

“Trust the People”? Democratic Secessionism and Contemporary Practice

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Abstract

Using the secession claims in Ukraine and elsewhere as points of reference, this article reflects on the meaning of popular sovereignty and consent of the governed in divided societies.

The article begins by critiquing the approach to secession claims prevailing internationally. It finds that the imprecision of the applicable rules, the plethora of secession claims, and most importantly, the claims' adverse effects on relations between and within states urge different treatment.

The article then assesses an alternative approach, based on realizing the principles of self-determination and democracy through independence referendums. It finds that a doctrine of democratic secessionism, if conceived consistently and implemented consequently, shows considerable potential as a guide in treating secession claims. Moreover, this alternative proves preferable to the prevailing approach, practically as well as conceptually.

According the principles of self-determination and democracy higher legitimacy than and precedence to other considerations would in some conflict cases lead to striking outcomes. Nonetheless, such an alternative approach could prove not only intrinsically but also instrumentally valuable, contributing, *ceteris paribus*, to conflict resolution.

A. Introduction

Are all of us really advocates of democracy¹ and self-determination (hereinafter SD)² now? Do we “trust the people” as these foundational principles of international ordering

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¹ *E.g., see:* “One simply cannot be against self-determination of peoples; one then would be for determination by others and thereby for foreign rule, oppression, tyranny, discrimination, despotism etc.” Jörg Fisch, *Die*

arguably call on us to do? The attempt to realize these principles simultaneously is appealing: Singly considered, both are “good things.” Moreover, direct democracy has played an increasing role in sovereignty politics and major constitutional change in the last twenty-five years.³ Would-be states appeal to SD and democracy in the hope of gaining international recognition and membership in intergovernmental organizations.⁴ As experience shows, however, the attempt is problematic, raising difficult questions, theoretically and practically.

In general, the concepts of SD and democracy appear complementary. The former refers here to the ability of persons living in a particular territory to decide the political status of that territory, while the latter refers to popular participation in and control of collective affairs. To enjoy the consent of the population, political power in general and the government in particular must be popularly controlled. Both SD and democracy are concerned with the sources of state authority, and both are premised on popular empowerment: people are the rightful “authors” and “owners” of their political being. The state is formed and formalized to achieve particular goals.

In the context of binding referendums on independence, however, the exercise of SD and democracy can produce tensions and even oppose one principle to the other. These tensions and this opposition can in turn encourage societal unrest, as has been variously demonstrated in countries in, or coming out of, conflict.

The following article is a critical reflection on SD and democracy and the way in which their relationship relates to conflict resolution in divided societies. It takes SD and democracy as first principles and deduces from them what a compliant right of secession⁵ would look

Rotlosigkeit der Statussucher—Kosovo und das Selbstbestimmungsrecht der Völker, NEUE ZÜRCHER ZEITUNG (Jan. 2006) (own translation).

² Over the last decades, democracy has emerged as the dominant reference point—“the default”—internationally regarding the control of political power. See, e.g., Amartya Sen, *Reif für die Freiheit—Warum Bürgerrechte vor grossen Katastrophen schützen*, INTERNATIONALE POLITIK 34 (June 2005).

³ See Anne Peters, *The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum*, LIBER AMICORUM TORSTEN STEIN 225 (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463536 (“[A] free territorial referendum is emerging as a procedural *conditio sine qua non* for any territorial re-apportionment.”).

⁴ Leaders of the breakaway Yugoslav and Soviet republics held referendums before declaring independence so as to legitimize their respective SD claims. See ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 79 (1995). More recently, separatist regions in the Caucasus have sought to “earn[] their sovereignty” by successfully building effective democratic institutions. Nina Caspersen, *Separatism and Democracy in the Caucasus*, 50 SURVIVAL 4, 113–14 (2008) (without emphasis).

⁵ Traditionally, *external* SD refers to a decision on the international legal status of a particular population and territory. Secession—one such form—is defined here as a process of their withdrawal from a larger existing state whose result is the creation of a new state. It may be brought about consensually or non-consensually.

like. Divided societies constitute the subject of analysis: Virtually every modern secessionist movement is ethno-nationalist in nature, and several recent referendums have taken place in conflict countries. More specifically, the article considers the meaning of "democratic secession" in the context of the ongoing crisis in Ukraine.⁶

In the event, the article argues that oft-alleged dilemmas regarding SD and democracy are illusory, neither inherent in their relationship nor inevitable in attempts to realize them simultaneously. Observers' difficulties in imagining democracy meeting the diverse needs of those who seek to self-determine stem from an underdeveloped interpretation of (substantive) democracy in the context of (external) SD. (Even advocates of "choice theory" fail to show the courage of their convictions in applying the doctrine.)⁷ The prevailing thinking about and approach to the issue of SD are neither coherent nor defensible, least of all in democratic terms. As recent developments confirm, SD claims are not handled internationally according to clear rules and in a consistent fashion.

Reconciliation between issues of SD and democracy can be, however, achieved through reconsidering the normative meaning of SD and then deducing guidelines for a right of secession that is conceived and implemented consistently with it. More specifically, self-government as a concern central to both SD and democracy can serve as the basis of political authority at all levels of governance. The ideals of popular sovereignty and consent of the governed possess real ideational and constitutive power, and the constructive potential of this power has yet to be exhausted, conceptually or practically. If so, the policy imperative in the present context is to facilitate the expression of the opinion of the population concerned by providing open spaces for free and fair political contestation (including about secession). Soliciting a mandate from the population concerned is the end in itself.

The argument here is not so much definitive as it is facilitative. I am not arguing in favour of secession as being morally required,⁸ philosophically supportable⁹ or particularly

⁶ Democratic secessionism is understood here as a variant of the right of SD. It is a general, free-standing right of secession that is vested in a group of persons that wishes to secede from its existing political community. The secessionist group proceeds to delimit "its" territory democratically. The aim thereby is to "maximise the number of individuals who live in mutually desired political associations" and to establish rightful political boundaries by the majority principle. Aleksandar Pavkovic, *Secession, Majority Rule and Equal Rights: a Few Questions*, 3 MACQUARIE UNIV. L.J. (2003), available at <http://www.austlii.edu.au/au/journals/MqLJ/2003/5.html>. See also Harry Beran, *A Liberal Theory of Secession*, 32 POL. STUD., 21 (Mar. 1984); David D. Speetzen & Christopher Heath Wellman, *Choice Theories of Secession*, in ASHGATE RESEARCH COMPANION TO SECESSION 413–26 (Aleksandar Pavković & Peter Radan eds., 2011).

⁷ Alan Patten, *Democratic Secession from a Multinational State*, 112 ETHICS 558, 560 (2002).

⁸ See, e.g., David Philpott, *Self-Determination in Practice*, in NATIONAL SELF-DETERMINATION AND SECESSION 79 (Margaret Moore ed., 1998).

politically promising¹⁰ (as elsewhere argued). Instead, I present extreme (but plausible) SD claims and pursue one approach to treating them, i.e. democratic secessionism, to its logical conclusions and foreseeable outcomes in the context of resolving societal (ethnic) conflict. My intent is to show that this alternative approach is neither inadvisable nor impossible and thereby to shift the terms on which related discussion tends to be carried out today. Let me here, in the spirit of the Swiss historian Jacob Burckhardt, “say an Our Father and have a go at it.”¹¹

B. Questions Raised

The heated debate internationally over the political status of territories and the recent balloting amid conflict in Crimea, Luhansk, and Donetsk demonstrate the enduring appeal of democratic secession. Despite the different contexts of application as well as their manipulation and misuse, votes on separation remain attractive and in principle, authoritative in multiethnic countries.¹²

Such popular votes seem to provide means of settling “sovereignty politics.”¹³ Upon closer inspection, recourse to a referendum in this context raises difficult but fundamentally important questions as to how the related rights are to be precisely defined. In particular cases, the answers may determine the democratic nature—and hence legitimacy—of the referendum process and outcome. These questions are inter-related but can concern, *inter alia*, the “who,” “where,” “how,” and “when” of an independence referendum respectively.¹⁴ They are posed squarely when the legal basis of the political SD is defined:¹⁵

⁹ As argued, for example, by Mill: “Where the sentiment of nationality exists in any force, there is a prima facie case for uniting all the members of the nationality under the same government, and a government to themselves apart.” John Stuart Mill, *Chapter 16: Of Nationality, as connected with Representative Government*, in REPRESENTATIVE GOVERNMENT (1861).

¹⁰ Formatively, see Chaim Kaufmann, *Possible and Impossible Solutions to Ethnic Civil Wars*, 20 INT’L SECURITY 136 n. 4 (1996).

¹¹ “Ein anderes Mal möge hier der Versuch eines Code dieses sogenannten Völkerrechts gemacht werden, wobei man ein Vaterunser beten und darauf losgehen muss.” JACOB BURCKHARDT, WELTGESCHICHTLICHE BETRACHTUNGEN 125 (1970).

¹² For further information, see Stephen Tierney, *Whose Political Constitution? Citizens and Referendums*, 14 GERMAN L.J. 2185, 2192 (2013) (“by the late 20th century, [...] the referendum had become, for many, an automatic part of constituent constitutionalism and even of the constitutional amendment process.”).

¹³ For more information on “sovereignty politics,” see *When Referendums Work: Vox Pops*, ECONOMIST, <http://www.economist.com/node/17249644>. Outside of the last year and partially outside of Europe, referendums on political status (including independence) have been held in the last decade and a half in East Timor, Montenegro, Netherlands Antilles, New Caledonia, Puerto Rico, South Ossetia, and South Sudan.

¹⁴ See generally, Maya Hertig Randall, *Démocratie directe et partition d’Etats: réflexions sur l’exercice du pouvoir déconstituant*, in DIREKTE DEMOKRATIE: HERAUSFORDERUNGEN ZWISCHEN POLITIK UND RECHT 339 (Andrea Good & Bettina Platipodis eds., 2013).

- the role of "outsiders" in settling secession claims. (I.e. who is actually the sovereign: What should international authorities or foreign powers decide and what 'the people'?)
- the definition of the territory and population in question, the "bounded community." (I.e. what are the territory's boundaries, and which groups are entitled to participate in democratic process realizing SD?)
- the many-sided nature of identity and the trans-national interests of individuals. (I.e. how are multiple—be they complimentary, cross-cutting, or cosmopolitan—identities and allegiances to be handled?)
- the relevant unit of political contestation. (I.e. how is this unit to be delineated on one hand, and further majority-minority divisions and cascading secession claims dealt with on the other?)
- the terms of the independence referendum. (I.e. what constitutes a clear question, a fair process, and a decisive majority—and who exactly is to set these terms?)
- the finality of its result. (I.e. the sovereign may have decided, but when is this "the last word"? How might, has, and should the repeat exercise of popular sovereignty in constitutive politics be regulated?)

C. Prevailing Approach

I. Description

The usual answers to the preceding questions and the contemporary meaning of SD more generally are confused and contested. As far as particular cases go, the answers have been *ad hoc* in nature and have varied by country-context. Help in orientation may be found in the observation that the envisaged and actual role of democracy in settling SD claims has tended to be secondary: Indeed, "democratic deficiencies [. . .] have plagued the invocation of the international legal principle of self-determination."¹⁵ The issue of SD—and more, of secession—in international relations remains primarily political.

¹⁵ *E.g.*, in crafting a secession clause, drawing up the list of eligible voters or setting limits on campaign spending.

¹⁶ Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 COLUM. J. TRANSNAT'L L. 601 (2002–03).

SD has achieved the rank of an international norm that is peremptory in nature (*ius cogens*) and a concern of all states (*erga omnes*). The exact breadth and content of the concept are, however, uncertain but certainly changeable. Article 1(2) UN Charter from 1945 is open-ended, speaking of “equal rights and self-determination of peoples”: Neither does it define what a “people” is nor does it specify the legal consequences thereof. Although Article 1(1) of the international covenants on human rights from 1966 is more emphatic and universal, its practical application remains unclear: For example, does SD imply a right to sovereign statehood?¹⁷

This question was answered in the affirmative in the context of decolonization. SD was expected to lead to the independence of the non self-governing territory and population, but it could also be achieved by free association or integration with another state.¹⁸ The end of the Cold War raised the possibility of extending SD to neo- or non-colonial contexts and subjected the principle to further debate. Since then, the community of states has handled SD claims with great care, and it has fought shy of defining SD clearly. The UN Security Council has, for example, attempted to respect both the foundational rule of state sovereignty and a right to SD in the particular context and has sought to characterize all cases as special and none as precedent setting. Although “there is in international law no absolute guarantee of the territorial integrity and the political unity of existing states”,¹⁹ the right to external SD has been generally restricted by international (and regional) organizations to exceptional situations. Decolonization, serious human rights violations, as well as alien subjugation, domination, and exploitation have been deemed sufficient to qualify as such situations (per “remedial rights theory”)—but not a simple vote in favour of independence by a sub-national group (per primary rights theory).²⁰ Unilateral secession is only permissible if the group concerned has been subjected to sufficiently severe and ongoing injustices at the hands of the parent state. Where a right to external SD has been otherwise identified, the UN has sponsored many plebiscites and referendums in order to enable the populations concerned to express their will about the political status of their territory.²¹

¹⁷ See BRAD R. ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT: PREMISES OF A PLURALIST INTERNATIONAL LEGAL ORDER 80–81 (2011).

¹⁸ See G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514 (Dec. 14, 1960); see also G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970).

¹⁹ Urs Saxer, *Unabhängig werden ist nicht einfach*, NEUE ZÜRCHER ZEITUNG (Sept. 2, 2008) (own translation).

²⁰ JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 417 (2d ed. 2006).

²¹ Notably no such plebiscite or referendum was foreseen regarding the disputed status of Kosovo. See S.C. Res. 1244 (1999), S/RES/1244 (1244), June 10, 1999; Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, S/1999/648 (June 7, 1999).

In other words, SD in international law is deemed to be flexible in nature, and what it demands in the particular case is considered to vary according to the facts. The outcome desired by the state community in the application of this instrumental principle is "to develop friendly relations among nations" (Art. 1(2) UN Charter), and the determinative facts remain open to its interpretation. This interpretation is above all intended to promote the *raison d'État* by protecting and affecting the "fundamental interests" of single states, especially in own territorial integrity. Too many states (multi-ethnic in particular) remain afraid of according priority to protection of ethnic groups over state sovereignty by internationally recognizing a right to secede in the absence of injustice.²²

A prevailing preference for realizing SD through autonomy was made plain in the Cold War's aftermath. The constituent republics of Yugoslavia and the USSR were, like colonies before them, deemed to be entitled to independence, political units and ethnic groups elsewhere only to autonomy. It is still widely argued today that *internal SD*, or the conferral of various political and social rights on a group once "the people" had achieved statehood, is more likely to approximate "true democracy." Politicians (and scholars) contend that it allows participation of all inhabitants (their concerns being represented at least in the existing state's central government) and that it respects plural identities and trans-national interests (especially of individuals in the ethnic group in question, who are not cut off from "the wider world").²³

As regards current arrangements in Europe, the Venice Commission's review found that describing secession as "inimical to national constitutional law" would be an "understatement".²⁴ (The language used varies—e.g. stipulating that the unity of the country, national sovereignty, or territorial integrity is eternal, unimpeachable, or indivisible—, but the aim is the same—i.e. to forbid secession expressly.)²⁵ Where secession is actually foreseen constitutionally (through entrenchment or being read in),²⁶ the principle underlying the process seems to be that of consent. The details vary by state, but a territorial community that wants to secede must clearly indicate its willingness to do

²² To do so would be tantamount to declaring themselves "a suicide club." Daniel Thürer, *Autonomie statt Sezession [sic]?*, 2 unizürich—MAGAZIN DER UNIVERSITÄT ZÜRICH (1996) (own translation). The Great Powers also pursue their own interests, granting or refusing recognition to individual secession claims so as to bolster allies and weaken adversaries.

²³ See, e.g., Stéphane Dion, Address at the School of Public Policy University College London: How to deal with secessionist demands in democracies (Oct. 15, 2003) (notes from the address) (on file with author).

²⁴ European Commission for Democracy Through Law, *Self-Determination and Secession in Constitutional Law*, at 2, CDL-INF/2000/2 (Dec. 10–11, 1999), available at <http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF%282000%29002-e>.

²⁵ Such provisions include the current UKRAINIAN CONST. art. II, cl. 2.

²⁶ See also Peter Radan, Conference of the Association for Research on Ethnicity and Nationalism in the Americas: Constitutional Law and Secession (2007) (unpublished paper) (on file with author).

so—usually through a referendum—and the existing state must consent—usually through an amendment to the state constitution. (For example, the UK government promised in 2014 to respect the outcome of the independence referendum in the secessionist territory Scotland and not to interfere with its sovereignty.) The standards for such votes, e.g. the majority required for approval, are all over the map, literally and proverbially.²⁷

For its part, the repeat exercise of popular sovereignty in constitutive politics has been regulated inconsistently (be the context that of constitutional law, political science, or democratic theory). The tendency is to think in terms of “one man, one vote, one time.” (Indeed, the term “neverendum” is used to connote endless constitutional deliberations, repeat referendums on secession, and perpetual instability in the state concerned.) Successive votes on political status have, however, been allowed when the power that be has not had the “right answer” to the question (regarding independence in Quebec in 1980) or when the process has been ‘captured by politics’ and has not reflected the “true opinion” of the electorate (regarding the Lisbon Treaty in Ireland in 2008).²⁸ Thereafter, the “settled will of the people” is likewise spoken of.

The recent secession claim of Crimea has challenged the prevailing approach to SD once more. In general, states have assessed this claim, like those of South Ossetia, Abkhazia, and Kosovo earlier, according to the traditional criteria (e.g. commission of serious human rights abuses and prior constitutional arrangements) as well as their abiding concern for territorial integrity and international stability.²⁹ Russia and its allies have come to a contrary finding of the claim’s legitimacy. These also assert that Russia’s intervention and the Crimean people’s choice on their future status are “in conformity with international law,” assertions that are *prima facie* plausible considering the aforementioned ambiguities in the relevant rules. In point of fact, they have made a significant innovation to the *Jex*

²⁷ For example, the EU could equally well have insisted in the Montenegrin referendum on independence that the requisite majority be fifty percent or sixty percent. It settled on fifty-five percent. In the case of the referendum in southern Sudan, it was set at sixty percent of those voting; in Scotland, fifty percent plus one. What exactly constitutes “a clear majority” in the case of Quebec independence is left up to politics by the Supreme Court of Canada. See *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.), available at <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do>. Canada’s Clarity Act, which is to give effect to the advisory opinion, leaves the question up to the Canadian parliament after a vote on independence. An Act to Give Effect to the Requirement for Clarity as set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference, S.C. 2000, c. 26, available at <http://laws-lois.justice.gc.ca/eng/acts/C-31.8/page-1.html>.

²⁸ Further see discussion of re-doing or undoing of Irish referendum on Lisbon Treaty in Grainne de Burca, *If at First You Don’t Succeed: Vote, Vote Again: Analyzing the Second Referendum Phenomenon in EU Treaty Change*, 33 *FORDHAM INT’L L.J.* 1472 (2011).

²⁹ See Press Release, General Assembly, *General Assembly Adopts Resolution [GA/11493] Calling Upon States Not to Recognize Changes in Status of Crimea Region*, U.N. Press Release GA/11493 (Mar. 27, 2014), available at <http://www.un.org/press/en/2014/ga11493.doc.htm>.

*lata*³⁰ in stridently advancing the pretence of democracy to legitimize the external SD. Russia has treated it as an accession of the independent "Republic of Crimea," which Crimea and Sevastopol briefly proclaimed after joining together, and which subsequently requested admission to the larger country. The Kremlin has strongly opposed the "annexation" label as offensive towards the inhabitants of the peninsula; the request is alleged to have been in conformity with a democratic process that had reflected the Crimean people's desire to join Russia.³¹ It sees this popular desire as stemming not from military or other pressure exerted by Russia but from the systematic oppression of a distinct people. Most recently, the draft law to revise the country's language policy promulgated a majoritarian, ethno-nationalist vision of the Ukrainian identity. The reform was seen by them as a threat to ethnic minorities,³² antithetical to collective and individual diversity as well as to full political debate.

Although this rationale for Russia's approach was clearly self-serving, it was notably made in terms of legal principles and is in keeping with the *Zeitgeist* regarding democracy. Government is to be of and by, as well as for, the people. The people are to drive decision-making in all matters of public concern: a country's political status like its political system and most of all, its government must be responsive to the people's changing demands. These are to be restricted only by their own will and not by any rules, institutions, or 'superior orders' which they have not assented to. That "declarations of independence may, and often do, violate domestic legislation", the Russian President observed after the referendum in Crimea with reference to the case of Kosovo, "does not make them violations of international law".³³

Put concretely: The residents of the Crimea had a right to choose their own political future; they had freely and fairly exercised that right; and they had clearly and convincingly demonstrated a desire to join Russia. In its argumentation, the Kremlin estimated that democracy is sufficiently established in international law such that no third country would

³⁰ See generally, William W. Burke-White, *Crimea and the International Legal Order*, Research Paper No. 14–24, Public Law and Legal Theory Research Paper Series, Univ. of Pa. Law School (July 2014), available at <http://ssrn.com/abstract=2474084>.

³¹ For references, see *Annexation of Crimea by the Russian Federation*, WIKIPEDIA, available at http://en.wikipedia.org/wiki/Annexation_of_Crimea_by_the_Russian_Federation.

³² On the Crimean Peninsula today, the majority is ethnic Russian, the rest being either Russian-speakers (Ukrainians) or "leaning towards" Russia (Crimean Tatars). See generally Katie LaRaue, *The "Moral Project" of Post-Communist Ukraine: Understanding the State, Nation(s), and the Future of Ukraine*, 11 DEMOCRACY AND SOC'Y 6 (2014).

³³ Vladimir Putin, *Address to the Russian Federation*, PRESIDENT OF RUSSIA (Mar. 18, 2014), available at <http://eng.kremlin.ru/news/6889>.

try to reverse a secession that was achieved democratically and that a more readily available right of SD would meet with significant resonance in the state community.³⁴

The ongoing crisis in Ukraine has demonstrated once more that the meaning of SD in the international legal order is “continuously evolving conceptually and experientially in response to the pressure of events, geopolitical priorities, and the prevailing moral and political climate”.³⁵ Going forward, the unilateral secession of the Crimean republic and the plethora of other claims being made³⁶ pose the question whether this newer conception of the “people” in SD should be developed further and if so, how.

II. Critique

The community of states’ intent in its current approach to assessing legality and legitimacy of secession claims may well be to avoid uncertainty and conflict over boundaries and thereby to foster stability and peace among all existing and any new states. The actual consequences are manifold and baleful. The approach has proven inflammatory as a process and as a concept, internally and externally. It works in individual cases against legal security and predictability; it leaves SD open to manipulation, self-serving interpretation, and hypocrisy; and most significantly, it can cause inter-ethnic conflict to escalate into public and even wider violence, including war between states.

The differing official opinions on contemporary claims have made the shortcomings of the prevailing approach obvious. In particular, they have demonstrated how the approach is irrelevant to, if not subversive of, a right of secession conceived and implemented according to the principles of SD and democracy:

- As noted, the community of states has approached secession claims one by one, deciding whether to respect territorial integrity according to flexible criteria. This ability to decide the exception makes the international community effectively the sovereign and not the relevant people, as on democratic principle the latter

³⁴ In this respect, the Kremlin’s political calculations have been borne out. A large number of states supported Russia, abstained, or were absent in voting on the General Assembly’s condemnatory resolution. Moreover, the Referendum’s outcome has not been challenged and no attempt has been made to overturn it, before the UN or elsewhere.

³⁵ RICHARD A. FALK, *HUMAN RIGHTS HORIZONS* 112 (2000).

³⁶ Given the multi-ethnicity of most countries today, the use of independence referendums could be even more widespread in future. In Europe alone, possible regions include the Basque country, Corsica, Flanders, Northern Cyprus, Republika Srpska, Transdniestria, and Veneto.

should be.³⁷ Its members must be given the opportunity to participate in the realization of this choice of independence; their democratic rights may not be usurped by international authorities or foreign powers,³⁸ even if done in good faith for their benefit.³⁹

- In assessing claims, states refer to the consequences of secession for security and stability. (For example, many states are withholding recognition of Kosovo for fear of "reigniting the Balkan powder keg.") Such reference is often used to trump contrary considerations and to decide who counts as a "people" and what a people deserve. However, it conflicts with democratic principles, since security and stability are defined according to others' interests. Reference should not be made to the security and stability of the community of states in general, but to that of the state in question and of its citizens in particular. How is the particular polity functioning (or not)?
- There has been, as also noted, a bias in international practice (and theory)⁴⁰ in favour of continuity in a country's political identity, which takes the form of a strong preference for realizing SD internally rather than externally. Against this bias it can be plausibly argued that speaking of a "limited right to self-determination" for ethnic groups or for related political units that do not comprise constituent republics of the state (as was commonly asserted upon Yugoslavia's break-up)⁴¹ is an oxymoron. The concept of SD implies the right to establish a sovereign and independent state, and secession should not be treated differently than other choices of political status.⁴² Finally, the burden of proof in

³⁷ The UN's nation-building efforts in East Timor have been sharply criticized on this basis. See Hua Fan, *The Missing Link between Self-Determination and Democracy: The Case of East Timor*, 6 NW UNIV. J. INT'L HUMAN RTS. 176, paras. 25–30 (2008).

³⁸ As the French philosopher Renan puts it, "if anyone has a right to be consulted in this matter, it is the inhabitant." Ernest Renan, *Qu'est-ce qu'une Nation?*, (Mar. 11, 1882), available at http://ourworld.compuserve.com/homepages/bib_lisieux/nation04.htm (own translation).

³⁹ These "arm-twisters" should "defer more to the political wills of the constituents that will end up living under the newly created constitutional orders." Zoran Oklopčić, *What's in a Name: Five Theses on the Self-Determination of Peoples*, THE TRANSATLANTIC ASSEMBLY (Feb. 15, 2006), available at <http://transatlanticassembly.blogspot.com/2006/02/whats-in-name-five-theses-on-self.html>.

⁴⁰ See, e.g., Amitai Etzioni, *The Evils of Self-Determination*, 89 FOREIGN POL'Y 21, 25 (Winter 1992–93) ("[p]eople desire and deserve a government that is responsive to them but not necessarily a separatist one.").

⁴¹ As exemplified by the opinions of the Arbitration Commission of the Conference on Yugoslavia (a.k.a. Badinter Arbitration Committee).

⁴² Similarly, see: "[i]t [is . . .] within the power of the people of Canada [. . .] to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada." [1998] 2 S.C.R. 217, para. 85 (Can.).

the treatment of a secession claim is mistakenly laid on the secessionists.⁴³ If a group in a liberal democratic society clearly expresses its preference for an own state, those who would grant it a lesser measure of autonomy (i.e. officials defending the external boundaries and internal order of the existing state) should be required to justify why that group's preference should be overridden rather than deferred to.

- A group's claim for external SD is deemed by many observers to be legitimate when internal SD has been firmly refused (a "just cause" in contradistinction to a "choice" argument). On this view, repeated rejection of reasonable demands for political autonomy or serious human rights violations by the government qua one group entitle another group in the country to secede unilaterally. The relevant threshold varies by commentator (persecution or single abuses? ongoing or past?). However low that may be, the criterion again gives others too much say, democratically considered. The success of a claim is dependent on their behaviour rather than on the political desires of the group concerned.
- A related concern about the prevailing approach is that focus on the rights of the existing state and the secessionist group respectively risks leaving out of consideration—and not providing for—the interests and desires of a newly-created minority. Achieving SD through democratic process does not guarantee that internal democracy will actually prevail in the new state:⁴⁴ "SD referendums" have often been instrumentalized by ethnic majorities to consolidate power during an internal conflict. External SD cannot just mean switching the identity of those groups suffering discontent or disadvantage.⁴⁵ If a resultant government is to be truly democratic, it must pursue the good of all people within its boundaries.
- The pejorative term "neverendum" and similar language⁴⁶ seek to discredit renewed efforts in favour of constitutional reform, including group accommodation outside of the current state. Stability and continuity are considered as virtues in themselves rather than considered as to their

⁴³ For example, see: "[T]hose who wish to undermine or to destroy the Canadian federal system must define clearly the risks involved and demonstrate that the new judicial and political situation they want to establish would be in the general interests of our people." Pierre Trudeau, *On Quebec Nationalism*, in THE ESSENTIAL TRUDEAU 105, 115 (Ron Graham ed., 1998).

⁴⁴ See YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS 91 (1994).

⁴⁵ A current example is the plight of minority groups in Kosovo under Albanian domination.

⁴⁶ E.g. speaking of "sore losers" "re-fighting old battles" and of an always present "threat" or "a looming, restless spectre."

consequences, one of which is a failure to consult dissatisfied groups fully. A minimum requirement of democracy is that periodic, free, and fair elections be held. In these, voters are entitled to "throw those bums out" whom they elected enthusiastically last time around. Why is it only possible for the sovereign to change its mind in representative democratic votes and not in direct?⁴⁷

D. Proposed Alternative

1. Elaboration

So far, I have sketched potential dilemmas in the relationship between SD and democracy, and I have highlighted several shortcomings in the prevailing approach to secession claims. The answer to these, as I will now explain, lies in questioning the concepts of SD and democracy involved and in viewing SD as a principled means of legitimization of political power nationally.

To be more specific: the aforementioned dilemmas and shortcomings may be traced back to limited understandings of the constituent concepts, especially the ethnic nationalist. On it, the population in question must objectively constitute a "nation" or a "people" in order to form a political unit. Related claims are justified as the expression of that population's will. For its part, "democracy" has a particular—and for modern western sensibilities, peculiar—meaning: "[R]ule of one kind of people, by one kind of people, for one kind of people".⁴⁸

The ethnic nationalist understanding should, however, be considered contingent and open to revision, since it is the product of particular circumstances of time and place. State identity may in theory and in fact be based on a civic understanding, according to which the population in question is not an *ethnos* but a *demos*. To ground consent, the relevant population has fundamental things in common other than ethnicity, such as a sense of common destiny (or modestly, of common fate). These commonalities give rise to the sense of belonging and to the desire to live together that are determinative of political unity.⁴⁹

⁴⁷ In Scotland, the prospect of a neverendum will allegedly create political uncertainty and damage economic well-being. It would be logical, however, for any devolution plan proposed to be voted on just as the option of independence was earlier.

⁴⁸ ROBERT M. HAYDEN, BLUEPRINTS FOR A HOUSE DIVIDED: THE CONSTITUTIONAL LOGIC OF THE YUGOSLAV CONFLICTS 145 (2000).

⁴⁹ See JEAN-LUC NANCY, THE TRUTH OF DEMOCRACY 34 (Pascale-Anne Brault & Michael Naas trans., 2010) ("[D]emocracy is first of all a metaphysics and only afterwards a politics.").

The US polity, which was created by the voluntary act of individuals who became its citizens,⁵⁰ provides an archetype for a principled alternative. What drove the revolutionaries' fight for independence was not a desire for ethnic SD but the desire for democratization and a responsive government.⁵¹ The meaning of SD today should arguably return to its roots in the two-fold understanding famously set out in the US Declaration of Independence. As the Declaration's very first sentence states, the "Laws of Nature and of Nature's God" entitle any "People" to determine their own government. As its third and fourth paragraphs explain, those who govern draw their legitimacy from the consent of the people, and when government becomes destructive of the ends for which it is created, that people are entitled to alter or abolish it. SD on this understanding consists of people's ability to realize themselves in public affairs and to control political power, equally and freely.⁵²

The alternative approach proposed here is indifferent as to the reason(s) why the population favours or opposes secession. The approach is based on non-coerced political choice: if they wish, a group is entitled to separate even from a (otherwise) perfectly legitimate state. Choice suffices for that group to found a right to secession and for the state to forfeit its claim to respect for its territorial integrity. The identification of the 'self' (the people holding the right to SD) involves just a subjective element (i.e. that the group in question considers itself distinctive) and not necessarily objectively determinable characteristics. Democratic process is to establish the existence of such a *self*-awareness. Although the existing state may well offer a separatist group greater security, a higher standard of living, etc. than it would have alone, if the group still prefers, in a fully informed and free decision, to make this trade off and achieve independence, it is entitled to do so. The choice would still be justifiable on the principle underlying SD and democracy. For under a system of self-government, priority is given to the way that decisions are taken rather than to their rationale and results.

The key question then is what guidelines may be proposed for treating individual secession claims. In order to make the "original meaning" of self-government in the Declaration

⁵⁰ These were, more precisely, white male adults in the population of the Thirteen Colonies speaking through representatives to the Continental Congress in Philadelphia in the summer of 1776.

⁵¹ At its founding, the US was thereby "spared the cheapest and most dangerous disguise that 'the absolute' ever assumed in the political realm, the disguise of a nation." HANNAH ARENDT, *THE HUMAN CONDITION* 195 (2d ed. 1998).

⁵² To be more precise: The Declaration conflates individual with collective rights, bringing together the idea that all "men" are created equal and endowed with certain rights (individuals against their governors) with the idea that a "people" assuming statehood are separate and free and are entitled to respect in their foreign relations (one people against another). Indeed, the Declaration implies that these individual and collective rights reinforce each other. See DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* (2007); see also Adam I.P. Smith, *All Men*, *TIMES LITERARY SUPPLEMENT* (June 8, 2007), available at <http://www.the-tls.co.uk/tls/reviews/history/article749863.ece>.

effective, a political system needs to embody certain goals. As regards SD these include that:

- The people (qua *demos*) are the authors as well as the owners of the state. The principle of SD means the right of a people to choose a political status. If independence is freely chosen, it also means that a democratic political system must be adopted for the new state. In both contexts, there is an exercise in collective decision-making, and in both contexts, the people must be the basis for authority (i.e. in the state and of the government, respectively). For their part, collective decisions should not be subject to the influence of extraneous actors seeking a particular outcome. While mediation may facilitate conflict resolution between groups, ultimately the "self" in self-determination must be *qua definitione* the freely formed will of the population in question and not that of any outsiders. Likewise, how can an appeal to the will of the people logically be allowed to end in the exclusion of the people from influence in public affairs?
- If the state is constituted by agreement (formal or informal) among different groups for their mutual benefit, these groups may seek to renegotiate the agreement or may withdraw their ongoing consent at any time, depriving the existing state of its ongoing legitimacy.⁵³ Recognizing that a group possesses the right to secession does not, however, mean that it can exercise the right to the maximum extent. As an agreement, its terms cannot be changed unilaterally or peremptorily by one group.⁵⁴ All constituent groups should have a say on a territorial re-apportionment.⁵⁵
- Just as future generations are entitled to redesign the internal constitutional order in full or in part, the right to external SD is not exhausted by its exercise on one occasion; "the right subsists and continues to be vested in the people".⁵⁶ Status—be it substantial autonomy or full independence—should not (and

⁵³ Further see Donald W. Livingstone, *The Very Idea of Secession*, 5 *Soc'y* 38–39 (1998).

⁵⁴ N.B.: No consideration of other groups should be required in cases of subjugation, domination or exploitation.

⁵⁵ This view has gained credence through recent international practice. See the reaction of Foreign Minister of Spain, a country with a particular interest in the debate on democratic secessionism, to the prospect of Scottish secession: "If in the UK, both parties agree that this is consistent with their constitutional order, written or unwritten, Spain would have nothing to say, just that this does not affect us. [...] No one would object to a consented independence of Scotland." The minister also stated that the independence of Kosovo, which Spain does not recognize, was a different case because it was based on a "unilateral decision." Graeme Murray, *Spain will not Veto an independent Scotland Joining EU*, *SCOTTISH EXPRESS*, Feb. 26, 2012 (citing Jose Manuel Garcia-Margallo).

⁵⁶ Daniel Thürer & Thomas Burri, *Self-Determination*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* para. 22 (Rüdiger Wolfrum ed., 2010), http://ilmc.univie.ac.at/uploads/media/self-determination_empil.pdf.

cannot) be determined “once and for all”, if it is subject to popular consent.⁵⁷ The people (qua *demos*) are entitled to—and will likely in changed circumstances—change their minds about their political status.⁵⁸ An abiding will cannot be counted on, and the notion of a “final status” in democratic secessionism is a fallacy.⁵⁹ (N.B. a referendum in favour of re-unification could conceivably be held in a newly independent state.)⁶⁰

- Self-government means that those subjected to a political decision are entitled to take part in it, i.e. there is a fundamental congruence between being governed and governing. Citizens have the chance to participate in civil and political life on equal terms, especially members of minorities, who are protected against a “tyranny of the majority.” Democracy is not just about “one man, one vote” but about the chance for everyone to realize themselves and to contribute to the development of the polity as a whole. Legitimate demands by minority groups are recognized in law and effected in practice within the state through creation of appropriate political arrangements, structures, and procedures.⁶¹
- Should a group claim a right to external SD, a referendum should follow in due course. The preference for such votes in ascertaining the opinion of the population in question conforms to the basic requirements of SD. Although its will could be stated through executive decree or parliamentary act, the “self” should be directly consulted in an act of SD.

⁵⁷ Similarly, see James Tully, *Introduction*, in *MULTINATIONAL DEMOCRACIES 5* (Alain-G. Gagnon & James Tully eds., 2001).

⁵⁸ There is precedent in this respect. The “Good Friday Agreement” provides that the British Secretary of State will call a referendum on independence in seven-year intervals if it is “likely” that the majority of those voting would express a wish that Northern Ireland should cease to be part of the UK and form part of a united Ireland instead. Northern Ireland Act, 1998, 46 Eliz. 2, c. 47, available at <http://www.hmso.gov.uk/acts/acts1998/19980047.htm>.

⁵⁹ In reference to the ongoing “threat” of Scottish independence, it seems appropriate to refer to the prediction of Macbeth: “We have scotch’d the snake, not kill’d it. She’ll close and be herself, whilst our poor malice remains in danger of her former tooth.” WILLIAM SHAKESPEARE, *MACBETH* act 3, sc. 2, 14–15.

⁶⁰ Appropriately, the current constitutions of both the Czech and Slovak Republics provide for a reunification of the states by mutual assent, and the Treaty establishing a Constitution for Europe provided for a state that has withdrawn from the Union to rejoin it. Treaty Establishing a Constitution for Europe art. I-60(5), 2004 O.J. (C 310), (Dec. 16, 2004).

⁶¹ For measures that may be taken in a pluralistic society to militate against majority rule see *inter alia* Thürer. These measures include minority political rights, e.g. “say & control” per Lund Recommendations on the Effective Participation of National Minorities in Public Life. *Lund Recommendations*, OSCE (1999), available at <http://www.osce.org/hcnm/30325>.

- The specific terms of the referendum are not prescribed by logic (or recommended by experience internationally). These should instead be negotiated and agreed by both sides, the movements for and against secession. Ideally, an unambiguous question with a "yes" or "no" answer is put to the voters, a certain threshold of them participates, and a substantial majority results, following an open, informed, and fair debate. The referendum's result may then be taken as an accurate and decisive expression of the collective will.
- As high turnouts in the referendums in Scotland and Quebec *inter alia* evidence, the population will be willing and able to make a choice itself about which polity it wishes to belong to. Voters will in effect prioritize a political identity that represents their truest self. A common worry about recourse to a referendum is that the voters will not understand the question or appreciate its significance. To permit the people to vote only on low politics and not high is, however, to fear democracy.
- Should a group achieve independence, it must be willing to grant others within the new state the same right of SD that it has just exercised. The so-called orphans of secession may also choose independence. (On democratic terms, partition is logically compatible with secession.) If they do not, they must be provided for (as individuals and groups) through protection of their identity and the ability to participate effectively in the life of the state. To proceed otherwise would be to favour one group over another rather than to accord all the equal respect and dignity due in a democratic society.

II. Possible Objections

Since the possible consequences of a free exercise of SD are so weighty, the alternative approach to the interplay of SD and democracy must first be demonstrated to be preferable to the prevailing, practically as well as conceptually. Here I follow criteria developed by a "remedial rightist" to assess theories of secession: Is the alternative approach proposed here "minimally realistic"; what "perverse incentives" could such an approach create; and how "morally accessible" is it?⁶² These questions should be addressed in terms of recent related experience.

Their short answer is that the proposed approach is not flawless, and it cannot be interpreted and concretized in conflict resolution without difficulty. This approach brings its own risks and possibly undesirable consequences. Nonetheless, the guidelines outlined above seem more promising than those usually applied. The former are more likely to facilitate the harmonious resolution of secession claims than the latter, as the following

⁶² Allen Buchanan, *Theories of Secession*, 26 PHIL. AND PUB. AFF. 31, 42–44 (1997).

examples of the application of the ‘original meaning’ of SD attest. Accordingly, the appropriate response to these objections is to limit and regulate in advance the relevant process as far as possible rather than to reject its application out of hand.

1. *Realism*

We may now agree that political communities must be able to decide their future according to their own understanding of their situation, needs, and interests. Among the questions raised by secession claims perhaps the most difficult – but the most central – to answer is who these communities entitled to SD are. It is truly a paradox: “[T]he people cannot decide until someone decides who are the people”.⁶³ Moreover, as Robert Lansing, the realistic Secretary of State of the idealistic US President Wilson, warned: “Without a definite unit which is practical, application of this principle [of SD] is dangerous to peace and stability.”⁶⁴ Subsequent commentators have claimed that only non-democratic means can define the *demos*. The “self” on their understanding is “the outcome, and not the source of radical constitutional reconstruction”.⁶⁵

In response to these arguments, it should be first noted that the question does not present itself as often as thought. It may well be “very difficult to draw boundaries in such a clean and neat way that homogeneous countries are created”.⁶⁶ As the former Canadian Prime Minister Trudeau advises, however, “the first law of politics is to start from the facts”.⁶⁷ These serve in the present context to assuage concerns about the application of the principle of SD and the definition of the people.

The facts in the present context reveal first, that there are instances in which a group in question is a clearly defined people with a clearly defined territory: i.e. it has a discernable commonality as well as a homeland. The claim of a particular population to constitute a people has often gone unchallenged in international legal affairs. (For example, the International Court of Justice recognised in its *Western Sahara* opinion (1975), *East Timor* judgment (1995) and *Palestinian Territory* opinion (2004) the populations as peoples in discussing the right to SD.)⁶⁸ Second, the people can in practice often derive their

⁶³ W.I. JENNINGS, *THE APPROACH TO SELF-GOVERNMENT* 56 (1956).

⁶⁴ JOHN O’BRIEN, *INTERNATIONAL LAW* 163 (2001).

⁶⁵ Oklopcic, *supra* note 39.

⁶⁶ Arend Lijphart, *Back to Democratic Basics: Who Really Practices Majority Rule?*, in *DEMOCRACY’S VICTORY AND CRISIS* 125, 143 (Axel Hadenius ed., 1997).

⁶⁷ Trudeau, *The Reason Behind Federalism*, in *THE ESSENTIAL TRUDEAU* 117, 119 (Ron Graham ed., 1998).

⁶⁸ Likewise, the Independent International Commission on Kosovo assumed in its report that there is a people of Kosovo with little discussion: “The people of Kosovo must take over the running of their affairs.” *INDEPENDENT*

boundaries from their existing political unit. A secessionist movement does not arise and make its claim *ex nihilo*. It operates within a defined territory and addresses itself to a particular population within a state from which it seeks to withdraw. (Attempts to define the collectivity of French-Canadians today offer a good example. The great majority of French-speaking Canadians live in the province, and it is within this unit that separatists have made their claim. Its boundaries can be used—at least initially (*infra*)—to define the relevant population.) In further cases, it is not necessarily the intent of secessionists to draw "clean and neat" boundaries, an intent that may be shared by prospective minorities who would prefer to remain where they are. The sense of a territory where most group members live and consider themselves to have their roots may not be definitive of their group identity.

Recent experience suggests that there may be pragmatic solutions to the problem as to who exactly belongs to "the people" who are to be "trusted." An overarching definition of the "nation" that encompasses all the inhabitants of the particular territory when these are divided by ethnic differences may not need to be imposed or agreed in advance. Such a definition can, *ceteris paribus*, be negotiated between parties, decreed by a higher authority, and voted on by the groups concerned, as successively explained below.

The success of the independence referendum in 2006 on whether Montenegro would secede from its Union with Serbia is particularly instructive. The run-up to the referendum witnessed heated arguments about who had the right to vote.⁶⁹ On the day, the electorate, a.k.a. the *pouvoir deconstituant*, comprised anyone who was over eighteen years old and who had been permanently resident in Montenegro for at least twenty-four months.⁷⁰ The referendum on the state status of the Republic of Montenegro demonstrates that a multiethnic territory that includes an alien population and a diaspora can be defined as a *demos* and not as an *ethnos* and is able to exercise a right to external SD peacefully.

Another aspect of the problem of who the people entitled to SD are was considered by the Canadian Supreme Court in 1998. In the *Secession Reference*, the Court held that Quebec could not in view of legal and pragmatic considerations secede unilaterally,

INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 287 (2000).

⁶⁹ The framework for voting was established by the Law on the Referendum on State Legal Status that was adopted by the Parliament of Montenegro on 1 March 2006 following extensive consultations between the two sides on the referendum issue and, it should be kept in mind, intervention by the EU. OSCE/ODIHR Referendum Observation Mission, Republic of Montenegro Referendum on State-Status—21 May 2006 (Final Report), Warsaw 4 August 2006, available at <http://www.osce.org/odihr/elections/montenegro/20099?download=true>.

⁷⁰ In other words, individuals' prior choice of permanent residency was taken to be determinative of their identity for the purposes of the referendum and not their citizenship or self-designation as ethnic Montenegrins, Serbs, Muslim Slavs, or Albanians. This people have been called the *pouvoir constituant composé*.

notwithstanding any majority in its favour in a provincial referendum. Principles of Canadian constitutionalism would require the provincial government and the federal government to recognize their obligations and the expression of popular opinion (respectively) and to enter into comprehensive negotiations with all parties to Confederation.⁷¹ In answer to the question of the “lives of others,” the Court effectively adopted—as we should here—the “all affected interests” principle to define the population that was to be consulted.⁷²

Related to the preceding is what has been called (ironically) “the Russian doll problem” of nationalism, namely that any territorial approach to a minority issue merely pushes the problem of who the people are to a lower level, owing to an admixture of majority and minority groups. Accepting the principle of popular decision-making when groups in a country are intermingled territorially but distinct in identity means that each group / sub-group / sub-sub-etc. group or rather, each minority within each majority within each minority *ad infinitum* may agitate for the polity to be reconstituted so that it is fully recognised and equally empowered. Here closer inspection reveals that the process of deconstructing a multiethnic entity need not require massive violence. There are means beyond recourse to (the euphemistic) “voting with the feet” and “exchanges of populations” to resolve the problem of minorities within the traditional ‘nation’ state. These include, *ceteris paribus*, democratic means. The key is to appreciate that the polity qua territory voting and the polity qua territory subsequently seceding may legitimately differ from one another. Once this possibility is accepted, the population concerned may keep voting until separation is no longer sought by a majority and all political units have decided whether they prefer ‘to stay or to go’. In an ongoing case, a Swiss canton (Jura) was created (and has been recreated) by the exercise of SD within a federal state. A series of referendums beginning in 1974 and continuing through 2014 has been held at all levels of government existing (national, regional, and local) to determine the new canton’s territory. Boundaries have been—and can be through time and space—drawn and redrawn following democratic process to suit the wishes not of the *ethnos* but of the *demos*.⁷³

⁷¹ Neither could Quebec dictate the terms of a proposed secession to the other parties to Confederation nor could, as the Court described the situation in an understatement, “the Canadian constitutional order [. . .] be indifferent” to a clear vote in favor of separation from Canada. [1998] 2 S.C.R 217, para. 92 (Can.).

⁷² The maxim of Roman law “*quod omnes similiter tangit ab omnibus comprobetur*” captures this principle. (Roughly translated: “What touches all similarly, should be approved by all.”) N.B.: Spanish Constitutional Court recently applied this principle with a different result. In its decisions from 2008 and 2014, it required that *all* Spaniards be able to vote in a referendum on the independence of a territorial unit (the Basque country and Catalonia, respectively) and that such a process be led by the government in Madrid. See Peters, *supra* note 3, at 270.

⁷³ Further see Andreas Glaser, *Die Beilegung des Jurakonflikts—Ein Modell für die direktdemokratische Sezession in Europa?*, 115 SCHWEIZERISCHES ZENTRALBLATT FÜR STAATS—UND VERWALTUNGSRECHT 463 (2014); Patrick J. Monahan, Michael J. Bryant & Nancy C. Coté, *Coming to Terms with Plan B: Ten Principles Governing Secession*, 83 C.D. HOWE INSTITUTE COMMENTARY 36–37 (1996), <http://www.cdhowe.org/pdf/comingtoterms.pdf>.

2. Incentives

An obvious objection to the approach proposed here is that a right of secession so conceived creates perverse incentives with dire effects. It would allegedly underestimate the dangers involved in SD as well as the role of contemporary law in preventing their realization. An example from international politics is the statement by former UN Secretary-General Boutros-Ghali that "if every ethnic, religious or linguistic group claimed Statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve."⁷⁴ Likewise, a horror scenario is depicted nationally: under conditions of the alternative approach, "the existence of a nation" would truly be, in Ernest Renan's words, "based on a daily plebiscite!"⁷⁵

Several considerations militate against such an objection in the international and the national contexts and suggest that any secession would in fact be more likely to occur peacefully. Allow me to enumerate these.

Using the security and stability of *the community of states* as a gauge for resultant incentives is problematic. First, any such predictions rely on guesswork. There are too many variables at play in these cases to be so sure about how permitting independence will play out internationally, and even less can these alleged effects be weighed with certainty against the tensions that might arise from not permitting independence. Second, it should be kept in mind that the current international legal / domestic constitutional restrictiveness about external SD and the continuing weakness of international minority rights create perverse incentives themselves. On one hand, disgruntled, territorially concentrated ethnic minorities may be tempted to resort to violence. (A main lesson from the Kosovo conflict seems to be that a radical redrawing of political boundaries can only be achieved with armed force.) On the other, the community of states is effectively encouraged to take sides and intervene in related conflicts. (Outsiders instigate or suppress insurrections, draw boundaries, herd groups together or drive them apart, and then (re-)design a state's constitutional order—often at cross-purposes with each other.) Third, permitting secession recently has not set off a "stampede for the exits" and does not support prophecies of doom and gloom.⁷⁶ Fears of spill-over effects into other existing

⁷⁴ U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*; Rep. of the Secretary-General, para. 17, U.N. Doc. A/47/277-S/24111 (June 17, 1992).

⁷⁵ Renan, *supra* note 38 (own translation).

⁷⁶ Outside of USSR and Yugoslavia, there have only been three universally-recognized secessions in the last twenty-five years—Czechoslovakia (1993), East Timor (2002), and South Sudan (2012)—none of which has set off a chain reaction in their respective regions. The break-up of Czechoslovakia, for example, did not produce two failed states and weaken international structures but solved an intransigent problem and strengthened the EU. (N.B.: The "Velvet Divorce" was orchestrated by political elites not by the electorate.)

states should not be pandered to anyway: If the “national deal” is acceptable to the constituent groups elsewhere, this state will be able to withstand “secession fever.” If it is not and will not, should it be protected internationally? Finally, these prophecies are to a large extent self-fulfilling. Existing states have it in their power to support a new state and so to alleviate resultant strains if they choose. The fallout can be diminished by establishing relationships with the new state, by providing political and economic aid, as well as by integrating it into the international (especially regional) order.

Likewise, reference in this context should not be made, as it typically is, to the security and stability of *particular states*. First, warnings of political “blackmail” and “sabotage” of efforts at coexistence⁷⁷ beg the question whether the group(s) in question should have a right to secede at all. If so, a more permissive posture on “state-breaking” could create proper incentives nationally: The prospect of secession would strengthen the position of minorities in country-wide negotiations on the national deal. (A credible threat of exit may prevent the tyranny of an ethno-nationalist majority, and a *de facto* minority veto may bring the majority to strike a compromise acceptable to the other group(s).)⁷⁸ Second, if the democratic principle inherent in a state’s constitutional framework requires the country’s government to respond constructively to secessionist demands (as the Canadian constitution does per the Canadian Supreme Court), secessionists have an incentive to hold referenda repeatedly until they achieve their desired result.⁷⁹ What happens, critics ask, to public confidence in and the stability of the polity when the referendum becomes a “neverendum”? Here it is to be noted that, given its ever-changing demography and the logic of democratic process, a state’s political status, like its political system, may never achieve permanence anyway.⁸⁰ Third, the oft-impugned sincerity of secessionist leaders—i.e. these politicians are actually attempting to grab power rather than to work for the welfare of the population—is irrelevant from a democratic perspective. What is relevant is the reception that the proposed reform of state status finds in the wider public at the given time. Finally, if the polity feels that “prudence” demands it,⁸¹ any risk hereby posed to state stability could be “contracted around” in the national deal qua constitutional

⁷⁷ E.g., Donald L. Horowitz, *The Cracked Foundations of the Right to Secede*, 14 J. DEMOCRACY 5, 10–11 (2003).

⁷⁸ See generally Susanna Mancini, *Rethinking the Boundaries of Democratic Secession: Liberalism, Nationalism, and the Right of Minorities to Self-Determination*, 6 INT’L J. CONSTITUTIONAL L. 553 (2008).

⁷⁹ Similarly, see Sujit Choudhry & Robert Howse, *Constitutional Theory and the Quebec Secession Reference*, 13 CAN. J.L. AND JURISPRUDENCE, 144 (2000). In point of fact, Quebec has seen two referendums on sovereignty, and the issue still cannot be considered “settled” once and for all.

⁸⁰ See “[I]t may be Canada’s [and by extension other multiethnic countries’] particular fate to engage periodically in existential constitutional discussions that may be impossible to resolve once and for all.” Sujit Choudhry, *Referendum? What Referendum?*, 15 LIT. REV. OF CAN., 7 (2007).

⁸¹ See U.S. Declaration of Independence: “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

arrangement. (The charter creating a union between Serbia and Montenegro in 2003, for example, provided that Montenegro was not entitled to appeal for secession for three years, i.e. before 2006, and that should this vote fail, it could not appeal again for another three years.)⁸²

3. Accessibility

I believe that my alternative approach to secession claims based on a reconciliation of SD and democracy would find broad acceptance—passive, if not active—in the international community. International law and practice remain geared toward maintaining the existing order, and one of its foundational rules is the inviolability of the state. There has been reluctance in the present context to pierce the “veil” of the state and to be concerned with the people(s) constituting it.⁸³ Why then should the community of states and particular states favour a more permissive rule?

To be clear: My approach opens the possibility of forming an independent political entity in the context of ethnic conflict resolution but does not require it, as many states would naturally fear. Secession is a drastic measure, and internal SD for related movements should be preferred in policy-making.⁸⁴ It should be considered a last resort, when provision for “everything short of secession”⁸⁵ will not lead to a peaceful, consensual resolution of the conflict in question. In short: Secession if necessary, but not necessarily secession.

The result of the popular consultations recommended may well be that secessionist regions express a will to be independent. Engaging in negotiations with Crimea, South Ossetia, Abkhazia, or Kosovo for the break-up of their country would be for many Ukrainians, Georgians, and Serbians, from the government on down, difficult to accept: These declare the secessionists to be “traitors” and seek to hold their country together by coercion. The strength of their commitment to democratic values and to free and open-

⁸² The Swiss regulation of direct democratic process is well-developed and worthy of being referred to, e.g. in terms of time needed to collect the required signatures, delay before vote held to allow proper deliberation, and moratorium until another vote on same issue. See generally WOLF LINDER, SCHWEIZERISCHE DEMOKRATIE: INSTITUTIONEN, PROZESSE, PERSPEKTIVEN 241–99 (2d ed. 2005).

⁸³ Consider states’ (in)ability to define what constitutes a minority in the Council of Europe’s eponymous framework convention, let alone to lay down comprehensive, binding rules about the preservation of the particular characteristics of such groups.

⁸⁴ The conflict parties might agree to postpone a definitive decision on secession by instituting autonomy for a prescribed period, at the end of which the secessionist unit would be able to express its preference for either through a referendum.

⁸⁵ See also John Packer, *The Origin and Nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life*, 11 HELSINKI MONITOR 29 (2000).

ended discussion would be tested: Would they at some point accede to a right of democratic secession “*fiat justitia ruat coelum*”?⁸⁶

The extent to which my argument for a change in state-making is “accessible” to policy-makers depends largely on the value that they attach to the realization of SD and democracy. As suggested above, statehood has an instrumental value, as a means to other ends; SD and democracy are considered here to be intrinsically valuable, foundational propositions that cannot be deduced from any other propositions. (Similarly in the Declaration of Independence, the people’s right to self-government is so self-evident that it is not justified. Independence is exactly that, declarative.) The only subjects worthy of protection are the human beings that constitute—who both form and make up—states.⁸⁷ Influential in policy-makers’ reactions to the alternative approach would also be a mentality regarding popular sovereignty. What is their underlying attitude vis-à-vis the *Gestaltungskraft* of democratic process—to what extent should it apply in these situations?⁸⁸ For example, is constitution-making an activity of elites or citizens? (The preference internationally seems to be that legislatures and courts frame and amend the constitution.) And can the sovereign change its mind or err in its decisions? (Contemporary observers tend to assess referendum results in terms of “right” and “wrong” and to advocate that voters’ discretion be limited.) In short, do policy-makers actually “trust the people” in political decision-making?⁸⁹

It may, of course, be too much to expect that states will cease insisting on the inviolability of territory and sovereignty and further, adopt democratic secessionism for the sake of “mere” principle.⁹⁰ If so, the sense in denying the reification of statehood is also justifiable on the basis of pragmatic considerations. Were the community of states to consider coolly

⁸⁶ Or “may justice be done though the heavens fall” (own translation).

⁸⁷ As Renan remarks, “we have banished from politics metaphysical and theological abstractions. What remains afterwards? Man—his desires, his needs.” Renan, *supra* note 38 (own translation).

⁸⁸ For example, see the argument that institutional devices are to be designed and imposed domestically in order to exercise responsible control on the influence of “unfathomable” pre-political forces on politics in society. Ulrich K. Preuss, *Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 143, 164 (Michel Rosenfeld ed., 1994). *Contra* RAYMOND BOURDON, *RENOUVELER LA DÉMOCRATIE: ÉLOGE DU SENS COMMUN* (2006) (arguing that common sense is good sense and thus to be trusted).

⁸⁹ I.e. the rallying cry of supporters of extending the electoral franchise in Great Britain in the nineteenth century. In full see: “[T]rust the people, and they will trust you—and they will follow you and join you in the defense of that Constitution against any and every foe. I have no fear of democracy. I do not fear for minorities; I do not care for those checks and securities [thought by some] of such importance.” Randolph Henry Spencer, Lord Churchill, *Speech: Trust the People* (Apr. 16, 1884), at <http://www.bartleby.com/268/5/7.html>.

⁹⁰ N.B.: Van der Westhuizen perceives “change in world politics [a]s increasingly being tied to successful argumentation processes and the significance of persuasion”, what he refers to as “ideational power.” Janis van der Westhuizen, *How (Not) to Sell Big Ideas: Argument, Identity and NEPAD*, INT’L J. 369, 370 (2003).

the pernicious effects that the prevailing approach to SD has internationally, it might see the attraction of pursuing an alternative. The prevailing approach serves, in short, to promote conflict internationally about SD claims. On one hand, the issue of whether or not to recognize the independence of a contested region has fuelled Great-Power rivalry. (In the case of Kosovo, the West deemed its recognition of that region's secession to be "exceptional", as the fact pattern did not satisfy conventional criteria. Russia cites this recognition, however, as precedent for its recognition of Crimea's secession, though Russia itself does not recognize Kosovo's independence.)⁹¹ On the other, the result of applying the prevailing approach in each of the aforementioned cases is a frozen conflict and an uncertain legal status, which situation can benefit no one. Moreover, an alternative approach may alleviate these effects to the advantage of the state as well as of the people(s). Especially in the aftermath of conflict, a measure of justice in the form of SD could promote lasting peace among groups. As Renan observes, "one nation never has a real interest in annexing or retaining another nation in face of its opposition". The moral, if not the factual, basis of the authority of the former depends on the latter's consent. In practice then, "the wish of nations is ultimately the only legitimate criterion, and it must always be reverted to."⁹²

E. Outlook

In a book published in 1990, Timothy Garton Ash stated that the collapse of Communism in Eastern Europe offered "no fundamentally new ideas on the big questions of politics, law, and international relations. The ideas whose time has come are old, familiar, well-tested ones".⁹³ It may well be that Garton Ash, who as a professional historian should have known better, spoke too soon. As explained here (and in other special issue contributions), the national crisis in Ukraine (as well as other recent practice) challenges foundational principles of international ordering, including that of external SD. It raises questions regarding state allegiance and the fixing of state boundaries for which there is no consensus internationally. One of these is what to do when in the course of human events (to paraphrase the US Declaration of Independence), one people believes it necessary to dissolve the political bands that have connected them with another and to assume a separate and equal station among the powers of the earth. The ongoing crisis presents thereby an occasion to reflect upon, and possibly an opportunity to effect a change in, the meaning of SD internationally. It may be that in the aftershocks of Communism's collapse now being experienced in Ukraine, the innovation in constitutional and international law that Garton Ash ruled out is still coming about.

⁹¹ Russia did the same earlier in supporting South Ossetia's and Abkhazia's secession claims. See Rein Müllerson, *Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia*, 8 CHINESE J. INT'L L., 2 (2009).

⁹² See Renan, *supra* note 38.

⁹³ TIMOTHY GARTON ASH, *THE MAGIC LANTERN* 154 (1990).

I have sought to make plain, if it was not already through the current debates over secessionist movements, the inadequacy of the prevailing approach. Judgements as to when a SD claim should be granted recognition internationally are largely made according to geopolitical and ideological preferences.⁹⁴ The ideals of democracy and SD may be universally supported, but their content and application are not universally agreed. The result in contemporary practice is that the values of SD and democracy involved are honoured more in their breach than in their observance.

I am not claiming that democratic secession is the answer to the problems of divided societies. Both democracy and SD are concepts that promise more than they can ever fulfil.⁹⁵ They are *Idealbegriffe* that do not, cannot, correspond to reality. For its part, the referendum as a constitutional tool is also subject to critical perceptions and imperfect process.⁹⁶ There is no panacea for identity conflicts, but some proposed solutions are more asymptotic than others. Even if these only mean the partial realization of principles,⁹⁷ something worth doing, as popular wisdom has it, is worth doing badly.

In the event, the alternative approach that I have presented proves not to be tricky or absurd as it might at first glance appear. The dilemmas in dealing with SD claims in practice are not necessarily irresolvable but may be resolvable—and, *ceteris paribus*, by democratic means at that. Realizing SD and democracy simultaneously may in fact help to resolve ethnic conflict. If the alternative approach above is applied faithfully, the way to resolve the conflict in Ukraine is relatively straightforward and the conclusion un-ambivalent—both contrary to that of the prevailing approach. Popular consultation and deliberation on the political status and governance of the contested regions should be allowed according to nationally negotiated referendums that are supervised by disinterested international authorities. Ukraine and its allies condoned the referendum in Crimea sponsored by Russia in March 2014 as non-democratic (neither free nor fair) and illegal (per constitutional and international law). Rather than principled and law-abiding, their opposition to making the right to SD more readily available seems cynical. They were unwilling to hold a referendum themselves among other reasons because a large majority of Crimeans would have been in

⁹⁴ See DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 230 (2d ed. 2000) (“Whether and when a secessionist movement will emerge is [sic] determined mainly by domestic politics, by the relations of groups and regions within the state. Whether a secessionist movement will achieve its aims, however, is determined largely by international politics, by the balance of interests and forces that extend beyond the state.”).

⁹⁵ See generally, JÖRG FISCH, *DAS SELBSTBESTIMMUNGSRECHT DER VÖLKER: DIE DOMESTIZIERUNG EINER ILLUSION* (2010).

⁹⁶ See also Michele Brandt, Jill Cottrell, Yash Ghai & Anthony Regan, *Constitution-Making and Reform: Options for the Process*, INTERPEACE 299–305 (Nov. 2011), available at <http://constitutionmakingforpeace.org/sites/default/files/Constitution-Making-Handbook.pdf>.

⁹⁷ For example, “it is unlikely that iterations of the secession process will arrive at a result in which no individual is required to go along with the associational preferences of those around him.” Patten, *supra* note 7, at 578.

favour of integration with Russia instead of staying with Ukraine.⁹⁸ For its part, the voting in Luhansk and Donetsk in November led separatists to declare sovereign governments in the territories. While these were also rogue elections, it seems again that the territories' residents preferred the pro-Russian rebels to the Ukrainian government.⁹⁹

I hope that through elaborating the alternative approach to help shift the onus onto those among national and international political actors who reject it (or the like). Why, for example, should the government in Kiev offer the Russian minority in the south and east internal SD only and not put the country's territorial integrity in question?¹⁰⁰ Shouldn't "the real diversity, disagreement and desires of the actual existing people within that state" be recognized rather than suppressed?¹⁰¹ It is these actors who should be required to justify their approach in terms of the principles of SD and democracy.

⁹⁸ See Rein Müllerson, *Ukraine: Victim of Geopolitics*, 13 CHINESE J. INT'L L. 133, 140 (2014) (noting that "[t]here is no doubt that most Crimeans [...] welcome the reunification of the Crimea with Russia.").

⁹⁹ See *Ukraine's Separatists: Shrinking Country*, ECONOMIST (Nov. 8, 2014).

¹⁰⁰ Though not by federalization, which is "assumed to be a way station to secession." Timothy William Waters, *Letting Go of Territorial Integrity: Getting Realism and Ideals Right on Ukraine*, VOLKERRECHTSBLOG (Jun. 16, 2014), <http://voelkerrechtsblog.com/2014/06/16/letting-go-of-territorial-integrity-getting-realism-and-ideals-right-on-ukraine/>.

¹⁰¹ *Id.*