueglin, a prominent Althusius scholar:

> At each level of this multilevel consociation of consociations, the smaller units are the constituent members of the larger one. At each level, governance is subjected to consent and social solidarity. In this sense, the term "consociation" may capture the essence of Althusius's intent better than that of association since the latter can be confused with the modern liberal pluralist notion of associationalism based on individualized and voluntary membership. One can easily join or withdraw from such a voluntary association, but one belongs to a consociational community in a much more committed sense (even though there is an ultimate right of resistance and secession as Althusius greatly emphasizes in particular reference to the Dutch Revolt and secession from Spain).[10]

Since, in Althusius's conception, "politics" are plural, the state is not the ultimate arbiter of what constitutes law and justice. Political authority is decentralized in such a way that lower levels of authority are able to retain their sovereign power. While consent to political authority in Hobbes's conception is unitary and irrevocable, Althusius's view is the opposite:

> [Consent is] continuous and may be withdrawn at any time. Any of the social units having the means to do so may legally secede from the higher social unit to which it has delegated authority.[11]

The social units of authority in the Althusian paradigm are able to unite and secede at will because they enter into higher levels of social units by compact, as entities that do not lose their sovereign character at the time of political union. Whereas Hobbesian order requires the elimination or marginalization of competing independent social authorities such as the family, church, or guild, the pluralism of Althusian order makes the option of secession both viable and legitimate.

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[10]Thomas O. Hueglin, review of *Politica*, by Johannes Althusius, *Publius* 17, no. 1 (Winter 1997), p. 150.

[11]Livingston, "The Very Idea of Secession," p. 39.

Liberal Democratic Theory of the Morality and Constitutionality of Secession: The Hobbesian Paradigm

Given the current push toward the establishment of a Hobbesian-style global democratic order, countries with secessionist movements are heavily influenced by prevailing liberal democratic ideology when it comes to the issue of inserting a right of secession into their constitutions. Some of these states actually consult the current academic literature on constitutionalizing secession to find out what the leading liberal democratic political philosophers have to say on the matter. For instance, the government of Canada consulted with noted Rawlsian political philosopher and secession scholar Allen Buchanan on the Supreme Court of Canada's handling of the constitutionality of secession and its relation to liberal democratic political values.[12]

However, before delving directly into the liberal democratic view on constitutionalizing secession, it is important to understand the underlying premises of such arguments. Because the act of seceding from an existing state involves the withdrawal of both people and territory, a keen awareness of the liberal democratic theories of the state, justice, and democracy is crucial to comprehending liberal democratic arguments both for and against a constitutional right of secession.

Generally, liberal democrats view the existence of a state, and in particular a constitutional democratic state, as the necessary means for establishing a society that functions based on certain principles of justice. This view of the state is the modern incarnation of the Hobbesian paradigm: The state results from a social contract among the people themselves to be ruled by a sovereign monarch or democratic legislative body, and membership in such a state is permanent and irrevocable. As such, the likelihood of incorporating a legal right of secession into the constitutional framework of the state is, at best, highly problematic. Daniel McCarthy explains:

> The logic of liberal democracy is that there must be a supreme arbiter, the State, to uphold a universal set of rights. It follows from that that the State must be universal as well. If multiple arbiters are permitted in the world, if there are other states (or non-states) with different procedures and

[12]See Allen Buchanan, "The Quebec Secession Issue: Democracy, the Rule of Law, and Minority Rights," paper presented for Department of Intergovernmental Affairs, Office of the Privy Council, Government of Canada, 2000.

> values, then the authority of the liberal democratic State is in question. For the same reason, liberal democracy cannot permit secession.[13]

The most common contemporary view of liberal democratic justice involves the late philosopher John Rawls's idea of distributive justice. Rawls's general idea is that individuals participate in a hypothetical contract to form the "basic structure of society." From an "original position" shorn of any knowledge of each individual's social, cultural, or economic background, each individual, acting behind "a veil of ignorance," would have every incentive to choose principles of justice that:

1) assure the equal enjoyment of basic fundamental social and political rights for all members of society; and
2) minimize naturally-resulting social and economic inequalities.

These would be accomplished by:

1) assuring every person equality of opportunity to all available positions in society; and
2) distributing social and economic benefits among members of society such that the resulting inequalities work "to the greatest benefit of the least advantaged members of society," a concept known as the "difference principle."[14]

According to Rawls, a constitutional democratic state must necessarily be a "just" state because it is the only type of political organization that can secure and protect basic human and political rights equally for all citizens. In addition, a constitutional democracy possesses the institutional structure required to distribute the economic products of society in such a way that the only allowable inequalities are those that result in providing a minimal standard of living to the least well-off members of society.

The liberal democratic understanding of concepts like justice and constitutional democracy provides further clues as to why liberal democrats treat the issue of secession the way they do. Allen Buchanan refers to the ideal of the "perfectly just state" as a measuring stick for whether secession is justified. Buchanan uses the perfectly just

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[13]Daniel McCarthy, "Who Wants to Die for Liberal Democracy?" *www.lewrockwell.com* (October 31, 2001).

[14]For the full account of his theory of justice, see John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, Mass.: Harvard University Press, 1999), chaps. 1–3.

standard of constitutional democracy in order to limit the moral utility of a secession right. The model for discussing the liberal democratic view of secession in this article will focus more on Buchanan's Remedial Rights Only Theory, which he defines as giving a group of citizens "a general right to secede if and only if it has suffered certain injustices, for which secession is the appropriate remedy of last resort."[15] After all, according to liberal democratic justice, any state that entrenches fundamental civil and political rights in their constitutions is a just state. Therefore, why would anyone want to secede from such a state?

This line of thinking leaves few occasions where it would make any moral sense for a group of citizens to secede: Either the state is in violation of "relatively uncontroversial individual moral rights, including above all human rights" or the state engages "in uncontroversially discriminatory policies toward minorities."[16] Buchanan makes a point of stressing that his general theory of secession is not as restrictive as one might think because he also allows for a "special right to secede if (1) the state grants a right to secede, or if (2) the constitution of the state includes a right to secede."[17]

Additionally, these moral limits on secession act to prevent the proliferation of theoretically ceaseless secessions or "recursive secessions,"[18] which would be the logical consequence of a contrary theory of unlimited and unqualified secession, extending down to the level of the individual. For the purposes of this article, we are most interested in what the constitutional secession right should consist of, and why. If, for instance, a constitutional right of secession is plagued with procedural hurdles or limitations, then this would not necessarily make Buchanan's overall secession theory less restrictive.

However, it should also be mentioned that there is another liberal democratic category of secession, which Buchanan calls the Primary Rights Theory of secession. The Primary Rights Theory is a more permissive general theory of secession wherein "a group can have a general right to secede even if it suffers no injustices, and hence it may have a general right to secede from a perfectly just state."[19] While the

[15]Buchanan, "Theories of Secession," pp. 34–35.

[16]Buchanan, "Theories of Secession," p. 40.

[17]Buchanan, "Theories of Secession," p. 36.

[18]For more on recursive secessions, see Harry Beran, "A Liberal Theory of Secession," *Political Studies* 32, (1984), pp. 29–30.

[19]Buchanan, "Theories of Secession," p. 40.

Primary Rights Theory is a more liberal general theory of secession than is the Remedial Rights Only Theory, each version of the Primary Rights Theory places a limit on how far secession can go. Harry Beran, for instance, argues that secession is permissible only if a seceding group can create a viable state, so that even if "an initial successful secession is likely to lead to a series of secessions resulting in unviable political entities," such continuous secessions "cannot proceed beyond a two-person polity."[20] Christopher Wellman, another Primary Rights Theorist, argues for a hybrid model of secession which limits secession to those groups of individuals who can form a state. However, unlike Beran, Wellman opposes the possibility of recursive secessions because the proliferation of thousands of sovereign entities would make the state's job of enforcing justice too difficult and chaotic.[21]

It follows for Buchanan that if a state's purpose is to protect human rights and democratic political participation, then it has the right to exercise its jurisdiction over a clearly defined territory. If, however, a liberal democratic state imposes unjust (i.e., undemocratic) policies on any minority of its citizens, that state loses its legitimate right to control that portion of territory where the oppressed minority lives. As a result, that minority has a corresponding moral right to secede. According to Buchanan:

> [I]ndividuals' rights, the stability of individuals' expectations, and ultimately their physical security, depend upon the effective enforcement of a legal order. Effective enforcement requires effective jurisdiction, and this in turn requires a clearly bounded territory that is recognized to be the domain of an identified political authority. Even if political authority strictly speaking is exercised only over persons, not land, the effective exercise of political authority over persons depends, ultimately, upon the establishment and maintenance of jurisdiction in the territorial sense. This fact rests upon an obvious but deep truth about human beings: They have bodies that occupy space, and the materials for living upon which they depend do so as well. Furthermore,

[20]Beran, "A Liberal Theory of Secession," p. 29.

[21]Christopher Wellman, "A Defense of Secession and Political Self-Determination," *Philosophy and Public Affairs* 24, no. 2 (Spring 1995), p. 156. For a view, contra Wellman, of recursive or unlimited secessions as a positive phenomenon, see Hans-Hermann Hoppe, *Democracy—The God That Failed* (New Brunswick, N.J.: Transaction, 2001), pp. 118, 237–38.

> if an effective legal order is to be possible, both the boundaries that define the jurisdiction and the identified political authority whose jurisdiction it is must persist over time.[22]

Since a constitutional democratic state's jurisdiction depends on secure territory, Buchanan treats the indefinite preservation and maintenance of the state's territorial integrity under modern international law as a fundamental political value. In this way, Buchanan derives a strong presumption against the secession of a portion of a state's people and territory, rebuttable only by egregious human rights violations or oppression imposed by the state.

For Buchanan, then, the primary utility of maintaining the territoryial integrity of perfectly just constitutional democracies is to ensure the "effective exercise of political authority over those within it" because "all citizens have a morally legitimate interest in the integrity of political participation."[23] Because Buchanan considers territorial integrity as vital to the enforcement of constitutional democracy, the taking of territory by secessionists becomes a second element that must be satisfied before secession can be fully implemented, in addition to the right of individuals to consent to the political jurisdiction of their choosing.[24]

By contrast, Scott Boykin argues that because only persons have the ability to determine the legitimacy of the state's jurisdiction over territory, once a group of persons has rejected such jurisdiction through an act of secession, any claim by that state over territory withers away. Daniel Philpott makes the additional argument that once a group demonstrates a grievance with the existing state and a right of secession is established, it makes no sense to require the group to make an additional claim to the territory in question before the secession of both persons and territory can be fully achieved.[25]

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[22]Buchanan, "Theories of Secession," p. 47.

[23]Buchanan, "Theories of Secession," p. 49.

[24]See Allen Buchanan, "The Making and Unmaking of Boundaries: What Liberalism Has to Say," in *States, Nations, and Borders: The Ethics of Making Boundaries*, ed. Allen Buchanan and Margaret Moore (Cambridge: Cambridge University Press, 2003), pp. 231–61; and Lea Brilmayer, "Secession and Self-Determination: A Territorial Interpretation," *Yale Journal of International Law* 16 (1991), pp. 177–202.

[25]For a general critique of Buchanan's and Brilmayer's view, see Scott Boykin, "The Ethics of Secession," in *Secession, State, and Liberty*, p. 76; and Daniel Philpott, "In Defense of Self-Determination," *Ethics* 105 (January 1995), p. 370.

To summarize, liberal democrats treat the world's constitutional democracies as real-world examples of "perfectly just" states in which secession would not be justified or even thought desirable. Yet, if these states are so perfectly or reasonably just, what explains the emergence of secessionist movements in these very states? For instance, countries like Canada, Spain, Italy, Germany, Belgium, France, the United Kingdom, and even the world's model constitutional democracy, the United States, all have secessionist movements.[26] Granted, most of these secessionist movements are politically weak at the present time, yet they exist nevertheless. Thus, a major problem faced by liberal democrats in the course of downplaying the secession option is trying to explain why secessionist movements emerge within perfectly just constitutional democracies.

Liberal Democrats Against Constitutional Secession

Equipped with a greater understanding of the liberal democratic view of the permissibility of secession, we now proceed to explore the liberal democratic arguments concerning the constitutionality of secession. Interestingly enough, liberal democratic political theorists are split on the issue of constitutionalizing secession. By understanding the liberal democratic theories of constitutionalizing secession, we can better understand the nature and effectiveness of the few constitutional rights and procedures governing secession that exist in the world today.

We start with noted constitutional law scholar Cass Sunstein, who argues against granting any constitutional right of secession. According to Sunstein, a right of secession would promote strategic behavior by political subunits that are supposed to obediently carry out their democratic burden of providing the state with the "benefits" necessary to carry out distributive justice.[27] For instance, economically rich regions like Padania in Northern Italy or the Canadian province of Alberta would try to avoid the hard work of creating a healthy democracy by not supplying the democratic state with the economic resources necessary to dispense justice to the citizenry.

For Sunstein, the purpose of constitutional government is to promote democratic participation based on compromise, cooperation, and deliberation. Specifically, Sunstein believes that constitutionalizing secession would threaten "constitutional precommitment strategies"—

[26]For more information on existing secessionist movements in the world, see *www.secession.net*.

[27]See Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001), pp. 102–4.

a term that refers to the set of rights entrenched within a constitution designed to insulate minority groups from majoritarian politics.[28] The constitutional precommitment strategies that Sunstein mentions include:

- provisions like the right to free speech and the right to vote which are designed to ensure that majority rule does not become excessive;
- a healthy federalism that allows private liberty to flourish;
- structural provisions that allow for a healthy political "division of labor," presumably through the separation of powers between the three branches of government;
- provisions that take morally sensitive issues such as abortion away from the political process; and
- provisions that avoid "collective action problems or prisoners' dilemmas" that occur when state units in federal polities like the United States act in their own self-interests to the detriment of the nation as a whole (Sunstein cites the federal enforcement of the Full Faith and Credit Clause and the Commerce Clause as examples of effective solutions to these collective action problems).[29]

The idea here is to use the constitution in ways that both protect and properly constrain the excesses of majoritarian democratic politics. For Sunstein, the mere introduction of a constitutional right of secession would mean a disabling or disruption of the democratic process. Sunstein worries that "if the right to secede exists, each subunit will be vulnerable to threats of secession by the others."[30] The result of institutionalizing such a right would be political instability and chaos because the democratic polity would be so bogged down with the prevailing secession issue that day-to-day public policy formation would be needlessly obstructed.

For libertarians interested in a world composed of a multitude of sovereign political entities of all sizes and forms, such a state of affairs could conceivably lead to the dissolution of the central state's authority and the emergence of a number of sovereign entities covering a territory where only one centralized state previously stood.[31] However,

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[28]Sunstein, *Designing Democracy*, pp. 96–101.

[29]Sunstein, *Designing Democracy*, pp. 99–100.

[30]Sunstein, *Designing Democracy*, p. 103.

[31]See Hoppe, *Democracy—The God That Failed*, esp. the chapter on "Centralization and Secession," pp. 107–11.

for a liberal democrat like Sunstein, the occurrence of multiple secession movements among subunits of a larger democratic state resulting from a constitutional secession right would spell political disaster. Given the disparaging effects on democratic deliberation of constitutionalizing a right of secession, Sunstein concludes that the most effective way to deal with secessionist concerns is to rely primarily on the internal mechanisms provided by constitutional democracy: "federalism, checks and balances, entrenchment of civil rights and civil liberties, and judicial review."[32]

Liberal Democrats For Constitutional Secession

Unlike their fellow liberal democrat Sunstein, Rawlsian philosophers Wayne Norman and Daniel Weinstock argue in favor of constitutionalizing the right of secession. They agree with Sunstein that secession from democratic states should be avoided if at all possible because they believe that most Western-style democracies are already "reasonably just."[33] If most democratic states do a reasonably good job of Rawlsian distributive justice, as liberal democrats claim, then no moral reason exists to justify the secession of any groups of individuals from the modern democratic state.

Norman admits that Sunstein "is absolutely right about the pernicious effects of secessionist *politics* on democratic deliberation and political stability." He writes:

> The issue here is not whether secessionist politics is bad for democracy and justice, but rather, what can be done through the constitutional engineering of a multinational state to take away the incentives for minority leaders to engage in secessionist politics.[34]

Here, Norman gives us the real reason why liberal democrats would ever consider inserting a right of secession into a democratic constitution in the first place. It is not to grant a group of citizens, who no longer consent to the authority of their government, a substantive right of external exit for the purpose of establishing a new political jurisdiction. Rather, a constitutional secession right is meant to act as a

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[32]Sunstein, *Designing Democracy*, p. 112.

[33]Both Norman and Weinstock use the term "reasonably just" to describe a well-functioning Western-style liberal democracy analogous to Allen Buchanan's use of the term "perfectly just."

[34]Wayne Norman, "Domesticating Secession," *www.creum.umontreal.ca/Textes%20Colloque/Norman.pdf*, pp. 19–20.

procedural means of forcibly keeping secessionists within the prevailing territory of the democratic state.

Working with the assumption that secessionists are better off staying within the existing reasonably just democratic state, Norman makes a number of arguments in favor of constitutionally entrenching a secession right. First, Norman favors designing a secession procedure in such a way that it serves as a "choking mechanism" for secession. Such choking mechanisms include the enforcement of minority rights within a democratic state and the brutal suppression of minority or ethnic secessionist leaders in non-democratic, dictatorial states. The most common choking mechanism would be the establishment of a high threshold supermajority requirement, most likely a two-thirds vote in a secession referendum.[35] Making the "yes" vote requirement in a secession referendum higher than a simple majority would serve to deter secessionist movements with sub-50% popular support from proceeding further along the secessionist path. It would also ensure that only those secessions that are truly justified, such as those that involve the violation of human rights or discrimination against a cultural or ethnic group and supported by the majority of the seceding population, are allowed to prevail. Here, Norman has in mind "vanity secessions," which he defines as "secessions by groups lacking just cause." As an example of this, one could think of a group of relatively well-off citizens within a democratic state who no longer consent to being economically exploited (e.g., taxed heavily) and who vote to secede and form their own government. This type of secession is considered vain by liberal democrats because these rich citizens are selfishly thinking only of themselves and not of those others living within the "reasonably just" democratic state, who depend on receiving (from the rich citizens) the economic benefits of distributive justice.[36]

Second, Norman argues that constitutionalizing a right of secession serves to ground secession in the rule of law, thereby reducing the chance of violence and disruption to the democratic process. Otherwise, if there were no constitutional rules in place governing secession, "a victory for secessionists in a referendum amounts to little more than the strengthening of the secessionists' hand in a game of power politics."[37]

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[35]Wayne Norman, "Secession and (Constitutional) Democracy," in *Democracy and National Pluralism*, ed. F. Requejo (London: Routledge, 2001), p. 4.

[36]Norman, "Domesticating Secession," pp. 6–7.

[37]Norman, "Domesticating Secession," p. 6.

In other words, we do not want secessionists to get an advantage over the central government in claiming the legitimacy to secede in a situation in which there are no legal rules in place to govern secession. Thus, it is better to have constitutional rules in place for secession than to have no rules at all.

Another argument Norman makes is that the existence of a secession clause would be "evidence that the state is united by consent and not force."[38] Here, Norman is essentially acknowledging the weak foundation of consent upon which the existence of the democratic state currently rests.[39] He admits that:

> Even in the democratic world, almost none of the existing national minorities ever gave their initial, democratic assent to their membership in the larger state; and few have had a formal opportunity to assent since.[40]

Instead of concluding that a constitutional right of secession should be a right used by non-consenting minority groups to correct the past injustice of non-consent, Norman instead justifies the legal right to secede as a tool to strengthen the seceding group's consent to the existing democratic state. The logic here seems to be, "we, the benevolent central government, have given you, the secessionists, the legal right to secede; now that you have this right, you live in a more consensual democratic state than you did before with greater rights protection than you had before; therefore, you have less legitimate reason to leave the democratic state."

Operating under the same Rawlsian liberal democratic idea of distributive justice and guarantees of minority rights as Norman, Daniel Weinstock also favors a qualified, procedural right of secession consisting of a number of procedural hurdles that secessionists would have to meet in order to successfully secede.[41] Weinstock's reasons for a legal right to secede are both pragmatic and moral. His pragmatic approach treats secession in the same way one might treat prostitution or drug use: It is a morally questionable vice that people are going to

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[38]Norman, "Secession and (Constitutional) Democracy," pp. 5–6.

[39]For a more detailed account of the non-consensual foundation for the modern democratic state, see Lysander Spooner, *No Treason: The Constitution of No Authority* (1870; reprint, Larkspur, Colo.: Pine Tree Press, 1966).

[40]Norman, "Domesticating Secession," p. 25.

[41]Daniel Weinstock, "Toward a Proceduralist Theory of Secession," *Canadian Journal of Law and Jurisprudence* 13 (July 2000), pp. 261–62.

engage in regardless of whether the act is legalized or not, so it is better to legalize secession, in the same way it would be better to legalize prostitution or marijuana use, because the government can regulate the behavior. Legalizing secession would present secessionists with "a cold and lucid cost/benefit analysis"[42] of seceding versus remaining in the existing state, giving them the hard truth about the tremendously difficult legal obstacles they would have to clear before they could successfully secede.

Weinstock, in making his moral argument for constitutional secession, relies on a modified version of the Rawlsian original position: Participants to a constitutional contract know they represent a national group within a multination state, but they don't know if they are the majority or minority national group. In other words, the participants are "placed behind a national veil of ignorance."[43] Not knowing on which side they will fall, constitutional participants will want to avoid two extremes. On the one hand, they would not want to make secession too easy, because they would be foregoing advantages of democratic cooperation (i.e., redistribution of wealth by the state). On the other hand, they would not want secession made too hard, because if they are actually oppressed or discriminated against, they would not be able to legitimately leave the remaining state. Therefore, a balanced right of constitutional secession would be desired, which would necessarily entail the imposition of procedural hurdles. Some of the procedural hurdles that Weinstock has in mind include mandatory waiting periods between referenda and mandatory waiting periods between referendum calls and the actual vote, in order to prevent impulsive, public-opinion-driven secessions.[44]

It is curious that liberal democrats are split on whether to constitutionalize a right of secession. Sunstein argues against a constitutional right of secession because he fears that a legal secession right could be used to sabotage the democratic process, whereas Norman and Weinstock argue in favor of legalizing secession precisely because it could serve to sabotage the secession process itself. No matter how liberal democrats choose to argue the merits or drawbacks of constitutional secession, both lines of arguments are derived from the same premise: preserving the territorial integrity of the world's constitutional democracies.

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[42]Weinstock, "Toward a Proceduralist Theory of Secession," p. 262.

[43]Weinstock, "Toward a Proceduralist Theory of Secession," p. 262.

[44]Weinstock, "Toward a Proceduralist Theory of Secession," p. 262.

Austro-Libertarian Theory of the Morality and Constitutionality of Secession: The Althusian Paradigm

Unlike contemporary liberal democrats, modern libertarian thinkers, especially those affiliated with the Austrian school of economics, are, for the most part, in favor of secession as an absolute right of individuals, not as a group right littered with procedural barriers and severely constrained by the almost universal legitimacy of constitutional democracy. Indeed, Donald Livingston makes the point that "the prohibition against secession is internal to all forms of contract theory except anarcho-libertarianism."[45] The reason for this is that Austro-libertarians recognize the legitimate existence of independent social authorities as a counterweight to the coercive and monopolistic power of the state. This makes the Austro-libertarian political order much more analogous to the pluralized federative order embodied by the Althusian paradigm.

As was done with the liberal democratic arguments on secession, an account of the Austro-libertarian views of state, justice, and democracy will be made before delving more fully into the arguments made by libertarians in favor of the morality and constitutionality of secession.

We begin by looking at the views of Ludwig von Mises. Like most contemporary liberal democrats, Mises accepted the existence and the legitimacy of the constitutional democratic state. However, Mises believed that the state was necessary only for the protection of private property rights as the most important building block for the establishment of a free society based on social cooperation through the free market:

> The state is essentially an apparatus of compulsion and coercion. The characteristic feature of its activities is to compel people to behave otherwise than they would like to behave. . . . With human nature as it is, the state is a necessary and indispensable institution. The state is, if properly administered, the foundation of society, of human cooperation and civilization.[46]

It was Mises's belief that democracy, grounded and limited by constitutional rules, was the best possible system of political order because it made possible "the adaptation of the government to the

[45]Livingston, "The Very Idea of Secession," p. 39.

[46]Ludwig von Mises, *Omnipotent Government: The Rise of the Total State and Total War* (Spring Mills, Penn.: Libertarian Press, 1985), pp. 46–47.

wishes of the governed without violent struggles."[47] For Mises, the ability of citizens to change their government by consent included a full right for a portion of a state's population to secede:

> If a democratic republic finds that its existing boundaries . . . no longer correspond to the political wishes of the people, they must be peacefully changed to conform to the results of a plebiscite expressing the people's will. It must always be possible to shift the boundaries of the state if the will of the inhabitants of an area to attach themselves to a state other than the one to which they presently belong has made itself clearly known.[48]

Here, it is instructive to contrast Mises's idea of constitutional democracy with that of contemporary liberal democrats like Allen Buchanan. The difference between Mises and Buchanan revolves around their fundamentally different definitions of the right of self-determination. These views of self-determination differ because liberal democrats like Buchanan treat constitutional democracy as necessary to promote human rights and establish distributive justice, whereas Mises views constitutional democracy as limited to protecting private property rights, which includes the right of individuals to secede and form their own state.

As mentioned previously, Buchanan perceives the right of self-determination to include the right of secession only in cases in which human rights have been violated or a group of individuals has been severely discriminated against by the state. Otherwise, a group can only exercise the right of self-determination through gaining greater political autonomy within the inner workings of the democratic state. Thus, for Buchanan, under international law, the preservation of the territorial integrity of constitutional democracies trumps any exercise of self-determination.

By contrast, Mises's view of the right of self-determination always includes "the right of the inhabitants of every territory to decide on the state to which they wish to belong."[49] Mises's view, that "a country can enjoy domestic peace only when a democratic constitution provides the guarantee that the adjustment of the government to the will

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[47]Ludwig von Mises, *Liberalism*, 3rd ed. (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1985), p. 42.

[48]Mises, *Liberalism*, p. 108.

[49]Mises, *Liberalism*, p. 109.

of the citizens can take place without friction,"[50] seems to indicate that he advocated at least an implied constitutional right of individuals to secede. For Mises, unlike for Buchanan, the preservation of a fixed territorial area is not the most important factor in assuring a just democratic state. Rather, it is the consent of the governed, the will of the people themselves, that matters most under both constitutional and international law, not whether a state has acted unjustly, as Buchanan believes.

Having worked through the importance of constitutional democracy and the right of self-determination as a guarantor of international peace among nations and peoples, Mises summarizes the fundamental requirements for secession:

> Whenever the inhabitants of a particular territory, whether it be a single village, a whole district, or a series of adjacent districts, make it known, by a freely conducted plebiscite, that they no longer wish to remain united to the state to which they belong at the time, but wish either to form an independent state or to attach themselves to some other state, their wishes are to be respected and complied with.[51]

What is most telling about Mises's view of secession is that the procedural rule required to change the territorial status quo is nothing more than a majority referendum vote, thereby making such a vote binding. This view stands in sharp contrast to the liberal democratic view in favor of constitutional secession, which treats secession referendum results as merely consultative, making a vote in favor of secession a prerequisite to subsequent constitutional negotiations that may or may not result in a final outcome of actual secession.[52]

Austro-libertarian economists Hans-Hermann Hoppe and Murray N. Rothbard, contrary to contemporary liberal democrats and even Mises himself, premise their views in favor of unlimited and unqualified secession on a fundamentally different theory of the origin of political order. Most liberal democrats, as predominantly contractarian theorists, presuppose that the state emerged from a hypothetical contract. The contract came first, and political authority, in the form of the coercive,

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[50]Mises, *Liberalism*, p. 108.

[51]Mises, *Liberalism*, pp. 109–10.

[52]See Patrick J. Monahan and Michael J. Bryant, "Coming to Terms with Plan B: Ten Principles Governing Secession," with Nancy C. Cote, *C.D. Howe Institute Commentary* 83 (June 1996), pp. 12–13, 15–16.

monopolistic state as the guarantor of a just society, followed. However, Rothbard and Hoppe argue precisely the opposite point: Before an individual is in any position to contract for the provision of security and justice, the individual's right to self-ownership and to private property is presupposed. The state does not come prior to the institutions of private property and justice as a necessary condition for civil society and political order; rather, as a matter of political ethics, individuals have pre-existing property rights which allow them to contract privately with one another as a necessary condition for political order. Hoppe elaborates further on this point:

> It is the very purpose of private property to establish physically separate domains of exclusive jurisdiction. . . . So long as something has not been abandoned, its owner must be presumed to retain these rights. . . . Every property owner may buy from, sell to, or otherwise contract with anyone else concerning supplemental property protection and security products and services. Yet every property owner may also at any time unilaterally discontinue any such cooperation with others or change his respective affiliations.[53]

We also see that Rothbard does not treat the existence of a constitutional democratic state over a fixed territory as a necessary condition for a just society. Instead of taking as given the necessity of the state's existence, Rothbard dissects the nature of the state, and questions whether it is even necessary. Rothbard writes:

> [The state is] that organization which possesses either or both (in actual fact, almost always both) of the following characteristics:
>
> (a) it acquires its revenue by physical coercion (taxation); and
>
> (b) it achieves a compulsory monopoly of force and of ultimate decision-making power over a given territorial area.[54]

Whereas liberal democrats simply assume the need for the state to have a monopoly over the use of coercive force as the only way to solve the problem of anarchy among individuals in the state of nature, Rothbard shows that the state's monopoly over justice is actually the source of the violation of individual liberties, as well as the means used by the

[53]Hans-Hermann Hoppe, introduction to *The Ethics of Liberty*, by Murray N. Rothbard (New York: New York University Press, 1998), p. xx.

[54]Rothbard, *The Ethics of Liberty*, pp. 172–73.

state to continuously expand its power, thus rendering impotent any existing constitutional checks and balances on such power.

Hoppe takes Rothbard's insights on the nature of the state and provides a detailed and perceptive reconstruction of the liberal democratic conception of the state. Hoppe does this by dispelling what he calls the "myth of collective security" or "the Hobbesian myth."[55] Hoppe starts by rehashing the all-too-familiar Hobbesian paradigm:

> In the state of nature, men would constantly be at each others' throats. . . . Each individual, left to his own devices and provisions, would spend "too little" on his own defense, resulting in permanent interpersonal warfare. The solution to his presumably intolerable situation, according to Hobbes and his followers, is the establishment of a state. In order to institute peaceful cooperation among themselves, two individuals, A and B, require a third independent party, S, as ultimate judge and peacemaker. However, this third party, S, is not just another individual, and the good provided by S, that of security, is not just another "private" good. Rather, S is a sovereign, and has as such two unique powers. On the one hand, S can insist that his subjects, A and B, not seek protection from anyone but him; that is, S is a compulsory territorial monopolist of protection. On the other hand, S can determine unilaterally how much A and B must spend on their own security; that is, S has the power to impose taxes in order to provide security "collectively."[56]

Here, Hoppe recites the Hobbesian assumption that a third party, S (the State), must be instituted as a sovereign power with a compulsory territorial monopoly over the provision of justice. According to political and economic theorists past and present, the monopolistic State arises as the result of a contract between individuals or between individuals and the sovereign state.[57] However, Hoppe cannot help but ask the following fundamental question:

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[55]Hoppe, *Democracy—The God that Failed*, esp. chap. 12, "On Government and the Private Production of Defense," pp. 239–47.

[56]Hoppe, *Democracy—The God that Failed*, pp. 239–40.

[57]Modern social contract theorists include Hobbes, Locke, and Rousseau. More contemporary exponents of various forms of the contractarian theory of the state include the already mentioned John Rawls and Allen Buchanan, as well as Nobel Laureate economist James Buchanan, who originated the idea of the emergence of the state from a "constitutional contract." For more on James Buchanan's flawed view of constitutional contract, see Hoppe, *Democracy—The God That Failed*, pp. 104, 228–29.

> Who in his right mind would agree to a contract that allowed one's protector to determine unilaterally—and irrevocably—the sum that the protected must pay for his protection? The fact is no one ever has![58]

Hoppe emphasizes that the monopolistic nature of the state results in an important economic consequence completely missed or ignored by liberal democratic thinkers. Because the state is the only institution to which citizens can turn to seek justice, the price of justice will tend to increase and the quality of justice provided will tend to fall. In addition, whatever justice the state provides to its citizens "will be perverted in favor of the government, constitutions and supreme courts notwithstanding."[59] It is on this point that the liberal democratic argument in favor of imposing constitutions as a means to check the expansive tendency of centralized democracy totally crumbles. As Hoppe explains:

> Constitutions and supreme courts are government constitutions and agencies, and whatever limitations on government action they might contain or find is invariably decided by agents of the very institution under consideration. Predictably, the definition of property and protection will continually be expanded to the government's advantage.[60]

Rothbard elaborates further on why democratic constitutions are useless as tools for limiting the power of centralized democracy:

> No constitution can interpret or enforce itself: it must be interpreted by men. And if the ultimate power to interpret a constitution is given to the government's own Supreme Court, then the inevitable tendency is for the Court to continue to place its imprimatur on ever-broader powers for its own government. Furthermore, the highly touted "checks and balances" and "separations of powers" in the American government are flimsy indeed, since in the final analysis all of these divisions are part of the same government and are governed by the same set of rulers.[61]

With these insights into the nature of constitutional government, Hoppe and Rothbard make a convincing demonstration of why the liberal democratic preference for internal checks and balances on state action is

[58]Hoppe, *Democracy—The God That Failed*, p. 240.

[59]Hoppe, *Democracy—The God That Failed*, p. 230.

[60]Hoppe, *Democracy—The God That Failed*, p. 231.

[61]Murray N. Rothbard, *For A New Liberty* (New York: Macmillan, 1978), p. 63.

doomed to fail. Although liberal democratic scholars like Allen Buchanan and Cass Sunstein fear that guaranteeing a constitutional right of secession would work to undermine democracy, internal checks and balances are already ineffective in the face of the coercive and monopolistic democratic state. Rothbard's and Hoppe's analyses of constitutional checks and balances confirm this view. Because internal checks and balances have failed to quell centralized democratic power, an alternative check is necessary. The only other check within the constitutional democratic framework that might be effective in limiting state power is one that is not internal in nature, but *external*, namely, the right of individuals to secede from the constitutional democratic state.

Now we arrive at Rothbard and Hoppe's views on secession as an unlimited moral right. We find Rothbard quite clear on this matter:

> Would a laissez-fairist recognize the right of a region of a country to secede from that country? Is it legitimate for West Ruritania to secede from Ruritania? If not, why not? And if so, then how can there be a logical stopping point to the secession? May not a small district secede, and then a city, then a borough of that city, and then a block, and then finally a particular individual? Once admit any right of secession whatever, and there is no logical stopping-point short of the right of individual secession, which logically entails anarchism, since then individuals may secede and patronize their own defense agencies, and the state has crumbled.[62]

While Rothbard argues that a full moral right of secession logically leads to anarchy and the withering away of the state, he is less explicit on whether secession should be treated as a constitutional right, although it is presumed that Rothbard would have no objection to constitutionalizing the unlimited and unqualified right of any individual or group of individuals to secede.

After assessing both Mises's and Rothbard's views on secession, Robert W. McGee concludes:

> Who should be able to secede and how should secession be accomplished? . . . First, secession should be built into the constitution, and second, secession should be unilateral. The group wishing to secede should not need the permission of the political entity it wants to secede from. . . .

[62]Rothbard, *The Ethics of Liberty*, p. 182.

> Third, the method by which secession can be achieved should be clearly spelled out.[63]

Thus, from an Austro-libertarian perspective, it appears that constitutionalizing secession is simply the logical outgrowth of recognizing secession as a moral right of individuals.

Although the Austro-libertarian position in favor of constitutional secession seems obvious, there is some question about whether it is the most effective strategy by which to carry out secession in practice. For instance, according to McGee (and, arguably, Mises and Rothbard), secession should be constitutional in addition to being unilateral. However, instead of arguing for constitutionalizing the right of secession as a way to make secession happen, Hoppe favors an alternate strategy: the simultaneous proliferation of small-scale secessionist movements across the entire territory of the democratic state, irrespective of whether such acts are considered constitutional or unconstitutional. In this way, the secession of smaller subunits from the larger territory of a sovereign state is less threatening to the central government than the threat of secession by a larger province or state, or even a group of provinces or states, as happened during the American War Between the States in 1861.[64]

THE HISTORICAL CONSTITUTIONAL RIGHT OF SECESSION

For most of human history and continuing into the present day, the only effective means of secession has been war. Though there are numerous historical examples of secessions, some successful and some failed, one starting point of interest is the secession of the Dutch states from the Spanish Empire in the sixteenth century. According to legal scholar Alexander Martinenko, the exercise of the right of secession by the Dutch against the Spanish led "to the creation of the first written document arguing the rightfulness of secession—the 'Act on Secession,' which was adopted on July 22, 1581." Martinenko argues that the Act on Secession established for the first time a right of secession as a potential "inherent right of the Dutch people" that "had to be substantiated by a number of proofs" before it could be proclaimed "as a universal

[63]Robert W. McGee, "Secession Reconsidered," *Journal of Libertarian Studies* 11, no. 1 (Fall 1994), p. 23.

[64]Hoppe, *Democracy—The God That Failed*, p. 291.

and unconditional right of all peoples."[65] If we take Donald Livingston's thesis on secession to be true, then the Dutch experience appears to be a historical victory of the Althusian conception of plural and federative political order over the unitary and irrevocable Hobbesian political order.

Martinenko goes on to argue that the next "proof" that worked to solidify the right of secession as a universal human right occurred with the American Revolutionary War, which "interpreted the right of secession as a common right of all the peoples in the world. Peoples' inherent right to sovereignty became the theoretical foundation for this position."[66]

Although the American Revolutionary War—the American War of Secession from the British Empire—counts as a seminal event in the emergence of a legally recognized right of peoples' to secede and form their own sovereign state, John Remington Graham argues that the real precedent for the American Revolution was the Glorious Revolution of 1689. According to Graham, the Glorious Revolution allowed for:

> A revolutionary but lawful and peaceful transformation of government in extraordinary circumstances, by the dignified means of a convention of the people and estates of the kingdom, assembled in as orderly a way as possible by a distinguished prince or the natural leaders of the realm for the purpose of reassuming the attributes of sovereign power, repairing the constitution so as to make it operable once again, and resettling the government of the land.[67]

Graham describes how James II, faced with growing opposition, including a competitor to his throne in William of Orange, summoned a "Magnum Concilium" of the House of Lords, which established a precedent for a convention to "promote moderation, justice, and reconciliation" during times of possible revolution.[68]

Graham describes the secessions of the thirteen British colonies in America, most notably the election of the Virginia Convention of 1776, as the "conscious reenactment of the call by William of Orange for the

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[65]Alexander Martinenko, "The Right of Secession as a Human Right," *Annual Survey of International and Comparative Law* 3 (Fall 1996), p. 20.

[66]Martinenko, "The Right of Secession as a Human Right," p. 20.

[67]John Remington Graham, *A Constitutional History of Secession* (Gretna, La.: Pelican Publishing, 2002), pp. 58–59.

[68]Graham, *A Constitutional History of Secession*, p. 49.

Convention Parliament of 1689." Like the convention of peers and estates in 1689 that revolutionized the fundamental law of England, the Virginia Convention established "the republican form of government" and the "fundamental law of Virginia" by adopting the Virginia Bill of Rights and Constitution.[69] Soon, all of the colonies declared their independence from England and came together with the signing of the Articles of Confederation as "free and independent states."

One concern with Graham's analogy between the Glorious Revolution's "lawful and peaceful transformation of government" and the similar transformation of the Virginia colony into a republic is whether apples are being compared with apples. The change in monarchy in 1688 was an internal manner within the English realm, while the political change in Virginia and the other 12 colonies involved an actual break from rule by the British King. As such, does the Glorious Revolution really provide a precedent for the subsequent secessions of the thirteen colonies almost one hundred years later and, therefore, a legitimate legal precedent for a constitutional right to secede? One might respond that while the substantial aspects of these two political events are not the same, the procedural aspects are. Because we are interested in the *procedure* of constitutional secession, Graham's analogy between the "Magnum Concilium" of the Glorious Revolution and the subsequent Virginia Convention holds.

Graham goes on to demonstrate that although the union of sovereign States under the Articles of Confederation was expressly perpetual, this "did not prevent breaking up the Confederation by secession of the several States so they might be free to form a new Union." In addition, he shows that the Confederation never required a constitutional amendment, nor did it require the unanimous consent of all the States for its dissolution.[70] The evidence here suggests that the American Confederation, at least at the time of the founding of the United States, was treated much more like an Althusian order based on a pluralistic federalism than like a Hobbesian order that treated political union as unitary and irrevocable.

Finally, Graham makes the point that while the States seceded from the Confederation by means of legislative vote, it was thought at the time of the Philadelphia Convention that "the People in each State," and not the legislatures, should be given the power to either

[69]Graham, *A Constitutional History of Secession*, p. 91.

[70]Graham, *A Constitutional History of Secession*, p. 100.

form or secede from a union of states. It stands to reason from Graham's analysis that, despite the lack of a clearly expressed constitutional right of secession, a precedent for lawful secession was created by the very act of the independent States breaking away from the Confederation to form a more "perfect Union."

In the modern discourse of American constitutionalism, mainstream scholars continue to emphasize the importance of the separation of powers and federalism as the requisite checks and balances to curb state power. In particular, the importance of the Supreme Court is singled out as the ultimate arbiter of constitutionality. Nevertheless, prior to the War Between the States, Graham points to the fact that there existed other types of constitutional mechanisms designed to counteract excessive government power, mechanisms which proved to be just as effective. These measures—interposition, nullification, and secession as a last resort—were utilized not by the President, Congress, or Supreme Court, but by the sovereign States themselves.

As part of its resistance to the Northern tariff, South Carolina began its constitutional objection with interposition, legitimized by the passing of the South Carolina Resolution of 1828 (similar to the Virginia Resolution of 1798). Graham defines interposition as "a political suggestion that the constitutional mechanisms of the Union had failed to work properly."[71] Interposition was used by South Carolina as a political warning shot designed to communicate the readiness of the people of the Southern states to form a convention to exercise constitutional change. When the effects of the tariff worsened in the South, an ordinance nullifying the tariff act was passed by a convention of South Carolinians (not by the South Carolina legislature) in November of 1832—a constitutional move perfectly in accord with Jefferson's Kentucky Resolutions of 1798 and 1799. Faced with the nullification ordinance, President Andrew Jackson was pressured to sign two moderate tariff bills designed to repeal the so-called "tariff of abominations." Once the new bills were signed, the nullification ordinance was repealed and the tariff crisis was resolved, thus restoring the balance of power between the North and the South.

While South Carolina felt the need to resort to both interposition and nullification in response to Northern tariffs on Southern industry, Graham argues that implementation of constitutional secession by the South was successfully delayed by the Missouri Compromise of 1850,

[71]Graham, *A Constitutional History of Secession*, p. 284.

which served to maintain the political balance of power between the Northern and Southern states. The Compromise maintained political balance by keeping the number of slave and free states in the Union at even par.

Eventually, however, the effects of the Northern tariff on Southern cotton production took their toll, and the Southern states felt they had no alternative but to secede from the Union. Just as they did during the American Revolution, each of the Southern states called a convention of their people (and not of their legislatures) for the purpose of exercising their constitutionally recognized sovereign power. One by one, through the adoption of ordinances at each of their conventions, the Southern states lawfully and peacefully seceded from the United States. According to Graham, the constitutional basis for the Southern states' assertion of their right of secession could be found in the details of the 1860 South Carolina Convention's "Declaration of the Causes of Secession," which justified secession by referring to:

> the Virginia and Kentucky Resolutions of 1798, the Report of the Hartford Convention in 1815, and the addresses to the people promulgated by the South Carolina Convention in 1832.[72]

No constitutional amendment was necessary. No referendum was required. No negotiation with the Federal government was conducted.

The secession of the Southern states as a prelude to the War Between the States is the last historical example of a constitutional, unilateral secession. According to Donald Livingston, the War Between the States marked the major turning point away from the legitimacy of Althusian federative order, which impliedly recognizes the right of smaller localized units of social and political authority to secede from the larger commonwealth, to the legitimacy of Hobbesian political order, embodied in the unitary state as the final arbiter of law and justice.[73]

President Abraham Lincoln responded to the secession of the Southern states with a war to preserve the Union. While many newspapers and media outlets both in the North and the South understood that the text of the United States Constitution implied a lawful right of the sovereign States to secede from the Union in the Althusian

[72]Graham, *A Constitutional History of Secession*, p. 284.

[73]Livingston, "The Very Idea of Secession," pp. 42–45.

sense,[74] Lincoln took a more Hobbesian and nationalist view of the Constitution:

> In the contemplation of universal law and of the Constitution, the Union of these States is perpetual . . . that no State, upon its own mere motion, can lawfully get out of the Union; that resolves and ordinances to that effect are legally void; and that acts of violence within any State or States against the authority of the United States are insurrectionary or revolutionary, according to the circumstances.[75]

With the Union victory over the South in 1865, the constitutional right of secession in the United States was effectively put to rest. The historical transition from Althusian to Hobbesian political order was complete, as was its subsequent effect of delegitimizing the act of secession. In the case of *Texas v. White* (1868), the Supreme Court of the United States effectively delegitimized secession as a viable constitutional option when it held that the unilateral secession of a state was unconstitutional.[76] In addition, the War Between the States came at a terrible cost in lives and property. Had there been an express constitutional right of secession inserted in the U.S. Constitution, the War itself might have been averted.[77]

Although secession as an inherent right of the several States was effectively delegitimized by the Union victory over the South and by *Texas v. White*, peaceful secessions guided by the rule of law were not completely unknown. Robert A. Young cites three such examples: the secession of Hungary from Austria in 1867, the secession of Norway from Sweden in 1905, and the secession of Singapore from Malaysia in 1965.

With the weakened condition of the Austro-Hungarian Empire after the war with Prussia in 1866, Emperor Franz Joseph agreed to negotiate Hungarian independence. The Emperor restored the Hungarian

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[74]See Charles Adams, *When in the Course of Human Events: Arguing the Case for Southern Secession* (Lanham, Md.: Rowman & Littlefield, 2000), pp. 14–16; and William Rawle, *A View of the Constitution of the United States of America*, 2nd ed. (Wiggins, Miss.: Crown Rights, 1998), pp. 234–35.

[75]Lincoln, quoted in Graham, *A Constitutional History of Secession*, p. 291.

[76]Graham, *A Constitutional History of Secession*, pp. 408–9.

[77]See Thomas DiLorenzo, *The Real Lincoln: A New Look at Abraham Lincoln, His Agenda, and an Unnecessary War* (Roseville, Calif.: Prima, 2002), pp. 52–53, 176–77, and 259–60; and McGee, "Secession Reconsidered," p. 23.

Constitution, and the Austrian Diet effected the secession of Hungary by passing the Ausgleich (Compromise), which was accepted by the Austrian Parliament in 1867. Once negotiations with the Hungarians were completed, the Austrian Diet amended the Austrian Constitution to conform to the new political arrangement.[78]

In the case of Norway's secession from Sweden, the Swedes were initially taken aback by the Norwegian Parliament's vote to secede. According to Young, "Norwegian opinion was solid for sovereignty; war would be ruinous and the Great Powers would isolate Sweden if it tried forcibly to maintain the union. Negotiation represented the only viable course of action."[79] A secession plebiscite was also held in Norway, with 99% of Norwegians voting to secede. Once negotiations were completed, the secession of Norway was completed with the abrogation by both the Swedish and Norwegian legislature of the Act of Union and the abdication of the King of Sweden from the Norwegian throne and his replacement by the King of Denmark.[80]

Unlike the Austria/Hungary and Sweden/Norway cases, the secession of Singapore from Malaysia in 1965 involved the Federation of Malaya expelling Singapore from the political union for reasons involving racial and economic incompatibility between the Chinese Singaporeans and the majority Malayan population. Amazingly, Singapore's secession was foisted upon it by Malaysia, after brief negotiations and a constitutional amendment effecting secession, passed by the Malaysian Parliament in only three hours.[81]

In all three of the above cases, Young argues that the secessions were achieved constitutionally through established fundamental law. The constitutional settlements achieved in each case were "a straightforward consequence of the predecessor state accepting the principle that secession will occur."[82]

The trend that began in the nineteenth and early twentieth centuries toward legally recognizing the right of cultural, ethnic, and national

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[78]Robert A. Young, "How Do Peaceful Secessions Happen?" *Canadian Journal of Political Science* 27, no. 4 (December 1994), pp. 781, 787.

[79]Young, "How Do Peaceful Secessions Happen?" p. 781.

[80]Young, "How Do Peaceful Secessions Happen?" pp. 781, 783, and 787. The actual vote result was 367,149 to 184 in favor of an independent Kingdom of Norway.

[81]Young, "How Do Peaceful Secessions Happen?" pp. 787, 778–80.

[82]Young, "How Do Peaceful Secessions Happen?" p. 787.

groups to exercise their rights of self-determination continued with the aftermath of World War I and the Treaty of Versailles. It was U.S. President Woodrow Wilson's hope that the right of national self-determination could provide for a lasting peace among the world's nations by granting national and ethnic groups their own states.[83]

The ideological context of national self-determination prompted the fledging Union of Soviet Socialist Republics to adopt a constitution that contained an express right of secession for all of its ethnic republics. After the Communist revolution of 1917, the USSR started out as a confederation of independent socialist republics. By 1922, the Treaty on the Formation of the Union of Soviet Socialist Republics, which included a right of secession for each republic, was signed by the sovereign Russian, Ukrainian, Byelorussian, and Transcaucasian socialist republics. Clearly, though, the real purpose of the Treaty was to induce the republics to enter into a confederation so that a true federation could be created.[84] According to Lee Buchheit:

> It was primarily Lenin's thesis that some expansive talk about secessionist rights was necessary to insure the acceptance of the early revolutionary movement by the many nationalities contained within tsarist Russia. By offering a protection of national rights, up to and including the right to secede, Lenin hoped to assuage the fears of the disparate populations within the Russian empire and woo them to the revolutionary cause.[85]

Since the member republics were still concerned about the protection and influence of their nationalities, Lenin and Stalin did not go so far as to legally impose a unitary system of government. Additionally, the promise to the republics of a legal right to secede helped convince them of the need to unify politically for the purpose of carrying out the Communist New Economic Policy, which required a large

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[83]For a more comprehensive account of Wilson's policy push for national self-determination and its disastrous consequences in the aftermath of the Treaty of Versailles, see Ralph Raico, "World War I: The Turning Point," in *The Costs of War: America's Pyrrhic Victories*, ed. John V. Denson, 2nd expanded ed. (New Brunswick, N.J.: Transaction, 1999), pp. 203–48.

[84]Urs W. Saxer, "The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States," *Loyola of Los Angeles International and Comparative Law Journal* (July 1992), p. 615.

[85]Lee Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven, Conn.: Yale University Press, 1978), p. 121.

internal economic market.[86] A Union Constitution, formalizing the provisions of the 1922 Treaty, was drafted by 1924. It proclaimed in its preamble "this Union is a voluntary association of peoples with equal right, that each republic is assured of the right of free secession from the Union." The Constitution further stated that "the right of secession, could not be amended, limited, or repealed without the prior consent of all of the republics."[87] In 1936 under Stalin, and again in 1977, the Soviet Constitution was changed. Each time, the right of secession remained in the document.

Despite the legal recognition of the right of republics to secede from the Soviet Union in every version of the USSR Constitution, the right had no practical effect because the USSR was governed as a de facto unitary state. The right of secession was subverted by the centralized activities of political institutions like the Presidium of the Supreme Soviet, which had "the power to annul decrees of the union republics that failed to conform to the law." With no separate judicial branches acting as a check on political power, the Supreme Soviet had the exclusive means to override the autonomy of the republics "with the help of propaganda, secret police, and mass psychology."[88]

Additionally, the Soviet republics' right of secession had no practical effect because it was never intended to be exercisable. The existence of a right to secede was always in conflict with the Soviet imperative to internationalize communism. If Soviet republics were able to secede and become independent states, then the global communist movement would be hampered. When faced with this clash of legal and political values, the choice for Lenin and Stalin was clear: Promotion of the proletarian revolution outweighed respect for the ethnic republics' right to full self-determination.[89]

Like Soviet Russia, the Chinese Communist Party implemented the express right of secession into the 1931 Chinese Constitution as a means to lure in the ethnic nationalities of the Chinese mainland and to subjugate neighboring territories like Tibet. Once the Chinese Communists consolidated control over the mainland and surrounding territories, the right of secession was dropped. The revised Chinese

[86]Saxer, "The Transformation of the Soviet Union," pp. 615, 613.

[87]Saxer, "The Transformation of the Soviet Union," p. 613.

[88]Saxer, "The Transformation of the Soviet Union," p. 617.

[89]Buchheit, *Secession*, pp. 123–25.

Constitution of 1975 provided that China was "a unitary multi-national state."[90]

Another historical example of a constitutional right of secession is Burma. Under the 1947 Constitution of the Union of Burma, chapter 10 contained "an express recognition that every state shall have the right to secede from the union 'in accordance with conditions hereinafter prescribed'."[91] A number of procedural conditions were required to exercise the right: a waiting period of ten years after the constitution was enacted, a two-thirds vote for secession by the members of the State Council wishing to secede, and a plebiscite vote by the people of the seceding State. The right of secession lasted until it was repealed with the imposition of the Constitution of the Socialist Republic of the Union of Burma in 1974. Since then, only the exercise of "local autonomy under central leadership" has been constitutionally permissible.[92]

The historical attempts to legalize the right of secession in national constitutions show that secession rights have often been used as a tactic to attract smaller sovereign ethnic and national groups into a larger political union for the purpose of enjoying perceived economic and social benefits. However, once the political union was attained, the right of secession was often delegitimized, either through practical politics or legal repeal. In cases in which the right of secession was exercised, the result was most often a war by the central state to preserve political union. In those cases in which secession occurred peacefully, it was because the central state accepted the reality and legitimacy of secession and negotiated a peaceful transition through established constitutional means.

THE MODERN CONSTITUTIONAL RIGHT OF SECESSION

The vast majority of the world's sovereign states do not recognize any right of secession in their domestic constitutions. According to a 1996 study conducted by Canadian law professors Patrick Monahan and Michael Bryant, 82 of the 89 constitutions that were examined did not have any provisions allowing for the secession of any part of its people or territory. Twenty-two constitutions expressly affirm the

[90]Buchheit, *Secession*, p. 102.

[91]Buchheit, *Secession*, p. 100.

[92]Buchheit, *Secession*, p. 100.

maintenance of the state's territorial integrity, using terms like "indivisible," "inalienable," and "inviolable." Some constitutions, like those of Cameroon, the Ivory Coast, and Rwanda, even go so far as to prohibit any constitutional amendment that would adjust the state's territory.[93]

Monahan and Bryant found seven constitutions, both present and past, which contained or do contain procedures for constitutional secession: Austria, Ethiopia, France, Singapore, St. Christopher and Nevis, the former Soviet Union, and the former Czech and Slovak Federative Republics.[94] To this list, we can add Switzerland, which has a provision in place to allow for the secession and creation of new cantons,[95] and the current draft of the European Union Constitution of 2003, which allows for the voluntary withdrawal of Member States from the Union.[96] Finally, we can add Canada, which now has a statute in force clarifying the steps required for a province to secede from the federation, based on a Supreme Court opinion on the issue of Quebec's potential secession from the rest of Canada.[97]

Since we are interested in analyzing constitutional procedures for secession that are relevant in today's post-Cold War world, we can disregard Monahan and Bryant's discussion of the secession provisions found in the USSR and Czechoslovak Federation constitutions. In addition, we can rule out their discussion of the secession provisions in the French constitution because these provisions apply only to France's overseas territories, not to its constitutionally "indivisible" domestic territory. Thus, we are left with looking more closely at the secession rights or provisions found in the constitutions of Ethiopia, the European Union, St. Kitts and Nevis, Austria, Singapore, Switzerland, and Canada.

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[93]Monahan and Bryant, "Coming to Terms with Plan B," p. 7.

[94]Monahan and Bryant, "Coming to Terms with Plan B," p. 14.

[95]Thomas Fleiner, "Recent Developments of Swiss Federalism," *Publius* 32, no. 2 (Spring 2002), p. 106

[96]"Article I-59: Voluntary withdrawal from the Union," *Draft Text of the European Union Constitution*, Part One, Title I: Definition and Objectives of the Union, http://european-convention.eu.int/docs/Treaty/CV00797-re01.EN03.pdf.

[97]*Reference re Secession of Quebec*, [1998] 2 S.C. 217; and Bill C-20, "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," 2nd. sess., 36th Parliament, 1999 (first reading, December 13, 1999).

Countries with Express Rights of Secession

Ethiopia

Ethiopia is a country of more than 50 different ethnic and tribal groups. Unlike the constitutions of most democratic nation-states in Europe and North America which vest sovereignty in the people (or, more accurately, in the centralized state), the Ethiopian Constitution vests sovereign power in nine ethnic sovereign states with the ability to exercise their sovereign power in much the same way as the free and independent sovereign States of the pre-Civil War United States. Among the most important of the constitutional rights given to the nine sovereign states is the right to secede. Article 39(1) of the Ethiopian Constitution states that "every nation, nationality, and people in Ethiopia has the unconditional right to self-determination, including the right to secession." Article 39(5) of the Ethiopian Constitution defines a nation, nationality, or people as:

> a group of people who have or share large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.

Thus, it is not just the nine sovereign ethnic states that enjoy this right. Rather, every minority tribal group in each of the nine states also has the right of secession.[98]

In addition to expressly acknowledging the right of secession itself, the Ethiopian Constitution contains the necessary procedures to effect secession in the constitutional text under Article 39(4)(e). A two-thirds vote by the Legislative Council of the nation, nationality, or people desiring secession is required before the issue is put to a referendum organized by the Federal Government and voted on by the seceding population. Once the referendum has passed in favor of secession, the terms of secession are negotiated, including the division of assets, which is "effected in a manner prescribed by law." Territorial borders are negotiated between the seceding tribal state and the adjacent non-seceding tribal state. If agreement on borders between the states cannot be reached, the Federal Government decides the issue based on the settlement patterns and wishes of the peoples involved.[99]

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[98]Minasse Haile, "The New Ethiopian Constitution: Its Impact upon Unity, Human Rights, and Development," *Suffolk Transnational Law Review* 2 (Winter 1996), p. 32

[99]Monahan and Bryant, "Coming to Terms with Plan B," p. 13.

European Union

At the end of June 2003, the European Convention completed the final draft of the new European Union (EU) Constitution, designed to legitimize the ongoing project of creating a politically united European superstate, what some commentators are calling the "United States of Europe." Because the European superstate is one of the largest multinational democratic states in the world, it would seem appropriate that the new Constitution contain a clause allowing its member states the right to secede or exit from the Union.

Such an exit clause is contained in Article I-59, paragraphs 1–4 of the EU Constitution. Procedurally, the withdrawing member state must notify the European Council, whose job is to examine the notification. According to the European Council's guidelines, the EU has a duty to negotiate an agreement with the withdrawing Member State that outlines the terms of withdrawal and the future relations of both sovereign entities. The negotiated agreement is concluded by a qualified majority of the European Council when consent is received from the European Parliament and without the participation of the Council representative of the withdrawing Member State.

The secession of the withdrawing Member State from the EU becomes effective from the date that the negotiated agreement comes into force. If no agreement comes into force within two years from the time the withdrawing Member State notified the European Council of its intent to leave, then the secession will become effective, although the Council and the Member State can agree to extend this period beyond two years. Finally, the EU Constitution gives the withdrawing Member State the option to re-join the EU.

St. Kitts and Nevis

St. Kitts and Nevis, two adjacent islands in the Caribbean, currently form a two-island political federation. Nevis, from the time it was joined with St. Kitts to be administered as one British colony in 1882, has had an active secessionist movement to become an independent and sovereign island state.[100] As part of the decolonization process of the 1960s, the island colonies moved toward independence from Britain, resulting in St. Kitts and Nevis becoming a state in voluntary association with Britain. By the 1970s and early 1980s, the idea of

[100]For more information on the political history of Nevisian independence, see *website.lineone.net/~stkittsnevis/nevis.htm*.

Nevis secession enjoyed wide political support on the island, and political pressure was put to bear for greater autonomy for Nevis.

In 1983, St. Kitts and Nevis achieved political independence from Britain and drafted their first constitution. Like Article 39(1) of the Ethiopian Constitution, Section 113 of the St. Kitts and Nevis Constitution includes an express right of secession. The island of Nevis has the legal right to secede from the federation with St. Kitts at any time.

In the late 1990s, the people of Nevis enjoyed one opportunity to exercise their right to secede from St. Kitts. After the secessionist party in power attempted to pass a bill to enable the secession of Nevis, an election was called in February 1997 so that a mandate for secession could be achieved. The secessionist party won the election by a slim majority of seats.[101] Under the Constitution, a two-thirds vote of the Nevis Legislative Assembly and a two-thirds vote of the Nevis electorate in a nationally organized referendum are required for secession to pass. In October 1997, the Nevis Legislative Assembly voted unanimously in favor of secession. However, in August 1998, the referendum vote was 61.7% in favor of secession, just short of the two-thirds required. Had the referendum achieved a two-thirds vote in favor of secession, there would have been virtually no negotiation over new borders because the territorial arrangements of St. Kitts and of Nevis post-secession are set out under the Constitution ex ante.[102] At present, both islands remain federated.

Countries with Procedures for Changing Borders

Austria

The 1983 Austrian Constitution expressly recognizes the existence of Austria as a federal state whose federal territory is composed of 9 autonomous states. More importantly, however, is a constitutional recognition of the possibility for changes to the federal territory of Austria, which "can, apart from peace treaties, only be effected by corresponding constitutional laws of the Federation and the State whose territory undergoes change."[103] The federal government determines the secession referendum question and the national population (including both the seceding and non-seceding groups) votes on the question. A simple majority in favor of secession is enough to

[101]See *website.lineone.net/~stkittsnevis/nation.htm*.

[102]Monahan and Bryant, "Coming to Terms with Plan B," chart, pp. 9–10.

[103]Austria, Constitution, Article 3.

bring the matter to negotiations between the seceding territory and the national government, followed by a constitutional amendment requiring a two-thirds vote of the Austrian House of Representatives.[104] As part of a negotiated secession package, the boundaries of the newly seceded territory require the agreement of both the national government and the seceding government.[105]

Singapore

In light of its secession (or, more accurately, its expulsion) from Malaysia in 1965, Singapore inserted a provision into its constitution that governs the surrender of its sovereign territory. While not expressly recognizing secession per se, the Constitution states that no part of the "sovereignty of the Republic of Singapore" can be surrendered or transferred in any way whatsoever (including joining another sovereign territory, e.g., a reunion with Malaysia) unless approval for such surrender or transfer is given by a two-thirds vote of the people of Singapore in a nationally-organized referendum.[106]

Switzerland

Switzerland has no express right of secession in its constitution. However, due to the constitutional recognition of its cantons as strong sovereign territories, a procedure exists to facilitate the peaceful secession of smaller districts from existing cantons, and their reformation into new cantons within the Swiss state. The "Jura procedure" offers a workable solution to boundary disputes that often arise as a result of secession. This process is worthwhile to mention because it allows groups of citizens, stuck within cantons they want no part of, to exercise their constitutional exit rights within their own cantonal space.

Before the creation of the Canton Jura in 1979, the French-speaking districts of Jura fell within the predominantly German-speaking Canton Berne. The Jura districts had clamored for secession from Canton Berne off and on since the late eighteenth century. Separatist sentiment was high at the time of World War I, but died down until September 1947, when a Jura citizen was refused membership to the cantonal parliament because he was a French speaker. By the 1950s, the Jura separatists petitioned successfully for a referendum vote on forming a

[104]Monahan and Bryant, "Coming to Terms with Plan B," chart, pp. 9–10.

[105]Monahan and Bryant, "Coming to Terms with Plan B," p. 13.

[106]Singapore, Constitution, Part III, "Protection of the Sovereignty," Article 6, "No Surrender of Sovereignty," 1963. See also Monahan and Bryant, "Coming to Terms with Plan B," p. 13.

new canton, but the canton-wide vote rejected the proposal and the Jura districts themselves voted against the proposal by a narrow margin.[107] The real problem was that the Northern Catholic Jura districts wanted to form a new canton while the Southern Protestant Jura districts did not.

Canton Berne passed a constitutional amendment in 1970 to allow only Jura districts to vote in a referendum on secession. In response to the continuing political crisis caused by Jura separatist aspirations, the Berne Executive Council set a referendum vote for June 23, 1974, in which 52 percent of the voters in the Jura districts voted to separate from Canton Berne.[108]

One outstanding issue was how to determine the cantonal status of southern Jura districts where the majority voted to remain with Berne. Almost nine months after the first referendum, the Berne government received a petition for a second plebiscite. This plebiscite was held on March 16, 1975, and the majority of these districts voted overwhelmingly to remain with Canton Berne.[109]

Finally, two more sets of plebiscites were held in September 1975 in the fifteen communes within the southern Jura districts that voted against remaining with Canton Berne in March 1975. Most of these districts voted to remain with Canton Berne. The outcome of these final two refererenda resulted in the creation of a new Canton Jura, which drafted a new constitution in 1978 and came into being on January 1, 1979.[110]

Canada's Quasi-Constitutional Right of Secession

Unlike the other countries mentioned here, Canada's constitution has no express constitutional right of secession, nor does it contain any specific procedures that govern how a political subunit is to secede. Instead, Canada's constitutional rules of secession consist of a Supreme Court opinion on the legality of Quebec secession, and a statute, the Clarity Act, which essentially codifies the Supreme Court's opinion.[111]

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[107]See Jonathan Steinberg, *Why Switzerland?* 2nd ed. (Cambridge: Cambridge University Press, 1996), pp. 89–91.

[108]Steinberg, *Why Switzerland?* pp. 93–94; and Monahan and Bryant, "Coming to Terms with Plan B," p. 14.

[109]Steinberg, *Why Switzerland?* p. 95.

[110]Steinberg, *Why Switzerland?* p. 96.

[111]For the full Supreme Court opinion on Quebec secession, see "Reference re Secession of Quebec." For the full statutory text, see Bill C-20.

So while Canada has legislative guidelines for secession in place, no right of secession, either substantive or procedural, is constitutionally entrenched.

The Supreme Court Reference on Quebec Secession that came down in 1998 was requested by the Canadian federal government in reaction to an extremely close referendum vote on the secession of the province of Quebec from the rest of Canada in October 1995. In 1995, no constitutional right of secession and no procedures governing the secession of a province existed. The political thinking of the federal government was one of denial and delay since a previous referendum vote in Quebec in 1980 had resulted in a decisive vote against secession. Following the 1995 vote, the government asked the court whether the unilateral secession of Quebec was legal under constitutional and international law. The Supreme Court responded by declaring that unilateral secession is illegal under both the Canadian constitution and under international law.

According to the Supreme Court, no province has the unilateral right to secede from the rest of Canada, but secession is legal and conditional under the Canadian constitution. The Court held that secession requires three things:

1) a referendum that shows a clear majority vote in favor of secession that expresses the will of Quebec citizens to secede, based on a clearly-worded question;
2) a duty on the part of the federal and provincial governments of Canada to enter into negotiations with Quebec guided by four fundamental constitutional principles (democracy, federalism, constitutionalism and the rule of law, and protection of minority rights); and
3) the passage by the federal and provincial governments of a constitutional amendment ratifying the secession of Quebec.

The Court was careful in its opinion to stick to a generalized legal interpretation of the right of secession, and did not implement any specific or concrete procedural rules. The Court made it clear that "it will be for the political actors to determine what constitutes 'a clear majority on a clear question' in the circumstances under which a future referendum vote may be taken."[112]

[112]"Reference re Secession of Quebec," para. 162.

Two years after the Secession Reference, the "political actors" took the Supreme Court's advice, and the federal government passed the Clarity Act, 2000. The Clarity Act essentially reaffirms the constitutional secession process expounded by the Court:

1) a clear referendum vote in favor of secession,
2) a negotiation agreement between Quebec and the rest of Canada,
3) and the passage of a constitutional amendment which effects the secession itself.

Like the Supreme Court Reference, the Clarity Act does not specify any concrete rules on what constitutes a clear majority referendum vote on secession or what constitutes a clearly-worded referendum question. However, the Act does make clear *who* determines what a clear majority vote and a clear question should look like: the federal government itself, in the form of the House of Commons. In addition, the Clarity Act specifies the additional requirement that a seceding province must meet before entering the negotiation phase, namely, a clear will on the part of the seceding unit's citizens to secede. Once again, it is the federal government that decides whether the voters of a seceding province express a clear will to secede when they vote to secede. The implication here is that if either the referendum question or the will of the majority to secede is unclear, then the rest of Canada has no duty to negotiate secession with the seceding province and the secession fails.

Conclusions on the Modern Constitutional Right of Secession

No uniform method exists for effecting secession in a constitutional manner, and there is no obviously correct way to constitutionalize a right of secession. Some countries, like Ethiopia, or St. Kitts and Nevis, provide both an express constitutional right to secede along with concrete procedural rules on how to secede. Other countries, like Austria or Singapore, do not refer to secession per se, but focus more on providing concrete procedures on how to effect changes in sovereign territory, which is basically an implied procedural right of secession. Switzerland has no explicit constitutional right of secession, yet it does provide an effective means of internal secession and creation of new cantons. Finally, Canada also has no express right of secession, but a Supreme Court opinion gives secession guidelines, and a statute clarifies the Court's constitutional principles for secession.

PROBLEMS WITH THE MODERN CONSTITUTIONAL RIGHT OF SECESSION

What should be clear from existing constitutional provisions for secession is that constitutional or consensual secession does not imply an absolute, unilateral right of secession.[113] A unilateral declaration of independence (UDI) is a declaration of intent to separate from the existing state for the purpose of creating an independent sovereign state. Such a declaration is often supplemented with a secession referendum to give the secession added legitimacy. Two key aspects of a UDI are: 1) it is illegal under virtually all domestic constitutions and international law; and 2) it is executed without the consent of, or negotiation with, the remaining state.

Judging from the various constitutional provisions for secession in existence, almost none of them allow for unilateral secession, the exception being St. Kitts and Nevis. As mentioned previously, the St. Kitts and Nevis constitution provides that a referendum and legislative approval for secession be limited only to the seceding unit (the island of Nevis, in this case). The St. Kitts and Nevis constitution also settles territorial issues ex ante. This provision is fairly straightforward since the secession of one island from another is a simple territorial matter. Granted, it would be asking a lot to expect larger multinational democratic states to insert ex ante territorial provisions in the event of a secession, which would involve carving territorial borders for a newly seceded state out of a contiguous geographic landmass—a far cry from a two-island situation. However, as the case of St. Kitts and Nevis shows, an ex ante constitutional provision for post-secession territorial frontiers is conceivable if the political will exists to implement such a provision.

Aside from St. Kitts and Nevis, in all other cases where secession is constitutionally recognized, constitutional secession entails not just a referendum vote but also a negotiated settlement. This is true of Austria, Singapore, Ethiopia, and Switzerland. In the case of Canada, a formal constitutional amendment is an additional requirement necessary to effect provincial secession. Thus, we notice that the results of secession referendums in most cases are meant to be merely consultative, not binding. Monahan and Bryant explain why this is the case:

[113]For more on the distinction between consensual and unilateral secession, see Buchanan, "The Making and Unmaking of Boundaries," pp. 246–58.

> It is impossible to generalize about the effect of a secession referendum without resort to a nation's constitution. Basically, if it is silent on the subject, a referendum is consultative, if only because there is no legal basis for making it binding. Thus, most referendums are consultative in the sense that the legal status quo remains until a resulting negotiation and eventual legislative measure addresses the referendum result. As one study concludes, "binding referendums are rare in parliamentary democracies, and are best suited to countries with a tradition of direct democracy, such as Switzerland."[114]

In its opinion on Quebec secession, the Supreme Court of Canada said this on the effect of referenda:

> Although the Constitution does not itself address the use of a referendum procedure, and *the results of a referendum have no direct role or legal effect in our constitutional scheme*, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion.[115]

In its summarizing remarks, the Court reiterated its view on the legal effect of a secession vote:

> Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own.[116]

The reason why most referenda on issues like secession are treated by constitutional democracies as consultative is easy to see: It is in every state's self-interest to maintain its territorial integrity. Indeed, under current international law, the preservation of a state's territorial integrity is the overarching value, subject only to strict exceptions. For instance, legal scholar Diane Orentlicher notes that the 1960 United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples allows for the secession of territory only for

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[114]Monahan and Bryant, "Coming to Terms with Plan B," p. 12. The authors mention Denmark, which requires a qualified majority vote to make constitutional amendments that would allow for secession, but such a vote is a binding vote. On the same page, the authors also mention the United Kingdom as an example of a country where "a binding referendum is an impossibility there since Parliament cannot bind itself."

[115]*Reference re Secession of Quebec*, para. 92 (emphasis added).

[116]*Reference re Secession of Quebec*, para. 160.

purposes of decolonization, while otherwise preserving the territorial integrity of existing states.[117] Orentlicher adds that the 1970 United Nations Declaration on Principles of International Law Concerning Friendly Relations "hinted at the possibility that established states *might* forfeit their right to territorial integrity if they abused the rights of minorities."[118] Finally, international law scholar James Crawford confirms that "a state which is governed democratically and respects the human rights of all its people is entitled to respect for its territorial integrity."[119]

The treatment of referendum results as consultative rather than binding allows the remaining state to control the secession process by adding extra hurdles, such as the attainment of a negotiated agreement regarding the terms of secession. Once the negotiated agreement is attained, the actors of the remaining central state will allow the territorial and jurisdictional status quo to be changed. At best, a consultative referendum vote in favor of secession may give the seceding group the legitimacy it needs as a source of leverage in the negotiation process with the central state government, but the legitimacy of even an overwhelming "yes" vote may not be enough to clear the hurdle of negotiation. In its opinion on Quebec secession, the Supreme Court of Canada says:

> No one can predict the course that such negotiations (concerning secession) might take. The possibility that they might not lead to an agreement amongst the parties must be recognized. . . . While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached.[120]

Thus, secessionists would obviously prefer a binding referendum vote which would have the legal effect of changing the status quo without the need for subsequent negotiation with the central state government.

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[117]Diane Orentlicher, "Separation Anxiety: International Responses to Ethno-Separatist Claims," *Yale Journal of International Law* (Winter 1998), p. 41.

[118]Orentlicher, "Separation Anxiety," p. 42, emphasis added.

[119]James Crawford, "State Practice and International Law in Relation to Unilateral Secession," Expert Report filed by the Attorney General of Canada, supplement to the case on appeal in the Quebec Secession Reference, 1997, para. 67.

[120]"Reference re Secession of Quebec," para. 101.

It is apparent from looking at existing constitutional provisions for secession that the central governments charged with the creation of these rules and procedures designed them in such a way as to make secession extremely difficult or virtually impossible. Though the right of secession may exist in principle, there is little expectation on the part of actors within political institutions that such a right would actually be exercised in practice. For instance, liberal democratic philosophers Wayne Norman and Daniel Weinstock favor the legalization of secession in order to prevent secession from occurring, by means of shutting down the political momentum of secessionist movements. In this way, secession is made more costly to the seceding unit, thereby making it cheaper to accommodate the seceding unit with offers of greater political autonomy within the larger state. Norman, in particular, argues in favor of creating a constitutional secession clause to act as a choking mechanism for secessionist politics. As an example of how a choking mechanism can successfully prevent secession, Norman cites the use of a two-thirds vote requirement in the case of the failed secession of the island of Nevis from the federation of St. Kitts and Nevis:

> A two-thirds majority requirement for a vote on secession is a feature of one of the world's only explicit secession procedures, in the Constitution of St. Kitts-Nevis, a microstate consisting of two islands in the Caribbean. In 1998, a majority, but less than two-thirds, of the voters in Nevis voted to secede and the referendum therefore failed. I am not arguing that a democratic secession procedure would have a two-thirds-majority requirement, but only that it would make secession more difficult than fifty-percent-plus-one on a question drawn up by the secessionists themselves.[121]

One problem with using a high supermajority requirement as a way to choke off secession is in the arbitrary nature of the rule. For how can one argue that the "yes" vote of 61.7% in the Nevis secession attempt was not indicative of a substantial level of popular support necessary to enact (or to legitimize in preparation for further constitutional negotiation, as the case may be) secession? Is a 61.7% vote really so significantly different from a 66.7% vote requirement that the seceding side must concede defeat? On the other hand, one may argue that so long as a two-thirds requirement is clear to all parties ex ante, then all parties agree to respect the final result, even if it is 66.6%, which would still fall short of a 66.7% vote requirement.

[121]Norman, "Secession and (Constitutional) Democracy," p. 4.

A major concern with the constitutional treatment of secession within multinational democratic states is the ability of the legislative branch to defer the issue of delineating a secession right to the judiciary. As the sole arbiter of what is or is not constitutional in most Western-style democratic states, the judicial branch can use its power to manipulate the substantive and procedural nature of a right of secession in favor of the central state vis-à-vis any provinces or other political subunits with secessionist tendencies. Once the high court ruling on secession is made, the legislative branch can treat the Court's opinion on secession as legitimate and then proceed to pass legislation that mimics the judiciary's decision.

Canada provides a prime example of institutional manipulation of the right of secession. In response to the close vote on Quebec secession in 1995, the Canadian federal government requested a constitutional opinion on secession from the Supreme Court of Canada. In doing so, the federal government asked the Court three questions:

> 1. Under the Constitution of Canada, can the National Assembly, legislature, or government of Quebec effect the secession of Quebec from Canada unilaterally?
> 2. Does international law give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
> 3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature, or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?[122]

For our purposes, we will focus on the first two questions asked of the Court by the federal government: Can Quebec unilaterally secede from Canada under either Canadian or international law? Now, would any supreme court in any democratic state be expected to answer these questions in the affirmative? Not at all. The reason is provided by Murray Rothbard who, in citing Professor Charles Black, demonstrates that:

[122]"Reference re Secession of Quebec," para. 2.

> The State has been able to transform judicial review itself from a limiting device into a powerful instrument for gaining legitimacy for its actions in the minds of the public. If a judicial decree of "unconstitutional" is a mighty check on governmental power, so too a verdict of "constitutional" is an equally mighty weapon for fostering public acceptance of ever-greater governmental power.[123]

Applying Rothbard's insight to the Quebec Secession Reference, we see that the Canadian federal government used the Supreme Court's power of judicial review to create legitimacy for the idea that unilateral secession is illegal under domestic and international law. In this case, the Court's judgment of unilateral secession as "unconstitutional" is the "mighty weapon for fostering public acceptance" of the idea that the secession of Quebec from Canada requires a legal duty to negotiate the terms of secession—on the part of Quebec, the federal government, and the remaining provinces—before a constitutional amendment could be passed ratifying Quebec secession.

In its Reference on Quebec Secession, the Supreme Court claims to have discovered the duty to negotiate as resulting from four constitutional principles of equal weight: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. Although most scholars treat the Court's analysis of these four principles as a given, there are a few who question the Court's basis for choosing these principles as the ones that imply a duty on Quebec and the rest of Canada to negotiate secession. This flimsiness in the Court's reasoning raises further doubt as to whether the Court engaged in serious legal analysis or merely served as a legitimizer of a heavily qualified secession procedure.[124]

The Canadian federal government could have gone ahead without the consent of the judiciary and amended the Constitution ex ante to allow for the secession of a province by using the appropriate constitutional amending formula. However, it chose to refer the question of secession to the Court instead so it could legitimize the idea of conditional, negotiated secession as opposed to unilateral secession. Unlike the Canadian experience with secession, the Swiss Canton Berne took

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[123]Rothbard, *For a New Liberty*, p. 65.

[124]For a more detailed treatment of the Court's secession analysis, see Dan Usher, "The New Constitutional Duty to Negotiate," *Policy Options* (January–February 1999), pp. 41–44; and Dan Usher, "Profundity Rampant: Secession and the Court, II," *Policy Options* (September 1999), pp. 44–49.

the decisive step of passing an actual constitutional amendment to allow cantonal districts and communes to vote on whether to remain with their existing canton or to create a new canton.

The ability of the Canadian federal government to use its Supreme Court in this way is also easily explained by Rothbard when he notes:

> The concept of parliamentary democracy began as a popular check on the absolute rule of the monarch. The king was limited by the power of parliament to grant him tax revenues. Gradually, however, as parliament displaced the king as head of State, the parliament itself became the unchecked State sovereign.[125]

This transfer of power from King to Parliament is exactly what has occurred in Canada. In fact, the power has transferred even further, from Parliament to the Prime Minister.[126] Canada's Prime Minister, as the "unchecked State sovereign" of Canada, was thus able to use the Supreme Court to get the desired legal opinion on the issue of Quebec secession.[127]

The Supreme Court issued its opinion on secession in 1998, and two years later, the Canadian federal government passed the Clarity Act. Although the Clarity Act is supposed to "clarify" the meaning of the Supreme Court's Secession Reference, the Act gives the federal House of Commons the power to decide whether a province's referendum vote to secede results in a clear majority to secede based on a clearly-worded question. The Act does not specify whether the referendum decision rule is to be a simple majority or a supermajority, nor does it give specifics as to how secession negotiations are to be handled. It merely stipulates that the federal government would be the key negotiator in the event that a province votes to secede from Canada. And the Act does not specify which amending formula is to be used

[125]Rothbard, *For a New Liberty*, p. 65.

[126]For more information on the collapse of parliamentary democracy and the emergence of prime ministerial-dominated government in Canada, see Donald J. Savoie, *Governing from the Centre: The Concentration of Power of Canadian Politics* (Toronto: University of Toronto Press, 1999).

[127]Although the Quebec secessionists treated the Supreme Court's opinion as a vindication of their right to secede and thereby claimed a political victory, this fact does not change the validity of the preceding Rothbardian analysis of the State's ability to use the judiciary as a way to legitimate its actions in the minds of the public.

to ratify the secession of Quebec from Canada. Ironically, it seems, the final consequence of the Canadian federal government's treatment of the secession issue is more ambiguity and less clarity.[128]

As noted above, the secession provisions contained in many constitutions today are riddled with procedural hurdles that make the likelihood of actual secession by constitutional means very low. To rectify these problems of constitutional design, the following series of solutions is offered, which, although no politician would likely enact them, are nevertheless constitutionally ideal.

SOLUTIONS TO PROBLEMS WITH THE MODERN CONSTITUTIONAL RIGHT OF SECESSION

There are many possible solutions to the problems listed above. I will deal with several such solutions, which fall into two general categories: *De Jure* Secession and *De Facto* Secession.

De Jure Secession

The most obvious solution to constitutional secession problems is to solve them constitutionally. A few points are worth mentioning in this regard.

Ex Ante Constitutional Amendment

The enactment of an ex ante constitutional amendment to allow for secession would provide the legal foundation to govern any future change in a state's territorial frontiers resulting from the secession of a portion of its citizens. Having such a rule would create certainty in the law on the issue of secession, and would pave the way for a legal and peaceful transformation of government. Of course, one disadvantage of this solution is the potential difficulty of its implementation, especially within federal or multinational democratic states. As Wayne Norman explains:

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[128]For the Canadian federalist/anti-secessionist perspective on the clarity of the Clarity Act, see Patrick J. Monahan, "Doing the Rules: An Assessment of the Federal Clarity Act in Light of the Quebec Secession Reference," *C.D. Howe Institute Commentary* 135 (February 2000). For the Quebec nationalist perspective, see Claude Ryan, "Consequences of the Quebec Secession Reference: The Clarity Bill and Beyond," *C.D. Howe Institute Commentary* 139 (April 2000).

> A normal constitutional amending procedure could always be used to write a subunit out of the constitution, so to speak, by changing the international frontiers of the state to exclude the territory in question. This procedure would not always be fair to secessionist regions, however, because a typical amending formula gives veto powers to the central government, and in federations to the other subunits.[129]

The province of Quebec has continuously faced this problem since joining the Canadian Confederation. As a minority province relative to the federal government and the other nine provinces on constitutional matters, Quebec has failed to get the approval required from the other provinces for a whole series of failed constitutional initiatives designed to reaffirm Quebec's place within Canada. Now, according to the Clarity Act statute, Quebec would face this problem again in its effort to secede because amending the Canadian Constitution to allow for Quebec's secession requires the approval of the federal government and at least a majority of the nine other provinces. But if such an amendment can be passed ex ante, like the constitutional amendment passed in Canton Berne allowing for the subsequent series of plebiscites that created Canton Jura, then all of this political and legal uncertainty regarding secession would disappear.

Of course, the successful application of an ex ante constitutional right of secession is a separate issue. After all, there is no guarantee that the remaining states or provinces in a federal union would consent to the reality of secession. The 1861–1865 War Between the States is a testament to that. Nevertheless, Robert McGee has argued that had there been an explicit constitutional right of secession in the U.S. Constitution at the time of the War Between the States, it is possible that the war, and the resulting deaths and property damage, could have been avoided.[130]

Specify in the Constitution Who Can Secede

Virtually none of the constitutions today that contain some provision for secession make an express mention of who can secede. In most cases, it is assumed that any political subunit with constitutional status, like a state or a province, has the right to secede, or at least the right to attempt to secede. The one exception to this might be the Ethiopian Constitution, which allows both smaller tribal groups as well as larger

[129]Norman, "Secession and (Constitutional) Democracy," p. 5.

[130]McGee, "Secession Reconsidered," p. 23.

sovereign ethnic States to secede. However, no constitutions with secession provisions expressly state that a city, district, community, neighborhood, or individual has the right to secede from the existing central state.

Clearly, no political actors within any state, democratic or otherwise, would give much consideration to implementing a constitutional rule that may potentially lead to the total disintegration of the state. Nevertheless, constitutional recognition of the rights of smaller groups within society could make secession more effective in situations in which a significant bloc of the populace actually desires it.

Permit Secessionists to Determine the Territorial Area for a Secession Vote

Liberal democratic philosopher Harry Beran, as part of his liberal theory of secession, is acutely aware of the inherent problems with using majority voting to determine the secession of a group of citizens from an existing state. He illustrates the problem with the following example:

> Let there be a separatist movement in North Wysteria, a region of the State of Wysteria. In a plebiscite, the majority of North Wysterians vote for secession. So, perhaps, North Wysteria should be allowed to secede. But let there also be a region of North Wysteria, called North West Wysteria, in which a majority voted against secession. Therefore, perhaps North Wysteria should not be allowed to take this part of its territory into independence. So, it seems, the majority principle gives incompatible results unless the potentially seceding region can be specified independently of the majority principle to be used for determining whether a presumption for permitting secession exists.[131]

A noteworthy real world example of Beran's Wysteria case involves the close secession referendum result in Quebec in 1995. Since there was no established majority vote principle in place at that time, it was an open question whether a simple majority of 50% plus one would be enough for Quebec to begin secession negotiations with the rest of Canada. The Quebec separatist side certainly felt that the simple majority was enough, but the federalist side hedged on whether a 51% "yes" vote would have prompted the Canadian federal government to negotiate. As Wayne Norman notes:

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[131]Beran, "A Liberal Theory of Secession," p. 29.

> On the question of secession, successive federal governments, like the Constitution itself, largely remained silent. Senior federal politicians played active roles on the "No" side in both the 1980 and 1995 referendum campaigns, thus legitimizing both elections to a significant extent. However, they never laid out an official policy about how they would respond if more than 50% of the voters voted Yes. They (literally) prayed that that would not happen, and were shocked when it almost did.[132]

The major reason why the 1995 vote result turned out the way it did was because the eligible voting population spanned the entire provincial territory of Quebec, which included heavily non-secessionist communities in Northern Quebec, the city of Montreal, and the Eastern Townships. It turned out that the overwhelming vote against secession in heavily-Anglophone Montreal was the deciding factor in the narrow defeat of the secession initiative.

If the Quebec separatists had won the 1995 referendum vote, it would have been an example of Norman's fear that " if there are no explicit constitutional rules in place to govern (secession) . . . then secessionists will be able to set and in some sense legitimize many of the 'rules' themselves."[133] Fortunately for Norman and his fellow federalists, and unfortunately for the Quebec secessionists, the opportunity in 1995 for Quebec secessionists to legitimize the rules of secession never came to pass.

As Beran notes, the use of a majority vote rule in determining whether a group of individuals can secede appears to "give incompatible results" because some portions of seceding territory may vote solidly pro-secession while other portions may vote solidly anti-secession. How to resolve this difficulty? Beran offers the answer:

> This difficulty can be overcome by making the use of the majority principle "recursive." Let the separatist movement specify the area in which a plebiscite is to be held, e.g., North Wysteria. Assume there is a majority for secession and that secession is granted in principle. Now any area of North Wysteria must in turn be permitted to vote on whether it wishes to secede from North Wysteria (and stay with what is left of Wysteria, if they wish). If the majority of, say, North West Wysterians does not wish to be part of the independent state of North Wysteria, any region of

[132]Norman, "Domesticating Secession," p. 12.

[133]Norman, "Domesticating Secession," p. 13.

> North West Wysteria could in turn vote whether to secede from North West Wysteria etc. This "recursive" use of the majority principle over any territory specified by a separatist movement must give a determinate and consistent result.[134]

Here, we clearly see the applicability of Beran's "recursive" theory to the 1995 Quebec secession situation. If the Quebec National Assembly had resolved instead to hold a secession referendum vote in only the central regions of Quebec where support for secession was the strongest, then the secession initiative would almost certainly have received overwhelming public support, and legitimacy for secession would have been attained.

Under all existing Canadian legal treaties, the current territorial borders of Quebec fall under the jurisdiction of the Quebec provincial government. Some analysts, like John Remington Graham, argue that any threat to take territory from Quebec during secession negotiations would be a violation of the international law protection of a state's territorial integrity.[135] While it is possible that Graham's analysis may be legally correct, if the Quebec government is truly serious about seceding from Canada, the practicality of achieving Quebec secession may mean sacrificing the territory encompassing northern Quebec and Montreal. It is quite possible that the Quebec government's refusal to hold a secession referendum only in Francophone Quebec was an indication that Quebec was not truly serious about seceding, and more concerned with trying to extract greater internal political autonomy from the federal government and remain within the Canadian state. Therefore, even Quebec secessionists may favor a legal rule that limits who can secede from Canada to only provinces and no smaller group.

The likelihood that any constitutional democracy would adopt a constitutional rule allowing for any small group of citizens or even an individual to specify the territorial area for secession is, of course, extremely low. No central state government wants to lose jurisdiction over any part of its territory because it is not in their nature to do so. Hans-Hermann Hoppe explains:

> A state is a territorial monopolist of compulsion—an agency which may engage in continual, institutionalized property rights violations and the exploitation—in the form of expropriation, taxation, and regulation—of private property

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[134]Beran, "A Liberal Theory of Secession," p. 29.

[135]Graham, *A Constitutional History of Secession*, p. 441.

> owners. Assuming no more than self-interest on the part of government agents, all states (governments) can be expected to make use of this monopoly and thus exhibit a tendency toward increased exploitation (and internal taxation). On the other hand . . . it means territorial expansionism. States will always try to enlarge their exploitation and tax base.[136]

Additionally, no state or province wants to lose jurisdiction over any part of its territory for the same reason. As long as only subunits with constitutional status are allowed to attempt secession, the chance of secession grounded in the rule of law ever happening is virtually zero. Thus, the limitation of eligibility for secession to relatively large-sized, political subunits with constitutional status acts as a means for the central state (and, in some cases, even the seceding subunit) to delegitimize and defuse secessionist political movements.

As demonstrated in Switzerland with the creation of Canton Jura in the 1970s, a workable procedure exists for changing jurisdictional boundaries through a series of plebiscites at local, district levels. This procedure worked for the secession of districts from Canton Berne and their subsequent amalgamation into a new Jura Canton. All of this activity occurred within the frontiers of the Swiss state, as an example of internal secession.[137]

However, a true innovation would be to extend via constitutional amendment the Jura procedure of sequential plebiscites to the realm of external secession, that is, the secession of political subunits from existing central states for the purpose of becoming newly independent sovereign states. Such a legal procedure would work to solve the problem of "trapped" minorities within newly seceded states, a problem that most scholars of secession never cease to point out. With a Jura procedure at hand, minorities trapped within seceded states would have the means to vote in a series of plebiscites on whether to remain with the predecessor state, or to join the seceding state, or even to form their own independent political entity. The Jura procedure can also avoid the potential problem of enclaves by allowing for the creation of new sovereign political entities over contiguous territory.[138]

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[136]Hoppe, *Democracy—The God That Failed*, p. 107.

[137]For a more detailed discussion of secession within existing state frontiers, see Robert W. McGee, "Secession as a Tool for Limiting the Growth of State and Municipal Government and Making it More Responsive: A Constitutional Proposal," *Western State University Law Review* 21 (Spring 1994), pp. 499–513.

[138]Monahan and Bryant, "Coming to Terms with Plan B," p. 14.

De Facto Secession

Although the previous solutions mentioned to rectify the inherent flaws of current constitutional provisions for secession are certainly ideal from a legal standpoint, it seems highly unlikely that they would be voluntarily implemented by political actors who have no interest in providing the constitutional means for what they would perceive to be the potential disintegration of the prevailing democratic state. But what if it is demonstrated over time that existing constitutional provisions for secession, encumbered as they are by numerous procedural and substantive barriers, are ineffective in allowing seceding majority or minority groups to peacefully withdraw from the state, regardless of how justified the cause for secession might be? What then would be the alternative solutions for groups who truly desire secession and no longer wish to remain within the existing state?

The Effectivity Principle

In its 1998 Reference on Quebec Secession, the Supreme Court of Canada did account for one possible scenario arising from the possibility of Quebec unilaterally declaring its independence from Canada. The Court was responding to an argument based on the principle of "effectivity," which suggested that:

> The National Assembly, legislature, or government of Quebec could unilaterally effect the secession of that province from Canada, but it was not suggested that they might do so as a matter of law; rather, it was contended that they simply could do so as a matter of fact.[139]

In response to the effectivity principle argument, the Court spelled out the following:

> Although under the Constitution there is no right to pursue secession unilaterally, that is secession without principled negotiation, this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community.[140]

Thus, the Court found it conceivable that a political subunit with constitutional status could unilaterally declare independence from the

[139]"Reference re Secession of Quebec," paras. 148–54.

[140]"Reference re Secession of Quebec," para. 164.

existing central state, albeit unlawfully, while ultimately achieving international recognition of its borders, assuming it could effectively assume control of its territory.

Whether a state or a province actually succeeds in becoming an independent state through extra-legal means is, of course, a separate issue. Historically, the success rate for unilateral declarations of independence has been extremely low.[141] This is largely because secessionists that unilaterally withdraw from the larger state have little choice but to engage in warfare with the larger state to determine which side wins control of the contested, seceding territory.

Private Guerilla Warfare

In addressing the problem of potential war resulting from an unlawful, unilateral declaration of independence by secessionist forces, Jörg Guido Hülsmann has offered a theory of secession by means of private guerilla warfare as a way for secessionists to overcome the larger military strength of the central state. Hülsmann argues that the maintenance of decentralized militia leadership and strictly contractual relations with the local population in order to gain the population's support gives secessionist warriors the best chance of freeing themselves from the hegemonic bonds of the larger state. He concludes that victory by secessionist forces would depend on how economically efficient they become in mobilizing themselves by using "the three forms of concentration known from civil business: (1) growth, (2) merger, and (3) joint venture."[142]

CONCLUSION

We notice from history and the present day that when secession is treated as a constitutional right, it is often subordinated to the immediate political interests of those who are faced with secessionist movements or threats of secession. In rare cases is the constitutional right of secession both recognized and respected by states. From seventeenth century Europe starting with the Dutch secession from Spain until the

[141]See James Crawford, "State Practice and International Law in Relation to Unilateral Secession," Expert Report filed by the Attorney General of Canada, supplement to the case on appeal in the *Quebec Secession Reference* (1997). According to Crawford, only one country since 1945, Bangladesh, has successfully seceded on a unilateral basis.

[142]Hülsmann, "Secession and the Production of Defense," p. 412.

defeat in 1865 of the Confederacy by Union forces in the American War Between the States, there was widespread recognition and acceptance of the idea of Althusian federative political order, which allowed for a multiplicity and hierarchy of social orders co-existing within the same territorial area. The existence of a coercive, monopolistic state to protect individual liberty was considered both unnecessary and potentially tyrannous. As such, secession as a constitutional right was implied de jure, at least in the United States prior to 1861.

With the lingering centralizing influence left from the French Revolution and the decisive Union victory over the Southern states in 1865, the ideology of political order shifted from Althusian federalism to Hobbesian unitary and centralized Leviathan. Today, the issue of whether the right of secession should be constitutional is determined largely by a Hobbesian conception of political order that requires the existence of nation-states characterized as coercive territorial monopolies. Liberal democracy, as the dominant political paradigm, depends on the structure of the centralized state as the necessary means to carry out its values of egalitarianism and distributive justice. The claim made by liberal democrats is that constitutional democracy is the best method to guarantee the universal and equal human rights of individuals and groups, as well as free entry for all in the arena of democratic politics. Since democracy constrained by constitutional rules is the best available system by which to protect human rights, any individuals within a democratic state who wish to secede have no moral cause to do so because they already find themselves living in a perfectly or reasonably just society.

The influence of the Hobbesian view of government on liberal democratic thought leaves little room for a right of secession. Since individuals, by entering into a social contract, consent to rule by a sovereign for collective security and justice, any action to withdraw from or revoke this contract would lead to anarchy. Herein lies the challenge for liberal democrats: how to incorporate some legal provision for secession when the Hobbesian premise of democratic governance does not allow for it.

However, facing this challenge on a theoretical level is moot because the political reality is that secessionist movements do exist, even in liberal democratic states that theoretically should not be spawning such movements. Liberal democrats are forced to deal with the issue of secession despite the existence of the “perfectly just” democratic state. They have come down both for and against making a right of

secession constitutional, while maintaining their common goal of suppressing or preventing secession. Many of the constitutional rights and procedures for secession that exist in nation-states today are so heavily qualified and limited that the actual implementation of constitutional secession of people and territory is almost certain to fail.

As the ideological competitor to liberal democracy, Austro-libertarianism offers an interpretation of Hobbesian political order that demonstrates the harmful politico-economic consequences of the centralized and coercive democratic state. This alternative perspective reopens the door for relegitimizing the morality and legality of secession. Secession in the Austro-libertarian conception works to undo the centralized structure of democratic states, and to reintroduce a more Althusian conception of pluralistic federal governance.[143]

While some Austro-libertarians, as previously discussed, argue in favor of legal secession as the natural consequence of its moral legitimacy, the existence of an explicit constitutional right of secession gives no assurance that secession could be practically achieved in a lawful and peaceable manner. First, the central government can always choose to use force against secessionists to prevent the withdrawal of people and territory despite the existence of a constitutional secession right. The American War Between the States and the USSR provide historical examples of this. Second, even if constitutional secession is adhered to, the constitutional provisions can be designed and influenced by the central government in such a way that the secession of a political subunit with constitutional status, like a province or state, is made virtually impossible. For these reasons, some Austro-libertarians, like Hans-Hermann Hoppe, favor secessions at smaller levels of social and political authority, regardless of their legality, as a less-threatening way to dismantle the territory and legitimacy of the centralized democratic state.

Thus, what we realize by looking at the political theory and history of constitutional secession is that de jure secession may not necessarily be a superior strategy to de facto secession.

[143]For a full discussion of the various economic, monetary, political, and cultural benefits of secession, see Hoppe, *Democracy—The God that Failed*, esp. the chapter on "Centralization and Secession," pp. 107–20.

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