

The Idea of Early-Conflict Constitution-Making: The Conflict in Ukraine Beyond Territorial Rights and Constitutional Paradoxes

By Zoran Oklopčič*

Abstract

Using the crisis in Ukraine and the annexation of Crimea as a foil, the aim of this article is three-fold. First, it offers an internal critique of the influential answers that normative theory and international jurisprudence provide to the paradox of constitutionalism. Second, building on critical engagement with these approaches, this article mobilizes constitutional theory to find a constructive response to the crisis in Ukraine that goes beyond the prescriptions offered either by normative theory or international jurisprudence. In doing so, it seeks to sketch a broad constitutional framework not for *post* but rather for *early*-conflict constitution-making. The final aim of this article is to contribute to a richer self-understanding of constitutional theory vis-à-vis its disciplinary neighbors.

A. Introduction: The Crisis in Ukraine and the Paradox of Constitutionalism

With President Yanukovich safely on his way to Russia, the post-revolutionary *Verkhovna Rada* adopted Law No. 4163, which restored the 2004 amendments to Ukraine's Constitution and, together with them, its parliamentary system of government. Most of the other fundamental commitments in Ukraine's Constitution remained the same, including perhaps the most important among them: A commitment to the ideal of popular sovereignty. As written in the original Article 5, "[T]he right to determine and change the constitutional order in Ukraine belongs exclusively to the people and shall not be usurped by the State."¹

This intuitively attractive, commonsensical political claim—variations of which have been entrenched in a number of modern constitutions—has increasingly been recognized as question begging in contemporary constitutional theory. If it is true that "a [c]onstitution

*Associate Professor, Department of Law and Legal Studies, Carleton University, Ottawa (zoran.oklopčič@carleton.ca). This article profited from probing comments by Karlo Basta, Sujit Choudhry, Helena Kolozetti, and the participants in the colloquium, "The Crisis in Ukraine: Between Law, Power and Principle" hosted by the Miller Institute and the Center for Constitutional Transitions at the Berkeley School of Law on 13 February 2015. The usual disclaimer applies.

¹ THE CONSTITUTION OF UKRAINE 1996, art. 5.

constitutes the People who in turn constitute it,"² we may be impelled to treat the very invocation of the people—its constituent power and ultimate authority—not as a political ideal, but rather as an "elaborate conjuring trick."³ While the constituent power of the people of Ukraine cannot be "usurped" by the State's constitutional order, that very order is the condition of the people's existence. What is more, in defining the very identity of "the people," the constitution seems to prefigure and limit its fundamental political choices. If that is indeed the case, how can we insist on the legitimacy of the claims of peoplehood if they rely on an unacknowledged circularity? Committed to the idea of popular self-government, constitutional theory appears incapable of answering which came first: The "egg" of the Ukrainian people or the "chicken" of Ukraine's Constitution. The crisis in Ukraine is constitutional theory's paradox.

Even if we insisted on the useful aspirational quality of the constitutional vocabulary of peoplehood, we might still be driven to accept its uncomfortable implications. If a "constitutionalized collective political identity is necessarily malleable and fluid," the constitutional form given to it "cannot be regarded as unassailable."⁴ In that case, the authority of constitutional form must rely on its "continuing capacity faithfully to reflect that collective political identity."⁵ But what happens to the authority of such a constitutional order when a fluid and malleable identity fractures and disappears, and competing political identities crystallize instead? What might "reflection" mean in that context? At this point, constitutional theory becomes silent and incapable of arbitrating between competing assertions of the constituent power by the peoples of Ukraine, Russia, Crimea, Donetsk, and Lugansk.

From the vantage point of constitutional theory's disciplinary neighbors, however, the entire debate about constitutionalism's paradox appears misconceived from the start. Though normative theories of territorial rights are diverse and mutually conflicted, they nonetheless offer concrete answers about which people has a right to establish an independent constitutional order over which territory.⁶ Equally, international

² Duncan Ivison, *Pluralism and the Hobbesian Logic of Negative Constitutionalism*, 47 *POL. STUD.* 81, 84 (199d9).

³ MARTIN LOUGHLIN & NEIL WALKER, *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 4 (2007).

⁴ *Id.* at 3.

⁵ *Id.*

⁶ Amandine Catala, *Secession and Annexation: The Case of Crimea*, 16 *GERMAN L.J.* 581, 602–03 (2015) (providing a rare direct confrontation of that difficulty from the perspective of normative political theory, stating:

There is indeed, to some extent, some circularity at play in the idea of self-determination and peoplehood, as several contributors to the present volume note in the context of international law and of constitutional theory, respectively: Self-determination presupposes the very self or people that is supposed to emerge from it; the

jurisprudence offers justification for legal norms that enable us to endorse one assertion of peoplehood over another. In doing so, both disciplines implicitly speak to constitutional theory. In different ways and for different reasons, they unintentionally “solve” its central paradox.

From the perspective of the inter-disciplinary division of labor, the crisis in Ukraine presents not only a high stakes geopolitical conflict, but also a theoretical opportunity. It is an occasion to confront three neighboring disciplines: Constitutional theory, normative theory, and international jurisprudence. They all share a central part of their vocabulary—“the people”—but they have yet to speak to each other.

Using the crisis in Ukraine, and specifically the annexation of Crimea as a foil, the aim of this article is three-fold. First, it offers an internal critique of the influential answers that normative theory and international jurisprudence give to the paradox of constitutionalism. Second, this article mobilizes constitutional theory to find a constructive response to the crisis in Ukraine that goes beyond the prescriptions offered either by normative theory or international jurisprudence. In doing so, it seeks to sketch a broad constitutional framework not for the “post,” but rather for *early*-conflict constitution-making. The final aim of this article is to contribute to a richer self-understanding of constitutional theory, which, while undergoing a “remarkable revival,”⁷ continues to suffer from an “identity crisis” as “its point and method remain obscure.”⁸ In confronting it with its disciplinary neighbors this article will try to sharpen its distinctiveness.

This article addresses these themes as follows: Part B offers a critique of the nationalist theory of territorial rights. Part C focuses on the critique of the legitimate state theory of territorial rights. While examining these two theories, the article engages the understandings of moral rights to self-determination that enjoy most purchase not only within disciplinary debates, but which also most faithfully correspond to how most

constitution constitutes the people that constitutes it. But I am not sure that either logical or chronological priority is what ultimately matters here. Rather, the issue is ultimately a normative one: peoples rightfully exercising political self-determination. If what results from the mutually constituting interaction between self and determination (or between people and constitution) are institutions that track the interests of the people they are supposed to represent, then if there is any circularity, it is a virtuous rather than a vicious one. And the relevant self or people will speak up to break up the circle if it becomes vicious rather than virtuous: *i.e.*, if it runs counter to, rather than serves, the rightful exercise of political self-determination.

⁷ Martin Loughlin, *Constitutional Theory: A 25th Anniversary Essay*, 25 OXFORD J. LEGAL STUD. 183, 183 (2005).

⁸ NICK BARBER, *THE CONSTITUTIONAL STATE 2* (2010).

participants in the struggles on the ground understand their claims. Part D engages with what I take to be the most promising and theoretically grounded defense of territorial integrity in international jurisprudence. Building on the critique of the contributions of the nationalist and legitimate state theories in Part E, I sketch a distinct perspective of constitutional theory that embraces both the normative ideals hidden behind the vocabulary of right, as well as the prudential justification for insisting on existing states' territorial integrity, but proposes to mediate them in a different way. The article concludes in Part F by offering an idea of constitutional theory's relationship with the two disciplines that surround it.

B. Nationalist Theory of Territorial Rights

For nationalists of different stripes, the idea that a nation has a right to a particular territory is a potent and frequently used means to justify the legitimacy of territorial claims. In Ukraine, the assumption of an ethnic nation's territorial rights informs the claims of every side in the conflict. Throughout the 1990s, various demands for regionalization of Ukraine were habitually rejected by invoking the rights of the indigenous Ukrainian nation over the "Ukrainian land."⁹ More recently, Russian President Putin has used the same vocabulary, calling Crimea sacred Russian land.¹⁰ Finally, for the representative of the Tatar Mejlis in Crimea, the peninsula belongs to neither nation: It is "not Ukrainian land, it's not Russian land; [it] is Crimean Tatar land."¹¹

Irrespective of its frequent association with radical nationalism, the vocabulary of a nation's territorial rights is one of the dominant ways to justify concrete claims of territorial sovereignty in normative political theory. According to David Miller, a nation's moral right over a territory is generated through a sequence of acts whereby a nation materially improves the land or endows it with symbolic meaning.¹² Nations build cathedrals and monasteries; its poets sing about localities that carry spiritual and political importance for the nation's self-understanding. Collectively, and over time, the members of a nation clear the land, build dams, bridges, and irrigation systems, and as a result acquire a territorial right over the land they have so transformed. These symbolic and material acts provide the "ethical force" that justifies national jurisdiction over both the territory and its physical shape.¹³

⁹ ANDREW WILSON, *UKRAINIAN NATIONALISM IN THE 1990s: A MINORITY FAITH* 164 (1997).

¹⁰ *Putin Assails West, Hails Crimea As "Sacred" Russian Land In Address*, RADIO FREE EUR. RADIO LIBERTY (Dec. 4, 2014), <http://www.rferl.org/content/russia-putin-address-west-crimea/26724829.html>.

¹¹ *Fear Is In The Air Among Crimean Tatars*, RADIO FREE EUR. RADIO LIBERTY (Mar. 2, 2014), <http://www.rferl.org/content/fear-is-in-the-air-among-crimean-tatars/25282748.html>.

¹² David Miller, *Territorial Rights: Concept and Justification*, 60 *POL. STUD.* 252, 258 (2012).

¹³ *Id.*

Nationalist theory, however, is inadequate for three main reasons. First, in many cases—visible especially in Ukraine—it remains insensitive to complications that arise from mutations in national self-consciousness. Second, it is incapable of justifying a nation's moral right over an integral territory. Finally, nationalist theory of territorial rights is incoherent because for it to make sense in liberal democracies the claimant of the right—an ethnic nation—must “die” in order for its recipient—the territorial people—to enjoy that right.

1. Mutations in Political Sentiment and Historical Continuity

Like all political theories, nationalist theory of territorial rights rests on simplifications. It postulates the existence of a national collective whose members across generations share the same national consciousness. In some cases, this account of nationhood may raise no practical difficulties: There are circumstances where national consciousness emerges early and continues unaffected by long lasting political encounters with other nations or with other larger imperial or federal structures. However, in most countries—especially those plagued by conflict over territory—it is difficult to take the postulated historical continuity of a nation for granted. For example, there is no way to objectively establish whether present-day “ethnic” Ukrainians are truly the “heirs” to the medieval or early modern Slavic population of present-day Ukraine, whose national consciousness had yet to be developed during centuries of rule under the Kievan Rus and Polish-Lithuanian Commonwealth.

In fact, the history of “material improvements” to land in a particular region may give rise to politically salient but non-national identities, further undermining the simplistic relationship between a putative trans-generational nation and its ongoing work to improve the land. For example, the pattern of economic life in the mining region of Donbass—located in Eastern Ukraine, and marked by the heritage of Soviet communism and a center-periphery dynamic within an independent Ukraine—has contributed to a fluid *regional* identity. While the region overwhelmingly supported independence in 1991, the crisscrossing cleavages between ethnic, linguistic, and cultural identity have made the advance attribution of a political—or national—identity to a discrete group almost impossible.

As many commentators have already noticed, to assume that the territorial conflict in Ukraine is a conflict between “Ukrainians” and “Russians” distorts the political reality because Ukrainian citizens identify with various ethnicities, cultures, and political projects. In Donetsk, for example, fifty-eight percent of the population has declared themselves ethnically Ukrainian, thirty-five percent Russian, and six percent “Other.” In linguistic terms, only ten percent of the population speak Ukrainian as their mother tongue, in contrast to seventy-three percent Russian and ten percent “Other.” Finally, in cultural

terms, thirty-five percent of the population embrace Russian identity, twenty-one percent Ukrainian, twenty-three percent Soviet, and ten percent "Other."¹⁴

The composite and fluid nature of the political identity of the population of the region, however, does not mean that such a population cannot be decisively and quickly mobilized toward the goal of territorial separation—something we usually attribute to multigenerational "nations." In fact, empirical research shows that the most reliable predictor of political preferences and regional cleavages has not been ethnic or linguistic affiliation, but rather the attitude towards momentous political episodes in Ukrainian and Soviet history.¹⁵ An affirmative or negative view of the Bolshevik revolution, the Holodomor, or Ukrainian statehood in the Second World War is the crucial polarizing judgment that transforms fluid groups into "nations" for political purposes. Though there is no reliable empirical research to corroborate this claim, it is reasonable to postulate that what radicalizes these groups to begin making territorial demands are affronts made to their views of particular historical episodes and not an enduring ethno-national sense of collective political subjectivity.

This is a problem for the nationalist theory. Even in the absence of discrete "nations," territorial conflict may be real, and the grassroots political feelings that animate it can be genuine. In cases where political antagonism has spatial contours, one of the politically sensible solutions would be to reconfigure territorial control as part of a comprehensive constitutional solution, the contours of which I will offer in Part E of the article. Unable to identify the requisite "nation," however, the nationalist theory remains silent before land grabs and power politics.

II. The (Im)possibility of Territorial Integrity: The Palimpsest and the Patchwork

But even if we regarded the fluidity of political identities in Donetsk and Lugansk as an anomaly, the nationalist theory of territorial rights would still be unable to offer an account of a legitimate, spatially integral territory. The first reason arises from the complex nature of multigenerational contributions to the material improvement of land. For example, one could argue that material improvements in Ukraine after 1945 were enabled by the military sacrifices made by all nations of the Soviet Union in their struggle against Nazism. Even if we understood material improvement in a more narrow sense, in many cases such improvement occurred through a morally ambiguous interaction between members of different nations. For example, though many villages and towns in Crimea

¹⁴ Taras Kuzio, *Nationalism, Identity and Civil Society in Ukraine: Understanding the Orange Revolution*, 43 *COMMUNIST & POST-COMMUNIST STUD.* 285, 291 (2010).

¹⁵ See Ivan Katchanovski, *Regional Political Cleavages, Electoral Behavior, and Historical Legacies in Post-Communist Ukraine*, in *ASPECTS OF THE ORANGE REVOLUTION III: THE CONTEXT AND DYNAMICS OF THE 2004 UKRAINIAN PRESIDENTIAL ELECTIONS* 55 (Ingmar Bredies et al. eds., 2007).

were created over time through local Crimean Tatar effort, Marcin Broniewski—a sixteenth-century Polish traveler and diplomat—reported that “the Tatars seldom cultivated the soil themselves, with most of their land tilled by Hungarian, Ruthenian, Russian, and Walachian (Moldavian) slaves.”¹⁶ In this case, nationalist theory cannot justify a territorial right of any nation to a particular piece of land and would probably weaken—counter-intuitively from a moral point of view—contemporary claims of Crimean Tatars to some form of territorial jurisdiction in the peninsula. In any case, the vision of territory that emerges from the vantage point of nationalist theory is that of a *palimpsest*: A surface inscribed by competing claims, each one lying atop of the others. Intermixed and hardly legible, these claims of right offer little useful guidance on how to resolve national conflict over territorial sovereignty.

One way to attempt to rehabilitate the practical relevance of the nationalist theory is to be as precise as possible about the territorial right’s object—a particular, small, and identifiable piece of land that has been materially improved or symbolically marked. In the context of determining territorial sovereignty over Crimea, one could propose that the territory legitimately belonging to Crimean Tatars is not the Crimean peninsula as such, but rather the actual mini-localities in its midst: The directly salient topography, cities, mosques and architecture such as *Qirim* (Stari Krim), the ancient capital of the Crimean Khanate, or Bakhchysarai, its subsequent capital, and other such localities. For Russians, one such locality could be the city of Simferopol, much of which was built by the Russian Empire after 1784. But even in this case, the territorial right is undermined by the fact that Russians built on the site of a Tatar town, Aqmescit. By taking this road, we would have circumvented the problem of the palimpsest only to encounter the problem of the patchwork. The aggregate of these mini-territorial rights does not yield the expected outcome: A state featuring “well-defined geographical limits.”¹⁷

Additionally, it is also worth noting complications in the application of the nationalist theory of territorial rights that stem from the symbolic contribution to the land—the second component that lends nationalist theory its ethical force. According to most nationalist theorists, nations have territorial rights over the lands that played a formative role in the emergence of their nation’s identity. The existence of such territories should, according to Tamar Meisels, be objectively verifiable through a “historiographical inquiry.”¹⁸ Apart from the epistemic difficulties in actually determining what counts as a national formative territory, this argument leaves ample room for political manipulation. While Russia was content to guarantee Ukraine’s territorial integrity in 1994, in 2014,

¹⁶ Mikhail Kizilov, *Slave Trade in the Early Modern Crimea from the Perspective of Christian, Muslim, and Jewish Sources*, 11 J. EARLY MOD. HIST. 1, 10 (2007).

¹⁷ DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE 214 (2009).

¹⁸ TAMAR MEISELS, TERRITORIAL RIGHTS 40 (2005).

President Putin suddenly realized the paramount formative role of Crimea in Russian history:

Start with the fact that for Russians—and I mean the ethnically Russian part of our multinational people, the Christian Russian people—[Crimea] is a sacred place. In Crimea in Chersonesus Prince Vladimir [Sviatoslavich the Great] was baptized, and then he converted Russia. The original baptismal font of Russia is there.¹⁹

In terms of nationalist theory, however, what justifies a right to formative territories is ultimately not the sheer fact of such territory's existence. Rather, what does the normative work is the existence of "intense individual interests held by members of nations"²⁰ not to be "in a state of pining and longing"²¹ and not to experience a sense of "deprivation as a result of the injustice inflicted upon them in the past."²² In the Crimean context, invoking longing and injustice has disturbing implications. It would require us to measure—quite impossibly—which nation, Russia or Ukraine, cares more about having sovereignty over Crimea. Equally, it would delegitimize the claims of other nations whose culture-specific relationship with the land fails to conform to Western political preconceptions.

By the same token, judging "deprivation" that results from past "injustice" is equally challenging. Some theorists, such as Jeremy Waldron, have suggested that there ought to be a "moral statute of limitations" that would cause the just expiration of certain territorial claims.²³ But drawing such a cut-off line is destined to be arbitrary and self-serving. Imperial Russia and the Soviet Union caused the exodus of the Crimean Tatars in the late eighteenth and nineteenth centuries, and again in 1944, following the withdrawal of Nazi forces. But it is unclear why we should limit the analysis to injustices only committed by Imperial Russia. From Meisels's and Miller's arguments, one could equally derive the claim that historical injustices against Tatars should be mitigated against the Crimean Khanate's own prior injustices against the Slavic population. Again, nothing concrete follows from the vocabulary of a nation's territorial right that would enable us to determine the jurisdictional extent and spatial shape of one nation's territorial control.

¹⁹ "Crimea Cradle of Russian Christianity": Key Quotes from Putin's Meeting with Historians, *RUSSIA TODAY* (November 8, 2014), <http://rt.com/news/203467-putin-speech-crimea-wwii/>.

²⁰ MEISELS, *supra* note 18, at 35.

²¹ *See id.* at 40.

²² *See id.* at 60.

²³ Jeremy Waldron, *Superseding Historic Injustice*, 103 *ETHICS* 4 (1992) (opposing the idea of the moral statute of limitations); *see generally* Rodney Roberts, *The Morality of the Moral Statute of Limitations on Injustice*, 7 *J. ETHICS* 115 (2003) (addressing the question of whether a statute of limitations on injustice is morally justified).

III. Who's the Boss?: The Nation's Territorial Right as a Performative Contradiction

This incapacity to justify integral territories further undermines hopes that the vocabulary of a nation's territorial rights will be productively used where it is most needed: To resolve territorial conflict. A conceptual problem inherent in the vocabulary of national territorial rights is that its bearer—a pre-political nation—magically disappears whenever it wishes, giving rise to the new bearer of authority in a newly created polity: The territorial people.

What gives rise to this performative contradiction? Why insist on the idea of a nation's right to territory if they are obviously self-contradictory, at least within the framework of liberal democracy? The only reason to do so seemingly lies in the combination of implicit political ideals and anxieties that animate our desire to use the vocabulary of nationhood to solve territorial conflict.

The solution of this conflict is perpetually over- and under-inclusive. No matter how we draw territorial boundaries, there will always be unwilling minorities trapped within them—Ukrainians or Crimean Tatars—and minorities willing to be included in a nascent polity but who have been excluded from it—for example, Russian speakers in the rest of Ukraine. Irrespective of how we draw boundaries, both the members of what is to become a national majority in a given territory—the initial claimant of a territorial right—as well as the national minority must be included in a new polity on equal terms.

The performative contradiction arises when we wish to reconcile our commitment to collective political subjectivity at the moment of foundation with the idea of political equality in the period that follows it. There would be no performative contradiction if we did not remain committed to the idea that a pre-institutionalized collective agent, exercising its territorial right—or constituent power, if we approach it from the perspective of constitutional theory—founds a territorial order, which must feature political equality among all included who continue to govern themselves within a bounded territory. As a result, the claimant of a territorial right—a pre-political ethnic nation—and the recipient of a territorial right—an a-temporal territorial people—present themselves with two qualitatively different collective subjects. Thus, to obtain its territorial self-determination, a pre-institutional ethnic nation must first symbolically “die.” Or, to put it formulaically:

An inescapable individual over-inclusivity in the formation of a polity +
the desire to maintain the idea of collective self-government *during* the
act of political foundation + the imperative to represent citizens' political
equality *after* the act of constitutional founding

= qualitative, but contradictory change in collective political subjectivity.

While nationalist approaches to territorial rights are not capable of solving this problem theoretically, in practice there has not been a shortage of rhetorical attempts to reconcile the tension between nationalist territorial rights and equal dignity between citizens and groups. Putin's presidential address commemorating the entry of Crimea and Sevastopol into the Russian Federation is one such example. In that address, Putin mixed the right of Crimean Russians to effectuate the return of Crimea to Russian sovereignty with the national equality of Russians, Ukrainians, and Crimean Tatars.²⁴ However, he also repeatedly referred to "the residents of Crimea" as the body of citizens—a body qualitatively different from Russians, Ukrainians, or Tatars—who "for the first time in history were able to peacefully express their free will regarding their own future" and join Russia.²⁵

Juggling contradictory statements about the bearer of territorial rights is one way to gloss over the problem of performative contradiction involved in invoking a nation's territorial rights. These rhetorical maneuvers suppress an inconvenient truth for nationalist theorists: There are true "owners" of the national territory, pre-political nations, who are the bearers of a territorial right and who, in a new polity, continue to act as landlords to minority tenants, whose rights to the part of the territory are inferior, derivative, and revocable. In many countries, this has a toxic effect in daily political life: Minorities are constantly put in their place by being reminded who the land and country truly belong to. Though Ukrainian politicians continue to balance their commitments to ethnic Ukrainian cultural hegemony with their respect for minority linguistic and political rights, important political and paramilitary organizations associated with the government continue to understand Ukraine's territory as rightfully belonging only to the Ukrainian ethnic nation.

Though such platforms have been relatively marginal in post-communist Ukraine,²⁶ the potential of unaddressed incoherence of nationalist theory to contribute to daily political humiliations of minority groups may be one of its subtle but serious political implications. More importantly, its unaddressed incoherence may prolong political sentiments that justify the refusal to negotiate constitutional settlements that would include power sharing, federalization, or territorial reconfiguration, as a matter of principle.

C. The Legitimate State Theory of Territorial Rights

The main competitor to the nationalist theory is the legitimate state theory of territorial rights. Its appeal is not only theoretical. Its traces are also visible in the public discourse

²⁴ See *Program of Petro Poroshenko Bloc* (Aug. 27, 2014), http://solydarnist.org/?page_id=874.

²⁵ Address by President of the Russian Federation, PRESIDENT OF RUSSIA (Mar. 18, 2014), <http://eng.kremlin.ru/news/6889>.

²⁶ ROMAN SOLCHANYK, UKRAINE AND RUSSIA: THE POST-SOVIET TRANSITION 145 (2001).

about the legitimacy of territorial change in Ukraine. Going beyond simply decrying the illegality of the Russian act of annexation, the leaders of Germany and the United States, for example, have used the morally charged metaphor of “stealing” or “theft” to condemn Russia’s act, assuming that the entirety of Ukrainian territory is its property.²⁷

The territorial right, according to Anna Stilz, belongs to a legitimate state that effectively implements a system of law, grants “the people” a voice in defining them, is not a “usurper,” and whose subjects have a legitimate claim to occupy the territory of the state.²⁸ Such a state has a *moral* right to territorial integrity. According to Stilz, during the existence of such a legitimate state, the people is not the actual bearer of the territorial right, but rather an imaginary “ward” under the “guardian” state’s custody.²⁹ But when such a legitimate state is “unjustly annexed by foreigners” or is “dismembered by rebellious domestic forces,” the people of such a state emerge as the bearer of the residual territorial right to restore the extinguished statehood. Such a people is defined by two features. First, it has established “a history of political cooperation together by sharing a state”—legitimate or otherwise—in the recent past. Second, it “possesses the ability to reconstitute and sustain a legitimate state on their territory today.”³⁰ Superficially, attributing territorial right to (the people of) a legitimate state circumvents the difficulties of the nationalist approach. Because it already assumes a territorially integral jurisdiction, this approach is not concerned with which group should exercise sovereignty over which piece of territory when different groups’ labor mixed under diverse historical circumstances. Though it evades some of these difficulties, this approach is problematic for three main reasons.

First, it fails to legitimize the territorial status quo in cases where contemporary sovereign states historically exercised their power in illegitimate ways. Second, the very idea of “historical cooperation” among members of a state’s population is too vacuous to justify the maintenance of territorial integrity, even if it is assumed that there has been such a

²⁷ Tony Paterson & Peter Foster, *Ukraine Crisis: Angela Merkel Accuses Putin of “Stealing” Crimea*, THE TELEGRAPH (March 12 2014), <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10692259/Ukraine-crisis-Angela-Merkel-accuses-Putin-of-stealing-Crimea.html>; Daniel Hurst, *Australia Imposes Sanctions on Russia After It “Steals” Crimea from Ukraine*, THE GUARDIAN (March 19, 2014), <http://www.theguardian.com/world/2014/mar/19/australia-imposes-sanctions-on-russia-after-it-steals-crimea-from-ukraine>; *Russia’s Duma Ratifies Crimea Annexation*, RADIO FREE EUR. RADIO LIBERTY (March 20 2014), <http://www.rferl.org/content/russia-annexation-crimea-ratification/25304008.html>; Sergey Lavrov, Foreign Minister, Ministry of Foreign Affairs of the Russian Federation, Speech and Answers to Questions at the 349th Extraordinary Session of the Federation Council of the Federal Assembly of the Russian Federation (Mar. 21, 2014).

²⁸ Anna Stilz, *Nations, States, and Territory*, 121 ETHICS 572, 578 (2011).

²⁹ *Id.* at 579.

³⁰ *Id.* at 591.

legitimate state. Lastly, as a result, this theory is incapable of answering the so-called *annexation objection* on its own terms.

1. Tainted State Legitimacy

It should be noted at the outset that the legitimate state's theory of territorial rights is plagued by an implicit circularity similar to that detected in constitutional theory. In assuming the right of the state's people to restore the state's territorial integrity, it derives the legitimacy of that people from the existing state's boundaries. Because this theory does not offer explicit guidance about the redrawing of territorial boundaries—but only about their restoration—the question of a territorial right turns on our judgment of what constitutes “usurpation,” a “legitimate claim to occupy the territory,” and “injustice” in annexation. Without such a judgment, this theory, like contemporary constitutional theory, would be unable to arbitrate between competing assertions of non-nationalistic territorial rights. Using a similar non-nationalist justification, the official remarks of the Russian foreign minister Lavrov, for example, recognized the right of “all the Crimean population” to determine the political status of Crimea. Though not articulated in the vocabulary of territorial right, this view assumed that the territory of Crimea is the object of the Crimean people's territorial right.

If we simply relied on the norms of positive international law, which guarantee territorial integrity to existing sovereign states, this assumption would be easy to defend. Within the ambit of the legitimate state's theory of territorial rights, however, we cannot do this. Unless we understand the legitimate state theory as one that justifies the contemporary international legal order in its totality—and from which, derivatively, spring the territorial rights of particular independent states—we would need to look into the specific grounds for legitimacy of each individual state whose boundaries come into question.

And here things get complicated. In her critique of the statist-popular theory, Ayelet Banai argued that many contemporary states emerged as the heirs of colonialist, despotic, or authoritarian regimes. In such cases, there is no reason to treat them as legitimate bearers of the right to territorial integrity.³¹ We could likewise reach this conclusion in the case of Ukraine if we treated it as an “heir” of the undemocratic Russian Empire and the Soviet Union. But even if we were to reject this claim—and accept that Ukraine was one of the victims of Russian czarism and communist oppression—we would still have difficulties justifying, within the ambit of the legitimate state theory, the moral claim of the “theft” of Crimea. In the Crimean case, Russia made the reverse argument. It claimed that the annexation of Crimea was the reversion of the initial theft because it was an undemocratic decision by an autocratic communist regime, which in 1954 reassigned the sovereignty of

³¹ Ayelet Banai, *The Territorial Rights of Legitimate States: A Pluralist Interpretation*, 6 INT'L THEORY 140, 144–46 (2014).

Crimea from the Russian SSR to the Ukrainian SSR in the form of an internal territorial cession. While technically legal, the Soviet Politburo's political "gift" lacked democratic legitimacy.

It is worth noting that the legitimate state theory is incapable of refuting the Russian response because of its own inherent weakness and not from its concrete affirmation of Russia's territorial claim. In fact, most of Russia's own internal and external boundaries have been morally tainted by acts of oppression and violence and there are many instances where contemporary Russia profited from the historically undemocratic inclusion of unwilling regions, such as Chechnya, Dagestan, or Tatarstan. In assuming the legitimate political history of existing states, this theory delegitimizes not only a Ukrainian claim to territorial integrity, but also that of many countries around the world, including Russia.

II. Spuriousness of Historical Cooperation

The legitimate state's theory of territorial rights uses the people to describe a collective agent vested with the "residual claim" to restore its sovereignty over the portion of its state that is unjustly taken from it. Stilz derives the identity of the people from a pattern of historical cooperation and sharing of the state, which manifests itself in the activities of obeying the law and paying taxes.³² Such understanding of cooperation, however, puts the legitimate state theory in a bind. On the one hand, if cooperation is understood as mere compliance with the demands of the state, the very idea of the people would be superfluous. It would suffice to say that legitimate political regimes have the right to re-establish territorial status quo ante. This, however, would bring us back to square one: Such an answer would still be incapable of offering an account of the legitimacy of a particular territorial status quo. On the other hand, we may argue that cooperation implies a degree of actual intentionality, including not only a purposive activity—inmates cooperate with wardens, too—but a purposive activity performed out of an appreciation that individual acts of cooperation contribute to a worthy collective goal.

It is curious then that paying taxes is singled out as a representative example of such an activity. In many countries, citizens not only actively engage in tax evasion, but often justify their behavior on ethical grounds. Empirical research shows, for example, that citizens in Ukraine tend to justify tax evasion if "the tax system is unfair," if "a significant portion of the money collected winds up in the pockets of corrupt politicians or their families," or if "the government discriminates against me because of my religion, race or ethnic background."³³ While hardly unique to Ukraine, such findings demonstrate that the assumption of cooperation is problematic not only given the diversity of attitudes exhibited towards seemingly flagship cooperative activities, but also in light of the actively

³² Stilz, *supra* note 28, at 592.

³³ Irina Nasydyuk & Robert McGee, TAX EVASION IN UKRAINE: A SURVEY OF OPINION 1, 5, 10 (2006).

anti-cooperative sentiments of an important part of the population. A similar point could be made with regard to “obeying the law.” Some people obey mindlessly, while others obey because they have a vague idea that not doing so could cause anarchy or would set a bad example, encouraging free-riding on the efforts of others. None of these reasons, however, are country-specific and can justify a wide variety of territorial reconfigurations.

The diversity of attitudes towards what Stilz understands as acts of cooperation undermines her conceptual reliance on the people and its residual right to re-establish territorial sovereignty. Ironically, in fact, the acts of political cooperation—understood as such among the cooperators themselves—are most frequent and most intense when a politically mobilized group acts antagonistically towards the current constitutional order. Organizing a referendum, canvassing for political support, keeping guards on the roads, such as in Crimea, Lugansk, or Donetsk, for better or worse, are more compelling examples of mindful political cooperation than habitual compliance of a disgruntled political minority within a state they do not wish to belong to.

However, Stilz makes an important argument that supports the restoration of the territorial status quo ante, but this argument has little to do with positing the existence of a legitimate people’s “residual territorial right” to recreate its state. Instead of moral or conceptual grounds, her strongest argument is ultimately prudential. After discussing alternative non-statal patterns of political cooperation, Stilz admits that “authoritative legal institutions are so difficult to establish, and because justice depends upon them, a group’s political tradition therefore has significant value.”³⁴ Stilz is correct that the difficulty of switching between one pattern of territorial cooperation from one state to another should not be dismissed lightly—something grimly testified by the violent birth of the self-proclaimed Lugansk and Donetsk Popular Republics.

III. The Annexation Objection

One distressing implication of the critique of legitimate state theory is that it leaves us with no response to the so-called annexation objection. Ironically, the theoretical difficulty with this counter-factual scenario was first raised several years before the annexation of Crimea. Its challenge is simple: If there were no legitimate “peoples of states” vested with the right to re-establish sovereignty over an annexed portion of their territory, how would we explain our resistance to peaceful annexation of a territory and its inhabitants by a democratic and fair polity, which would guarantee its new citizens every right of political participation and would treat them with equal respect regardless of their previous nationality? If the criteria for a state’s legitimacy are ultimately a-contextual, why does it

³⁴ Stilz, *supra* note 28, at 594.

matter to which state a particular population or territory belongs if the annexing state is equally legitimate?³⁵

As it is posed in the literature, the annexation objection assumes that the annexing state is a wholly legitimate liberal democratic polity. In the case of Russia, we cannot make this assumption. But tackling the annexation objection is nonetheless illuminating. As I will later argue, it is worth asking the question: What if Russia were an exemplary democratic state when it annexed Crimea? Would such an act be considered morally illegitimate, even if there were no people vested with residual territorial rights?

While I believe it would, my answer is more complex than that offered by the legitimate state theory as it requires us to distinguish between two scenarios. The first concerns the unlikely peaceful annexation of territory featuring a population whose allegiance is dominantly hostile to the change of sovereignty. The rejection of annexation in this case is highly intuitive, but it rests on a different justification than the one provided by Stilz's theory. It requires us to ask a more finely grained question: What happens to individual voluntary political allegiances when we compare the territorial status quo ante with the new territorial status quo? In posing this question we realize that the reason why such annexation is illegitimate is not because a putative "people's" territory has been truncated, but because the aggregate degree of allegiance to a political community has decreased following annexation in comparison to the status quo ante. Thus, a greater number of people in the territory of reconfigured states are now forced to live in a political community to which they do not have allegiance. Faced with a choice—where all other relevant factors are the same—territorial changes should strive to achieve political outcomes that increase the satisfaction of individual political attachments and reject those that do not. Therefore, this new answer presents itself once we re-imagine peoples as proxies for the aggregates of individual political allegiances, instead of understanding them as collectives vested with moral rights.

The second scenario is more disturbing, as it is more similar to present-day Crimea. In this case, the aggregate degree of allegiance to a political community has actually increased. Instead of roughly 2 million Crimeans who were dissatisfied with the status quo distribution of sovereignty prior to 16 March 2014, their peaceful incorporation into Russia improves the aggregate degree of political allegiance—even excluding the Crimean Tatars—over the entire reconfigured territory of Russia-Ukraine. Ukrainians will still be dissatisfied with this solution, having experienced humiliation with the loss of territory they perceive as theirs. But such feelings will not affect their political attitude towards Ukraine—the country they want to belong to in the first place. In fact, the degree of consent to Ukraine among Ukrainian citizens—now without Crimea—improves in relation to the territorial status quo ante. And such aggregate improvement—as I have argued

³⁵ See *id. passim*.

elsewhere—is a suppressed ideal behind all territorial changes ushered in the name of self-determination, irrespective of whether we envisage the bearer of the right to self-determination as a territorial or an ethnic people.³⁶

But our moral intuitions rebel against annexations, even in cases that would yield a territorial configuration where more people end up in states they want to belong to. It is possible to provisionally defend those intuitions even without the help of the legitimate state theory on two grounds. First, even if the idea of a people's residual moral rights to territory is unpersuasive—as previously argued—this does not mean that the citizens of pre-war Ukraine do not have legitimate interests in participating in the process leading to the change in the political status of Crimea. These legitimate interests may or may not amount to a right to take part in a referendum on the status of the peninsula itself, but they would merit at least a voice in the process leading to it, as well as in negotiations that would have arguably followed. Second, even a peaceful annexation would deny the unwilling minorities-within-minorities, such as the Crimean Tatars, a seat at the table as agents. Not only would they be denied as objects of the constitutional change, but also they may or may not be granted extensive minority rights after the fact of annexation. Under this annexation scenario, they are treated as objects of someone else's political will and not as participants in the political process that determines the status of the territory.³⁷ This is an important objection, especially if we agree that application of the people's will conceals an improvement in the aggregate satisfaction of willful political allegiance to a polity.

These arguments against the second scenario are provisional because an imagined inclusive and democratic Russian occupier could have, in theory, taken steps to address them and increase the legitimacy of its own actions. Together with the de-facto Crimean authorities, Russia could have delayed the referendum, opened up the political process to voices from the rest of Ukraine, and ultimately acknowledged Tatar demands for territorial autonomy within Crimea. These actions could be part of a comprehensive constitutional settlement that would include the transfer of sovereignty of Crimea to Russia. Had Russia done so, normative political theory would prove a far less useful basis on which to reject

³⁶ See Zoran Oklopčic, *Farewell to Rhetorical Arms: Unraveling the Self-Determination of Peoples*, in *RECOGNITION VERSUS SELF-DETERMINATION: DILEMMAS OF EMANCIPATORY POLITICS* 101 (Avigail Eisenberg et al. eds., 2014).

³⁷ See Steven Wheatley, *Modelling Democratic Secession in International Law*, in *NATIONALISM AND GLOBALISATION: NEW SETTINGS, NEW CHALLENGES* 32 (forthcoming 2015) (arguing the peoples of Crimea, Donetsk and Lugansk do not have a right to secede,

not because those populations do not have a right to self-determination or must subject themselves to the authority of the Ukrainian State, but as a consequence of the failure of the authorities and the populations to engage in reasoned, democratic deliberations concerning the allocation of political authority in the region).

the annexation of Crimea. Irrespective of its inconsistencies, the nationalist theory of territorial rights would have been sympathetic to it. Given its problematic conceptual assumptions, the legitimate state's theory could not consistently defend the territorial integrity of Ukraine. For a more compelling normative reason in favor of Ukraine's territorial integrity, we must look elsewhere.

D. International Jurisprudence: Bounded Pluralism and the Tacit Calculus of Suffering

A more compelling way to offer a strong normative defense of Ukraine's territorial integrity is to look at the big picture. In the context of struggles over territory, concern with the big picture emerges most strongly not in normative theory, but rather in international jurisprudence. The reason why Ukraine's "people" has a right to demand the preservation of the territorial integrity of Ukraine is not because its members have engaged in material improvements to the land or because they have engaged in historical cooperation. The reason for postulating both the existence of a sovereign people and the territorial integrity of its state stems from larger political ideals and prudential anxieties that concern the world, not just Ukraine.

For Brad Roth, the constellation of those political ideals and prudential anxieties is captured under the name of "bounded pluralism:" A name for a vision of international order that provides respectful accommodation of ideological differences among sovereign states.³⁸ As a result, "internal" self-determination cannot be interpreted as providing a recipe for the establishment of a particular constitutional order in a sovereign state. International law as an embodiment of bounded pluralism has no preference for either a unitary, federal, or confederal Ukraine. Rather, internal self-determination is best understood "with much irony but little exaggeration, as a right of territorial populations to be ruled by their own thugs and to fight their civil wars in peace."³⁹ Likewise, bounded pluralism denies the right of minority populations to "external" self-determination. While it does not require them to submit to the will of the central government—hence "fight civil war in peace"—it provides them with no legal entitlement, even in cases where they are severely oppressed. By the same token, the ideal of bounded pluralism provides support for the principle of non-intervention that requires external powers to refrain from interfering in domestic power struggles or recognizing entities and territorial changes that have come about through the violation of peremptory norms of international law.

While Roth's conceptualization of self-determination does not call for global ideological diversity, it can nonetheless be read as an implicit normative argument that demotes nationhood from the place of a privileged source of state's legitimacy. For Roth, "[National]

³⁸ BRAD R. ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT: PREMISES OF A PLURALIST INTERNATIONAL LEGAL ORDER 81 (2011).

³⁹ *Id.*

culture is not worthy of special standing, analytically independent of, and morally privileged over garden-variety ideological difference.”⁴⁰ Cultural arguments are especially suspicious as they privilege “traditional-hierarchical non-liberalism [over] revolutionary-egalitarian non-liberalism,” which may silence “local liberal dissidents.”⁴¹

Roth’s relative agnosticism about the sources of state legitimacy, however, must be complicated in light of his own fragmentary and speculative—but nonetheless discernible—acknowledgment of the relevance of individual constituent attachments. Writing about the application of self-determination in the context of decolonization, for example, he portrays it as remedying the international order’s “original sin.”⁴² Equally, though he argues that there are no shared understandings about the “assumption of popular sovereignty” across ideological divides within existing states, he suggests that the proponents of radically different ideologies within those states “may hold common understandings of a constitutional compact that is binding by virtue of express, tacit, or imputed consent.”⁴³ While the international order has a strong preference for territorial status quo, Roth also mentions the hope that “collectivities encompassing the permanent populations of existing territories regard themselves, or will come to regard themselves, as ‘nations.’”⁴⁴ Moreover, he suggests that the effective control doctrine can be interpreted to embody respect for the self-determination of diverse political communities as to which empirical investigation to ascertain public opinion is most often impracticable.⁴⁵ Finally, even in the case where the population has grudgingly “made their peace with an unwanted regime,” it may still “plausibly prefer” and “demand” the respect for the international subjectivity of the existing state.⁴⁶

It is worth insisting on these disparate and tentative remarks as they together suggest the presence of a suppressed moral and political ideal that unites them all—the respect for individual constituent attachments and the improvement in the degrees of their satisfaction, as part of the process of state formation. The strongest reason why we continue to see colonialism as “original sin”, for example, lies not in the economic exploitation of African, Asian, and Latin American natural resources. Instead, it consists in the destruction of pre-existing polities, violating—in the process—the political attachments

⁴⁰ *Id.* at 100.

⁴¹ *Id.*

⁴² *Id.* at 184.

⁴³ *Id.* at 274; see also, *supra* note 14.

⁴⁴ ROTH, *supra* note 38, at 24.

⁴⁵ *Id.* at 204.

⁴⁶ *Id.* at 205.

of those polities' populations. By the same token, the fact that the notion of "consent" may indeed be shared across ideological divides shows that there is a criterion that can help us disentangle otherwise mutually incommensurable territorial claims. Equally, the fact that we "hope" that the distinct collectivities encompassed within existing states will voluntarily change their mind and decide to belong to existing, territorially incorporated nations suggests that the willful allegiance to a polity is an underlying—if suppressed—aspiration behind popular sovereignty, and one of the unacknowledged "premises of international legal order." Also, Roth's speculation that effectivity is a proxy for self-determination of diverse political communities suggests that effectivity is not ideal in and of itself, but rather is the second best tool for ascertaining the existence of "self-determination." In this case, however, we cannot rely on effectivity to define self-determination. Instead, we must inquire what self-determination *ultimately* means. The suggestion again comes from Roth's juxtaposition between "making peace" with an unwanted regime and "plausible wishes" about preserving existing state's sovereignty. Calling those wishes plausible in this context with that juxtaposition only makes sense if they are comparably more voluntary than the sheer reconciliation with the unwanted government.

Though the presence of "consent," "plausible wishes," and voluntary identification ("regarding themselves") all appear to suggest that individual constituent attachments play a role even in Roth's argument, we should not too hastily argue that Roth likewise embraces them as a normative ideal behind self-determination. The fact remains, however, that wherever self-determination is applied to a territorial conflict—either as a political ideal, legal principle, or a legal right—the degree of satisfaction of individual constituent attachments over the entire reconstituted territory has always improved in relation to the territorial status quo ante. This suggests—at the very least—that aggregate improvement is not simply a coincidental byproduct of self-determination's application, but rather intimately related to self-determination's function. While Roth's suggestions prevent us from confidently reading suppressed normative content into his argument, they nonetheless strongly suggest that "aggregate improvement" is at least of prudential value when it comes to drawing boundaries of nascent polities.⁴⁷ Even if it were devoid of normative content, an aggregate improvement in the satisfaction of intense local wishes is intuitively of practical importance. When new states have a robust public support, they contribute to their own viability, as well as to the stability of the international order.

Outside of his doctrinal exegesis, nothing in the preceding discussion justifies Roth's insistence on the preservation of territorial integrity of sovereign states. If we are not committed to global ideological diversity, there is no reason not to intervene to promote liberal democracy among oppressed, territorially concentrated minorities. The strongest

⁴⁷ See Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?* 41 COLUM. J. TRANSNAT'L L. 601, *passim* (2003) (providing a skeptical account of the democratic promise of self-determination).

argument for territorial integrity and prescriptively “empty” self-determination is not normative, but prudential. It is implicitly present in Roth’s argument against the “evolution” of the right to self-determination and humanitarian intervention. An “evolved” right to self-determination might encourage minorities to militarily provoke the state in hope that the state’s repressive response will be disproportionate, and thus delegitimize that state in the eyes of international public opinion and make external intervention easier.⁴⁸ External interveners usually have mixed motives, which has led them to use “cut-rate and irresolute methods that leave the situation worse off than it was before the action was undertaken.”⁴⁹ For example, though aerial bombing may be a comparatively safe policy option for interveners than a ground invasion, it nonetheless may exacerbate, rather than mitigate, human suffering.

Though Roth concedes that we may live in a world with “too little intervention,” he claims that “it does not follow that broader licensing of intervention would occasion more of the right measures in the right places.”⁵⁰ But it also does not follow that it would not. From the vantage point of international jurisprudence, this is probably an impossible empirical judgment to make, as it implies conjuring alternative universes where the intervention and its concrete outcomes did or did not happen.⁵¹

In that case, it may be that the best argument in favor of the norm of territorial integrity and prescriptively “empty” self-determination comes neither from normative theory nor international jurisprudence, but from another discipline altogether. According to comparative political scientist Tanisha Fazal, there is strong empirical evidence of a correlation between the “norm against conquest” and the probability of state survival.⁵² Territorial integrity—the contemporary norm against conquest—has dramatically reduced the number of externally inflicted violent “state deaths” since 1945. In contrast, the period between 1819 and 1945 amounted to more than sixty percent of all violent state deaths, most of which occurred among the buffer states, which were subject to the rivalry of great powers.⁵³ Given the beneficial effects of the norm against conquest, Fazal argues that the norm against conquest should be aggressively defended not only in the most egregious

⁴⁸ ROTH, *supra* note 38, at 161.

⁴⁹ *See id.* at 127.

⁵⁰ *See id.*

⁵¹ *See* Thomas Franck, *Humanitarian Intervention*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 531 (Samantha Besson & John Tasioulas eds., 2010) (providing an example of such a debate that under the cloak of juridical and normative judgments features a comparative calculus of human suffering and a dispute about what is the relevant time frame for judging the legitimacy of humanitarian intervention); *see also* Danilo Zolo, *Humanitarian Militarism?*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 549 (Samantha Besson & John Tasioulas eds., 2010).

⁵² TANISHA M. FAZAL, *STATE DEATH: THE POLITICS AND GEOGRAPHY OF CONQUEST, OCCUPATION AND ANNEXATION* 230 (2011).

⁵³ *Id.*

cases, but everywhere where it is violated “at the edges.”⁵⁴ The subtle prudential intuition that animates Roth’s jurisprudential argument thus receives its empirical support.

Irrespective of its support for the substance of Roth’s juridical argument, however, this defense of the norm against conquest must be complicated. As Fazal recognizes, this norm may be implicated in the faster pace of state dissolutions.⁵⁵ Also, there is a possibility that the norm against conquest is causally related to an increase in “state failure,” which should lead us to question the wisdom of the norm against conquest.⁵⁶ In qualifying her support for the norm against conquest, Fazal joins scholars from other disciplines who have already observed the ideological benefits that a norm against conquest—justified by the idea of popular sovereignty and self-determination—brings to the United States when they violate sovereignty of other states.⁵⁷

E. Beyond Moral and Juridical Rights: The Promise of Constitutional Theory in Ukraine

The critique of national and legitimate state theories of territorial rights has uncovered ideals behind the application of self-determination in situations of territorial conflict: A respect for individual constituent attachments and an imperative of improving their aggregate satisfaction. In the context of the nationalist theory, this claim needs no particular confirmation: When territories are reassigned in the name of nationhood, this results not only in that nation’s territorial sovereignty, but also—at a deeper level—in increased satisfaction among all of its members concerning their individual political status.⁵⁸ Though less immediately visible, the same principle can be unearthed from the prescriptions of legitimate state theory. With the idea of “historical cooperation” discredited in Part C.II, the best way to reject annexations has been to point to the undesirable changes annexation produces in the degree of aggregate satisfaction of constituent attachments. My critique of Roth’s defense of territorial integrity and prescriptively empty self-determination has, equally, uncovered traces of respect for the same ideal.

As asserted above, the best argument in favor of territorial integrity and “empty” self-determination is empirical. Insisting on Ukraine’s territorial integrity—and by implication, on the sovereignty of “the people of Ukraine”—makes most sense not if we embrace

⁵⁴ *Id.* at 239.

⁵⁵ *Id.* at 232.

⁵⁶ *Id.* at 234.

⁵⁷ *Id.* at 234–35; see also ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 279 *passim* (2004).

⁵⁸ I am convinced this would occur even if the shape of a territory were readjusted to include localities—historically important members of the nation, currently not a part of it.

Roth's juridical worries, which *ex hypothesi* cannot be falsified, but if we embrace the results of empirical research which implicates today's iteration of the "norm against conquest" (territorial integrity) in the sharp—and welcome—decrease in "violent state death" and consequently, in mitigation of human suffering over time.

Before moving on to the remaining, constructive part of this article's argument, it is worth stressing that the previous discussion gives us a new way to resolve the so-called paradox of constitutionalism. "The people" that emerges from critical engagement with normative theory and international jurisprudence is neither a nation nor a "territorial people" nor a name for the population whose composition must remain intact due to the imperatives of bounded pluralism. Rather, by uncovering the ideal of constituent attachments and their aggregate improvement, "the people" emerges as the trope which brings about that improvement—through selective application of the people's "will"—but that simultaneously suppresses the recognition of that ideal's existence. To put it differently, in the context of struggles over territorial sovereignty, "the people" is the name we give to our societal and disciplinary anxieties which prevent us from openly debating the pace, degree, and extent of the recalibration of the aggregates of constituent attachments. The so-called paradox of constitutionalism, then, is not a genuine puzzle, but rather *a symptom of the suppression of these anxieties*.

Thus, the critique of normative theory and international jurisprudence enables us to go beyond the paradox of constitutional theory. Equally important, however, it has given us the tools through which constitutional theory may approach the conflict in Ukraine in principled terms, beyond the twin—moral and juridical—vocabulary of the people's right. Instead of relying on these, a constitutional theory of early-conflict constitution-making will openly aspire to mediate normative ideals and prudential concerns that animate them. By the same token, such theory will also embrace territorial integrity as a prudential side constraint, divorced from the moralistic invocations of the right of an allegedly sovereign people—or a nation—to decide its political destiny. In doing so, it continues to assert the factual inevitability of external political interference. Within that frame, it seeks to come closer to the normative ideal implicit in both nationalist and legitimate state theories of territorial rights. It does so, however, without resorting to the invocation of the rights vocabulary, and its attendant contradictions, epistemic difficulties, and moral hazards.

It is worth making clear, however, that the constitutionalist framework for early-conflict constitution making must own up to the contingent way in which it seeks to reconcile the normative and prudential assumptions that animate it. Unlike the choice theory of secession advanced by Catala and to a certain extent Maclaren in this volume⁵⁹, I do not propose a less restrained pursuit of aggregate improvement—the results of which may

⁵⁹ Catala, *supra* note 6.

often coincide with Catala's vision of "political self-determination."⁶⁰ Rather, a constitutional theory of early-conflict constitution-making builds on the empirical case behind Roth's defense of bounded pluralism. For those who are not convinced either by Roth's argument or by the empirical case behind it, the passages that follow will be similarly unconvincing.

However, the benefits of the approach I propose go beyond a simple alternative to the way in which territorial conflict is argued in normative theory and international jurisprudence. They also lie in its hoped-for contribution to the affective register of political struggles over territory; more specifically, towards deflating the moralistic invocations of collective political subjectivity, irrespective of whether they are defined in nationalist (Miller and Meisels) or statist terms (Stilz). By uncovering the inconsistencies, performative contradictions, and circularities on the way towards the constructive proposal that unfolds below, my critique in the previous three sections has also sought to demonstrate that the very vocabulary that ethnic and statist nationalists consider natural is in fact the result of wider—if unacknowledged—societal and disciplinary anxieties.

More concretely, in contrast to the vocabulary of a nation's or a state's territorial right, the approach to early-conflict constitution-making proposed in this article features three central components. The first component asserts the existence of a constitutional duty on the part of a central government to negotiate *federalization*⁶¹ in good faith. By privileging federalization my argument intersects with the substantive proposals of Andrew Arato's *two-stage* constituent process defended in this volume.⁶² The second component asserts the early exercise legitimacy of the ontologically inevitable—if perceptually latent—external constituent power, intervening to impel all sides in an otherwise "domestic" conflict to negotiate toward federalization. The third component begins in the most extreme case: When "saving" the political existence of an internally conflicted sovereign state becomes impossible. In that case, after the failure of an externally facilitated, constitutional project of federalization, the imperative should be more of the same: Recursive federalization within to-be independent territorial units.⁶³

⁶⁰ *Id.* at 283–86.

⁶¹ By federalization, I mean an institutional outcome of constitution-making that would result in the creation of one or more territorial autonomies within a state which would, in turn, be represented at the central level of decision-making. I hasten to add, however, that this process need not necessarily result in a federation. The exact content of such a federal-like solution would emerge through negotiations as parties negotiate (and trade-off) the territorial extent of the autonomy, its jurisdiction, and the powers and composition of the central organs of government.

⁶² Andrew Arato, *International Role in State-Making in Ukraine: The Promise of Two-Stage Constituent Process*, 16 GERMAN L.J. 691 (2015).

⁶³ See Zoran Oklopčic, *Provincializing Constitutional Pluralism*, 5 TRANSNAT'L LEGAL THEORY 331 (2014) (defending a similar claim).

1. Constitutional Duty to Negotiate Federalization in a Good Faith

A constitutional duty to negotiate federalization in good faith is a constitutionalist manifestation of the normative ideal to increase the aggregate satisfaction of individual constituent attachments. Beyond its partial correspondence with ideals implicit in the nationalist and statist vocabulary of self-determination, this duty also finds inspiration in comparative constitutional jurisprudence. A constitutional duty to negotiate federalization is a less-known relative of its more famous cousin, the constitutional duty to negotiate secession in good faith, articulated by the Supreme Court of Canada in 1998 in the *Secession Reference*. Basing its judgment on the interplay of four unwritten principles that animate the Canadian constitutional order, the Supreme Court determined that all participants in the federation are under duty to negotiate secession in good faith when the people of Quebec clearly manifests a will to pursue it.⁶⁴ Though the Reference rejected any outright constitutional implications of the federal government's refusal to engage in negotiations in good faith, the Supreme Court suggested that such a move would rightly undermine the legitimacy of the Canadian state in the eyes of the international audience.⁶⁵

Many have hailed the Court's reasoning as an example of the capacity of modern constitutional orders to offer flexible and attractive responses to fundamental challenges to its very existence.⁶⁶ Given such widespread praise, one could argue that advancing a weaker version of this duty—a *maiore ad minus*—would, in principle, be even more laudable. The adoption of the spirit of the *Secession Reference* in Ukraine would escape the conceptual difficulties associated with territorial rights, evade the impossible task of disentangling competing historical claims, and circumvent the moral hazards that stem from apodictic understandings of territorial rights in popular discourse. In doing so, the spirit of the *Secession Reference* would still respond to important normative ideals implicit in the idea of territorial rights by leading the constitutional order to work towards the accommodation of radical political difference.⁶⁷

⁶⁴ Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

⁶⁵ *Id.* at para. 103.

⁶⁶ See Sujit Choudhry, *Does The World Need More Canada?*, 5 INT'L J. CONST. L. 606 (2007) (providing a skeptical view that the world needs "more of Canada").

⁶⁷ I mention this because some of the current approaches in comparative constitutionalism would object to such migration on contextualist grounds, arguing that each polity's constitutional order is a unique manifestation of its culture and history. Indeed, the *Secession Reference* itself suggests as much as it develops the meaning of the four unwritten principles from an interpretation of the relevant episodes in early Canadian constitutional history and relevant constitutional jurisprudence. While this objection legitimately demands caution in migrating and adapting constitutional ideas, it cannot be taken as credible in its strongest form, namely that a constitutional order is an expression of a particular people's values and ideals. If my critique of territorial rights discourse has been persuasive, it would also have undermined the insistence on the legitimacy of a putative territorial people. By uncovering constituent attachments as a suppressed ideal behind the vocabulary of the people, the migration

While the Secession Reference's concrete message, by migrating from Canada to Ukraine, is inevitably subject to de-contextualization and adaptation,⁶⁸ its three core constitutive components would remain preserved. The first component promotes the idea of a constitution's radical responsiveness as a functional equivalent to a dissatisfied nation's rights discourse. As mentioned earlier, one reason why the vocabulary of territorial rights will always appear attractive, irrespective of its difficulties, is because it continues to provide a straightforward way of legitimizing political and moral claims.

The first lesson of the Secession Reference is that the existence of a territorial right—or any collective right for that matter—is not necessary to understand the constitutional order as being imperatively responsive to radical demands for its own territorial reconfiguration. In the case of Quebec, for example, the Canadian Supreme Court came to the conclusion—without addressing who the relevant people of Quebec were for the purpose of secession or the validity of independent Quebec's territorial jurisdiction—that the “continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada.”⁶⁹ If a clear majority of “Quebeckers” expresses their desire to secede, the government of Quebec has a *right* to pursue secession,⁷⁰ which creates “an obligation on all parties [in the federation] to come to the negotiating table.”⁷¹ No assertion of a *territorial* right is necessary to trigger this process, or logically implied in the Court's reasoning.

The second lesson of the Secession Reference concerns a constitution's tendential responsiveness. The vocabulary of territorial rights may still be necessary in some contexts—not only because these rights trigger the politico-legal process that leads to the formation of a new polity, but also because they carry an ethical force that propels the process towards the satisfaction of a claim to a particular territory. Therefore, even if this critique of nationalist theory's incapacity to determine precise boundaries of an integral territory is correct, nationalist theory may, arguably, provide a *pro tanto* determination of a territory—a determination absent from the constitutional framework envisaged by the Secession Reference.

of the *Secession Reference* is actually justified on *normative* grounds—as a way to respond to this ideal, implicit among all those who believe in the idea of popular sovereignty.

⁶⁸ See Gunter Frankenberg, *Constitutional Transfer: The IKEA Theory Revisited*, 8 INT'L J. CONST. L. 563 (2008) (providing a critical account of the logic of decontextualization in the migration of constitutional ideas).

⁶⁹ 2 S.C.R. 217, at para. 92.

⁷⁰ *Id.*

⁷¹ *Id.*

Under the Secession Reference, however, this problem is alleviated by the duty of all parties to negotiate the demand to secede in, what most Secession Reference commentators have dubbed “good faith.” Such good faith negotiations over secession must imply tendentiality towards the satisfaction of the demand to secede. The demand to secede by its nature only recognizes a binary outcome—secession or no secession—and does not consider good faith as a requirement to meet the other side halfway. While such an understanding of the requirement of good faith is commonplace in other areas of law, the binary nature of the demand to secede makes it implausible in the context of constitutional negotiations. This does not mean that the opponents of secession must accede to secessionists’ demands at all costs; it only means that the opponents of secession have the right to demand the satisfaction of their legitimate interests and that they ought to narrow their demands in such a way that does not deliberately frustrate the viability of the secessionist project.⁷²

The duty to negotiate federalization, however, preserves the tendentiality of good faith negotiations, though its ultimate destination is perforce more obscure. Secession radically affects the extant constitutional order, but rarely continues to affect its functionality after the fact, unless new territorial boundaries make its operation difficult, or unless the initial act of secession provokes a chain reaction that leads to an ongoing constitutional crisis in the rump state.⁷³ A demand for federalization, paradoxically, should lend more negotiating power to the central state. Federalization, unlike secession, implicates all regions in an ongoing functional political relationship.

The third core component of the Secession Reference mandates the inclusiveness of different stakeholders in the negotiating process. While the Canadian Supreme Court steered clear of the vocabulary of territorial rights, it also stipulated that good faith negotiations should be held among “all parties to Confederation.”⁷⁴ The Canadian Supreme Court did not specify who these parties were, and a restrictive reading of this demand would extend the invitation to negotiate only to provinces, and not to aboriginal peoples or linguistic minorities in Quebec. Considering the migration of the core components of the Secession Reference to Ukraine, there is little reason to interpret the demand of inclusion in negotiations so narrowly. Non-territorially concentrated native peoples as well as

⁷² See Zoran Oklopčic, *Anxieties of Consent: Theorizing Secession Between Constitutionalism and Self-Determination*, 22 INT’L J. MINORITY & GROUP RTS. 259 (2015) (providing my further defense of this view, against the claims that “the duty to negotiate” requires secessionists to persuade other participants that the essence of their demand is legitimate).

⁷³ *Elecciones para cambiar la UE*, EL PAÍS, May 17, 2014 (stating that in the context of debates over the secession of Catalonia, for example, some have argued that its secession would provoke a “domino effect” in the rest of the “España invertebrada,” “spineless Spain”—a term invented by Ortega y Gasset—whose political unity has always been a precarious achievement).

⁷⁴ 2 S.C.R. 217, at para. 88.

territorially concentrated and politically self-organized minorities-within-minorities ought to have a seat at the negotiating table along with the constituent units of the federation. Understood this way, the core components of the Secession Reference permit the dignified inclusion of all stakeholders in the territorial conflict in Ukraine—such as Crimean Tatars or pro-Ukrainian minorities in the eastern part of the country—without requiring the application of the vocabulary of territorial rights.

II. Early Exercise of Latent, External Constituent Power

The adapted message of the Secession Reference does not require the central government to negotiate the demand to secede. This approach to early-conflict constitution-making accepts the strong empirical correlation between increased incidents of violent state death and the absence of the norm against intervention. This constitutional theory—contrary to approaches in international jurisprudence that prohibit intervention in the domestic affairs of an independent state—would embrace the exercise of external constituent power at an early stage in a radical constitutional conflict.

In doing so, such constitutional theory re-envisioning an important part of its own foundational imaginary, as well: it divorces the idea of “the people” from the idea of “constituent power” and imaginatively pluralizes the number of constituent power’s bearers. Instead of seeing the people of Ukraine bootstrapping itself into constitutional existence through the adoption of a new constitution, this constitutional theory envisions the foundation of a post-conflict constitutional order as the work of the plurality of constitutional powers across the divide between the inside and the outside. Such a view of political foundations is nearly self-evident in other disciplines. For example, Jens Bartelson argues that “all communities are formed through processes of *co-constitution*, which involve a constant exchange of symbols and values resulting from intercourse between communities of different size and scope.”⁷⁵ In constitutional theory, however, this perspective has until recently remained obfuscated, and devoid of more concrete implications.

If negotiating federalization is desirable, and if external constituent interference is inescapable, then the constitutional theory advanced here requires honoring the different forms of external interference in the domestic affairs of countries that experience territorial conflict—assuming that the goal of interference is to pressure all domestic actors to negotiate towards federalization. More concretely, this interference may include different forms of diplomatic pressure, such as sanctions against actors who oppose negotiating federalization or financial donations for political actors that promote it.⁷⁶

⁷⁵ See, e.g., JENS BARTELSON, *VISIONS OF WORLD COMMUNITY* 11 (2009).

⁷⁶ See Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT’L L. 1 (1989) (providing a comprehensive survey of legitimate forms of interference from the vantage point of international law).

Equally, this interference may include conditioning the recognition of a new government on its commitment to negotiate towards the federalization of the country or withdrawing recognition from such government if it reneges on that commitment.

Dignifying the exercise of external constituent power poses an important lateral issue: One of the norms of territorial integrity is to fend off a powerful state's hegemony, but federalization may favor one powerful state. A loose Ukrainian federation, where constituent units participate in foreign policy, for example, would inadvertently be more sympathetic towards Russian geopolitical interests. And this, according to Ivan Krastev, has been the true aim of Putin's policy:

[T]he Kremlin's vision for Ukraine's future is that it becomes a "Greater Bosnia"—a state that is radically federalised with its constituent parts allowed to follow their natural cultural, economic and geopolitical preferences. It means that in theory, the territorial integrity of the country will be preserved but the Eastern Ukraine's status will be similar to that of the Republika Srpska in Bosnia and it will have closer ties with Russia than the rest of the Ukraine.⁷⁷

This prospect largely fuels the anti-federalist sentiment engrained among the Ukrainian elite, as well as nationalists on the ground. The affective aversion towards federalism, while understandable, is normatively questionable given the incapacity of the leading moral theories of territorial rights to justify Ukrainian territorial integrity.⁷⁸ Equally, worries about the geopolitical orientation of the outcome of externally imposed constitution-making are less relevant due to the inescapability of some geopolitical orientation: Whatever its constitution, an independent Ukraine will end up favoring one set of external interests over others.

⁷⁷ Ivan Krastev, *What Does Russia Want and Why?*, PROSPECT (Mar. 6, 2014), <http://www.prospectmagazine.co.uk/politics/what-does-russia-want-and-why>.

⁷⁸ While the recent antipathy towards federalism in Ukraine is exacerbated by Russia's insistence on federalism as the appropriate constitutional framework for the resolution of the conflict, its roots are deeper. The Ukrainian elite's insistence on unitary statehood can in good part be explained by its assimilation of what it has considered to be "European" political and constitutional imaginary. The "return to Europe," as a geopolitical orientation, has entailed as its complement the adoption of what is seen as the "European" (in effect, French) constitutional form of a "unitary state," and the repudiation of its own Soviet, federalist, constitutional heritage. Kataryna Volczuk, *Catching Up with "Europe"? Constitutional Debates on the Territorial-Administrative Model in Independent Ukraine*, 12 REGIONAL & FED. STUD. 65 (2002). Equally, federalism was rejected by invoking the alleged purpose of American federalism whose purpose was to centralize, not devolve political power. Ukraine was already a unified state, so, consequently, federalism was unnecessary. *Id.* at 75.

But the calculus behind the norm against conquest justifying its contemporary incarnation as “territorial integrity” should be interpreted as prohibiting not only outright annexation, but all similar changes in the constitutional structure of the targeted countries—effectively turning them into political vassals. The problem is not that a federal Ukraine would simply wallow in “geopolitical ambiguity,”⁷⁹ as Krastev suggested, but rather that its—factually or allegedly—dysfunctional constitutional order would be used to justify perpetual political tutelage over it, as exemplified by the two-decades-long protectorate over Bosnia and Herzegovina.⁸⁰

Irrespective of the fact that the involvement of external constituent powers is ontically inevitable, their constitutional interference should be pursued in good faith, and not driven by their self-serving geopolitical motivations. One imperfect way to respond to this worry is to recognize the political legitimacy of the *tu quoque* objection otherwise considered inadmissible in moral reasoning and in legal argumentation. A powerful state—in its exercise of external constituent power—could not legitimately press for a constitutional power-sharing arrangement that it is not willing to implement in its own constitutional order. Insisting on moral consistency on the part of external constituent powers would be less important for moral consistency’s own sake, but would rather serve as indirect evidence of its good faith constitutional engagement.

III. Recursive Territorial Pluralism

The third component of a constitutional theory approach to early-conflict constitution-making reveals itself only in a liminal case—not currently on the horizon in Ukraine—when the reconstitution of a central state becomes increasingly implausible. The vocabulary of territorial rights—being a-contextual and temporally insensitive—does not offer prescriptions for this specific case. Equally, Roth’s international jurisprudence of bounded pluralism remains silent on the issue as well, arguing that a constitutional outcome will be determined through the interplay of the principles of effectivity and non-intervention. Instead of the application of self-determination, the international legal order continues to offer us “ad hoc solutions” to in determining what constitutes an independent state.⁸¹ Whether or not such an interpretation of international law is credible, state practice shows remarkable consistency in privileging the independence of first-order territorial units in

⁷⁹ Krastev, *supra* note 77.

⁸⁰ See, e.g., Gerald Knaus & Felix Martin, *Travails of the European Raj*, 14 J. DEMOCRACY 60 (2003) (giving a critique of the tutelage of the EU over Bosnia and Herzegovina).

⁸¹ ROTH, *supra* note 38, at 199.

multilayered polities at the expense of the self-proclaimed territorial units that do not enjoy robust political autonomy under the previous constitutional regime.⁸²

Following the collapse of communism, this principle—*uti possidetis juris*—was first applied in the former Yugoslavia, and the merits of its application in that context remain hotly debated.⁸³ But the implicit mechanics of territorial fragmentation have gone unnoticed—the pattern of territorial reconfiguration over the *entire* Yugoslav political space *over time*. Over time—beginning in socialist Yugoslavia in 1991 and ending with Kosovo in 2008—the contours of recursive territorial pluralization have been brought to light, manifesting itself as recursive federalization—in Bosnia and Herzegovina—or recursive decentralization—in Kosovo—wherever deep national plurality had not been extinguished by the state’s military might, such as in Croatia in 1995. Without its military victory and the ethnic cleansing of Krajina Serbs that followed it, Croatia would most likely also have been reconstituted as a federacy, featuring robust Serb territorial autonomy, and within it, local-level territorial autonomies for the Croatian population.⁸⁴ Instead of being a simple case of botched external intervention, or the (mis)application of *uti possidetis*, the experience of territorial re-composition in the former Yugoslavia from 1991–2008 paints a picture of territorial fragmentation on a “time release” structured by the demand to territorially compensate politically significant national communities for their new minority status.

Both constitutional and international lawyers should consider this picture as they contemplate constitutional solutions for other deeply divided places. The first constitutional settlement for Bosnia in March 1992—Cutileiro’s Plan—envisaged a similar territorial recursion, linking the independence of Bosnia to the creation of territorial cantons with the Bosnian, Serb, and Croat majority. However, it was effectively torpedoed by the U.S. administration, whose eventual resistance to cantonization in 1992 encouraged the Bosnian-Muslim leadership to withdraw their support for the constitutional settlement.⁸⁵ A constitutional settlement was finally reached three years later at Dayton, giving *more* territory and autonomy to the Bosnian Serbs and Croats than originally envisaged in Cutileiro’s Plan. Could one of the tragedies of the former Yugoslavia lie in the fact that the most powerful states embraced this recursive territorial pluralism haphazardly as a regrettable matter of fact, and not of principle?

⁸² Some have defended this practice as a matter of *uti possidetis* rule. Others, such as Jure Vidmar, have defended it in terms of the “historical pedigree” of such units. See JURE VIDMAR, *DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW: THE EMERGENCE OF NEW STATES IN POST-COLD WAR PRACTICE* (2013).

⁸³ See, e.g., PETER RADAN, *THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW* (2002); see also SUZANNE LALONDE, *DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF UTI POSSIDETIS* (2002).

⁸⁴ See Z-4 Plan for Croatia; See DRAFT AGREEMENT ON THE KRAJINA, SLAVONIA, SOUTHERN BARANJA AND WESTERN SRMIUM (Z-4 PLAN) (Jan. 18, 1995), <http://www.liv.ac.uk/library/sca/owen/boda/sp10a.pdf>.

⁸⁵ James Goodby, *When War Won Out: Bosnian Peace Plans Before Dayton*, 1 INT’L NEGOTIATION 501, 509 (1996); see also Saadia Touval, *Coercive Mediation on the Road to Dayton*, 1 INT’L NEGOTIATION 547 (1996).

There is no way of knowing whether the military conflict would have been prevented, or its human toll mitigated, if powerful states explicitly committed to the principle of recursive territorial pluralism before the constitutional conflict became an armed struggle. Irrespectively, however, the recursive territorial pluralization of newly independent states should not be seen as an accidental ironic return of the same—where Bosnia leaves the Yugoslav federation only to become yet another federation—but rather as a desirable institutional outcome, supported by the same normative ideal that lies behind the invocation of both territorial people or ethnic nation’s territorial rights—the same ideal that seems to be implicitly operative even in the jurisprudential accounts that negate it, such as Roth’s.⁸⁶ The normative attractiveness of this solution—which over time increases the aggregate satisfaction of individual constituent attachments—has remained obfuscated not only by international jurisprudence’s sharp distinctions between internal/external self-determination, but also by the skewed moral vocabulary of a nation’s or people’s territorial rights.

F. Federalizing Ukraine and Constitutional Theory: An Alternative and an Irritant

The chief practical implication of this article is to join a growing—if disenchanting—chorus of voices, both within and outside academia, that propose the federalization of Ukraine as a morally justified and politically commonsensical solution to its increasingly violent conflict.⁸⁷ Nonetheless, the theoretical proposals advanced here differ not only from the scholarship in normative and international jurisprudence, but also from the ways in which consociational democracy for post-conflict societies is justified in political science.⁸⁸

Needless to say, the resonance of these institutional proposals will be determined by (geo)politics, not theoretical argumentation. Even so, constitutionalist engagement with

⁸⁶ See *supra* Part D.

⁸⁷ See, e.g., HERMAN VAN ROMPUY, CINQ ANS À LA PRÉSIDENTIE DU CONSEIL EUROPÉEN: DISCOURS À SCIENCES PO, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/fr/ec/145952.pdf (“Il faudra une solution globale. Il faudra trouver une façon pour l’Ukraine d’être un pays décentralisé (ou fédéralisé) et inclusif.”); see also *Germany’s Vice-Chancellor Backs “Federalization” in Ukraine*, REUTERS (Aug. 23, 2014) <http://www.reuters.com/article/2014/08/23/us-ukraine-crisis-germany-gabriel-idUSKBN0GN08X20140823>.

⁸⁸ Improvement in the aggregate allegiances can also be discerned from some influential approaches to consociational democracy, however. The defense of “liberal consociationalism” in the Iraqi context, offered by John McGarry and Brendan O’Leary, insists on “ensur[ing] that the rights of individuals as well as groups are protected.” John McGarry & Brendan O’Leary, *Iraq’s Constitution of 2005: Liberal Consociation as Political Prescription*, 5 INT’L J. CONST. L. 670, 675–76 (2007). But the way in which liberal constitutionalism manifests itself institutionally, on the ground, is through the constitutionalized possibility of the territorial reconfiguration of Iraq’s governorates, through referenda called triggered by popular initiative. The net result of such process would be the manifestation of the same ideal—improvement in the aggregate satisfaction of individual constituent attachments over the reconstituted territory—already offered in this article as a more compelling answer to the annexation objection.

the crisis in Ukraine has also been productive for conceptual and disciplinary purposes, enabling us to resolve the paradox of constitutionalism in a manner different from those proposed implicitly by normative and international jurisprudence. As a matter of political realism, the paradox does not make sense. The “people” is formed at the interstice of the provisional and tentative “inside” and “outside,” and the external constituent powers inadvertently partake in the constitution of an allegedly “sovereign” people. Perhaps surprisingly, however, the reverse side of this constitutional realism is normative prescription. Through an engagement with the annexation objection, it is clear that the idea of the people conceals a more basic ideal—the respect for individual constituent attachments—that provides a criterion to assist in the reconstitution of territorial boundaries of sovereign polities.

Nonetheless, the three concrete proposals of constitutional theory advanced in this article do not quietistically accept the inescapable role of external constituent powers, nor do they demand the redrawing of the political boundaries of sovereign states to increase the aggregate of satisfied constituent attachments over a reconstituted territory. The reason for stopping short of this conclusion is simply prudential; it lies in constitutional theory’s conscious acceptance of the empirical and historical argument in favor of territorial integrity that provides the strongest—if implicit—support to Roth’s “bounded pluralism.”⁸⁹

In grounding its understanding of the people through inter-disciplinary confrontation, this article has also presented constitutional theory with an opportunity to come to a more profound understanding of its own purpose. Beyond offering parameters for early-conflict constitution-making, constitutional theory hazarded in this article establishes itself as an alternative to the ways in which normative theory imagines political conflict over territory. It offers simpler institutional prescriptions that still satisfy important normative ideals hidden in the vocabulary of moral rights to territory. In doing so, constitutional theory invites a broader debate about the most effective kind of theoretical discourse necessary to address political conflict over territory.

On the other hand, this constitutional theory challenges increasingly frequent doctrinal and critical contributions to international jurisprudence claiming that there is no inherent normative content in self-determination that would offer useful guidance in territorial conflict. In the context of the dissolution of Yugoslavia, for example, Martti Koskenniemi complained that self-determination “becomes useless when it seems most needed: in a dispute about the boundaries of a particular ‘self’ against another.”⁹⁰ For Roth, “affective communities have no natural territorial coherence, and imposition of such coherence

⁸⁹ ROTH, *supra* note 38, at 128.

⁹⁰ Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT’L & COMP. L.Q. 241, 264 (1994).

could be accomplished only by grotesque means.”⁹¹ But the first claim is correct only if a theoretical inquiry is ignored and considerations of what ideals lie behind the people’s territorial rights and self-determination are sacrificed. Conversely, the correctness of Roth’s second claim is conditional on acceptance of the hyperboles it entails.

But even if Roth’s claim that affective communities have no natural territorial coherence is accepted, we can, and in fact have, historically come closer to satisfying their aspirations. In fact, the entire legal and political history of self-determination’s application is a story of forward movement towards improving the degree of satisfaction of individual constituent attachments over reconstituted territory. Whether normative or prudential, both ideals serve as a metric that unites the acts of ethno-national self-determination in the interwar period, the applications of *uti possidetis* during decolonization, and our ongoing revulsion towards annexations—some annexations in particular—with our contemporary discomfort with tolerating various neo-protectorates in perpetuity. It also provides an answer to why a federal Ukraine is preferable to a unitary one.

Without aspiring to be yet another call for the institutional reform of international law, constitutional theory offered in this article should also be seen as a perceptual irritant to international jurisprudence—inviting it to consider whether it is worth excluding this insight, at least as a subplot, from its dominant narrative of self-determination and territorial integrity.

⁹¹ ROTH, *supra* note 38, at 24.