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# Constitutionalism and Secession

Cass R. Sunstein†

The Soviet Constitution guarantees a right to secede.<sup>1</sup> The American Constitution does not. Although some secessionists in the American South, invoking state sovereignty, claimed to find an implicit right to secede in the founding document, it was more common to invoke an extratextual and nonjusticiable “right to secede” said to be enshrined in the Declaration of Independence.<sup>2</sup> In any case, no serious scholar or politician now argues that a right to secede exists under American constitutional law.<sup>3</sup> It is generally agreed that such a right would undermine the Madisonian spirit of the original document, one that encourages the development of constitutional provisions that prevent the defeat of the basic enterprise.<sup>4</sup>

Eastern European countries are now deciding about the contents of proposed constitutions. They are often doing so in the context of profound cultural and ethnic divisions, both often defined at least roughly in territorial terms. These divisions have propelled

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<sup>1</sup> Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, Art 72: “Each Union Republic shall retain the right freely to secede from the USSR.” The translation is reprinted in John N. Hazard, *The Union of Soviet Socialist Republics* 31, in Albert P. Blaustein and Gisbert H. Flanz, eds, 18 *Constitutions of the Countries of the World* (Oceana, 1990).

<sup>2</sup> Dwight L. Dumond, *The Secession Movement, 1860-1861* 120-21 (Macmillan, 1931).

<sup>3</sup> As a formal matter of constitutional interpretation, the issue has been settled since *Texas v White*, 74 US 700, 724-26 (1869) (holding secession of Texas from the Union unconstitutional because the states’ acceptance of the federal Constitution represented a waiver of the right to secede). See also Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U Chi L Rev 483, 501-02 & n 68, (1991) (discussing secession).

<sup>4</sup> Lincoln set out the basic Madisonian view: “Perpetuity is implied, if not expressed, in the fundamental law of all national governments. . . . [N]o government proper ever had a provision in its organic law for its own termination.” First Inaugural Address (Mar 4, 1861), reprinted in T. Harry Williams, ed, *Selected Writings and Speeches of Abraham Lincoln* 117 (Hendricks, 1943) (“*Lincoln Writings*”).

claims for local self-determination that could readily be transformed into attempts to guarantee a right to secede or even into secession itself. In Eastern Europe in particular, debates over the right to secede have already played an extraordinarily important role in discussions of new institutional arrangements. Various political actors have vigorously asserted a right to secede in Yugoslavia, the Soviet Union, and the Czech and Slovak Republics.<sup>5</sup> Active secession movements have played a central role in current efforts to establish democratic governance. Such movements have led to claims for a constitutional right to secede, paralleling the Soviet right but to be respected in practice. A draft of the Slovak constitution, for example, creates a right to secede.<sup>6</sup>

It is likely that these claims will be asserted all the more vigorously in the future. The claims for secession, or for a right to secede, raise exceptionally large questions about the theory and practice of constitutionalism. It is therefore an especially important time to explore the relationship between secession claims and constitutionalism in general.

My principal claim in this essay is that whether or not secession might be justified as a matter of politics or morality, constitutions ought not to include a right to secede.<sup>7</sup> To place such a right in a founding document would increase the risks of ethnic and factional struggle; reduce the prospects for compromise and deliberation in government; raise dramatically the stakes of day-to-day political decisions; introduce irrelevant and illegitimate considerations into those decisions; create dangers of blackmail, strategic behavior, and exploitation; and, most generally, endanger the prospects for long-term self-governance.<sup>8</sup> Constitutionalism,

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<sup>5</sup> See, for example, Celestine Bohlen, *East Europe's Past Imperils 3 Nations*, NY Times A16 (Dec 16, 1990) ("*East Europe's Past*"). The Croatian Parliament has adopted a constitution that would give it a right to secede from Yugoslavia upon a two-thirds vote of the local legislature and a simple majority vote in a plebiscite. See *Croatia Takes the Right to Secede*, NY Times A9 (Dec 22, 1990). In October 1990, Slovenia passed a constitutional amendment creating a right to secede.

There are active secession movements elsewhere—in Canada and India, for example—and while I do not explore them here, this article bears on the issue of secession generally.

<sup>6</sup> See Draft Constitution of the Slovak Republic, Arts 2, 7 (on file with U Chi L Rev).

<sup>7</sup> It would follow that courts should not find such a right to be implicit in constitutions.

<sup>8</sup> Lincoln made many of these arguments:

Plainly, the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly in-

embodying as it does a set of precommitment strategies, is frequently directed against risks of precisely this sort. Political or moral claims for secession are frequently powerful, but they do not justify constitutional recognition of a secession right.

The principal argument for recognition of a right to secede is that it would operate as a powerful deterrent to oppressive and discriminatory practices, and also serve as an effective remedy for these practices. Usually, however, these goals can be promoted through other, more direct means. If they cannot be, a negotiated agreement embodying secession or a right of revolution—also not recognized in founding texts—is a preferable safeguard. The opportunity for a negotiated agreement or a right of revolution would provide a remedy against most of the relevant abuses without raising the continuous risks to self-government that would be created by a constitutional right to secede.

In the process of making this argument, I hope also to disentangle the various possible grounds for a moral claim to secession and to indicate which of those grounds have force in different contexts. Some of the discussion will provide support for the view that secession is often justified as a matter of political morality. In such cases I argue against national efforts to stop secession through military or other action.

In Part I, I discuss constitutions as precommitment strategies, designed to foreclose debate over certain fundamental questions. These strategies should often be seen as enabling rather than constraining, that is, as devices not only for limiting government, but also for facilitating the difficult process of self-government. This argument has powerful roots in the American constitutional tradition and applies with particular force in the context of secession. The argument also has general implications for the theory of what does and does not belong in constitutions. This theory remains in a surprisingly primitive state, and I will venture some preliminary remarks on the subject.

In Part II, I discuss reasons why a subunit of a nation might want to secede, and provide a brief assessment of those reasons as a matter of political morality. My conclusion is that those reasons often create a strong moral claim for secession. Even when this is so, however, the creation of a right to secede in a founding docu-

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admissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.

First Inaugural Address (Mar 4, 1861), in Williams, ed, *Lincoln Writings* 117, 120 (cited in note 4).

ment is usually unjustified. Part III discusses qualified rights to secession, arguing that even though these are superior to a general right of exit for subunits, they are inferior to an across-the-board waiver of that right by all subunits in a nation.<sup>9</sup>

## I. CONSTITUTIONS AS PRECOMMITMENT STRATEGIES

### A. In General: Notes on Constitutionalism

It is often said that constitutionalism is in considerable tension with democracy. Thomas Jefferson was emphatic on the point, arguing that constitutions should be amended by each generation in order to ensure that the dead past would not constrain the living present.<sup>10</sup> Many contemporary observers echo the Jeffersonian position, claiming that constitutional constraints often amount to unjustified, antidemocratic limits on the power of the present and future.<sup>11</sup> Responding to Jefferson, James Madison argued that a constitution subject to frequent amendment would promote factionalism and provide no firm basis for republican self-government.<sup>12</sup>

Madison envisioned firm and lasting constitutional constraints as a precondition for democratic processes, rather than a check on them. This vision captures a central goal of American constitutionalism: to ensure the conditions for the peaceful, long-term operation of democracy in the face of often-persistent social differences and plurality along religious, ethnic, cultural, and other lines. This goal is highly relevant to constitutional developments in Eastern Europe, where religious and ethnic hostilities are especially intense. Madison saw differences and diversity as strengths rather than weaknesses, if channeled through constitutional structures that would promote deliberation and lead groups to check, rather than exploit, other groups. It may be possible for Eastern Euro-

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<sup>9</sup> My argument builds largely on the theory and practice of constitutionalism in the United States and, to a lesser extent, on more general western political and constitutional theory. By so concentrating, of course, I do not mean to suggest that American and western traditions and approaches provide the only basis for evaluating the constitutional implications of a right to secede. In view of the underlying issues, however, it would be surprising if other traditions and approaches did not reach similar conclusions.

<sup>10</sup> Thomas Jefferson, Letter to Samuel Kercheval (July 12, 1816), reprinted in Merrill D. Peterson, ed, *The Portable Thomas Jefferson* 558-61 (Viking, 1975).

<sup>11</sup> For an extreme example, see Roberto Mangabeira Unger, *Politics: A Work in Constructive Social Theory* 454-57 (Cambridge, 1987).

<sup>12</sup> James Madison, Letter to Thomas Jefferson (Feb 14, 1790), reprinted in Marvin Meyers, ed, *The Mind of the Founder: Sources of the Political Thought of James Madison* 230-31 (Bobbs-Merrill, 1973).

pean countries to replicate this approach, although they face far more profound differences of language, ethnicity, history, and religion than those that confronted the Framers of our Constitution.

To approach the question of secession, it will be useful to provide a brief outline of some of the reasons for entrenching institutional arrangements and substantive rights.<sup>13</sup> On such questions, constitutional theory remains in a surprisingly primitive state.<sup>14</sup> I begin by examining what sorts of considerations might lead people forming a new government to place basic rights and arrangements beyond the reach of ordinary politics. The crucial idea here is that for various reasons, people in a newly formed nation might attempt to do so as part of a precommitment strategy.

Some rights are entrenched because of a belief that they are in some sense pre- or extra-political, that is, because individuals ought to be allowed to exercise them regardless of what majorities might think. Some of these rights are entrenched for reasons entirely independent of democracy. Here constitutionalism is indeed a self-conscious check on self-government, attempting to immunize a private sphere from public power. Plausible examples include the rights to private property,<sup>15</sup> freedom from self-incrimination, bodily integrity, protection against torture or cruel punishment, and privacy.

But many of the rights that are constitutionally entrenched actually derive from the principle of democracy itself. Their protection from majoritarian processes follows from and creates no tension with the goal of self-determination through politics. The precommitment strategy permits the people to protect democratic processes against their own potential excesses or misjudgments. The right to freedom of speech and the right to vote are familiar illustrations. Constitutional protection of these rights is not at odds with the commitment to self-government but instead a logical part of it.<sup>16</sup>

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<sup>13</sup> By using the word "entrenching" here and elsewhere, I refer to simple constitutionalization, not to a decision to immunize a constitutional provision from amendment. I assume throughout that constitutional provisions are much more difficult to change than ordinary statutes, but nonetheless amendable if there is a consensus that they should be.

<sup>14</sup> For a valuable collection of essays on this topic, see Jon Elster and Rune Slagstad, eds, *Constitutionalism and Democracy* (Cambridge, 1988).

<sup>15</sup> The right to property is an ambiguous case; it is a democratic right as well as a private one. Private property provides for security and independence from government, and these are preconditions for citizenship—a theme that played a large role in republican thought. See J.G.A. Pocock, ed, *The Political Works of James Harrington* 53-63, 67-68, 144-52 (Cambridge, 1977).

<sup>16</sup> For an extended elaboration of this theme, see John Hart Ely, *Democracy and Dis-*

Institutional arrangements can also be understood as an effort to protect a private sphere from majoritarianism. Often this effort stems from a fear of democratic processes. A decision to divide government among the legislative, executive, and judicial branches might be regarded as an effort to check and limit government by requiring a consensus among all three before the state can interfere with the private sphere.<sup>17</sup> Private liberty flourishes because government is partially disabled. So too, a federal system might ensure that the nation and its subunits will check each other, generating a friction that enables private liberty to flourish.<sup>18</sup>

Structural provisions of this sort limit the political power of present majorities (or minorities), and in this sense raise difficulties for those who believe that the only or principal purpose of constitutionalism is to provide a framework for democratic governance. But if structural provisions are generally seen as precommitment strategies, some of them can be enabling as well as constraining.<sup>19</sup> We can understand both individual rights and structural provisions in this way. Like the rules of grammar, such provisions set out the rules by which political discussion will occur, and in that sense free up the participants to conduct their discussions more easily.

The system of separation of powers, for example, does not merely constrain government, but also helps to energize it, and to make it more effective, by creating a healthy division of labor. This was a prominent argument during the framing period in America.<sup>20</sup> A system in which the executive does not bear the burden of adjudication may well strengthen the executive by removing from it a task that frequently produces public opprobrium. Indeed, the entire framework might enable rather than constrain democracy, not only by creating an energetic executive<sup>21</sup> but, more fundamentally,

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*trust* (Harvard, 1980).

<sup>17</sup> See Federalist 51 (Madison), in Clinton Rossiter, ed, *The Federalist Papers* 320-25 (New Am Library, 1961).

<sup>18</sup> See *id* at 323 (federalism and the separation of powers create a "double security" for individual rights because "[t]he different governments will control each other, at the same time that each will be controlled by itself.").

<sup>19</sup> I borrow here from Stephen Holmes, *Precommitment, and the paradox of democracy*, in Elster and Slagstad, eds, *Constitutionalism and Democracy* 195 (cited in note 14), and Stephen Holmes, *Gag rules or the politics of omission*, in *id* at 19.

<sup>20</sup> See Arthur S. Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, with Special Emphasis upon the Doctrine of Separation of Powers*, 27 *Ark L Rev* 583, 588-89 (1973) (efficiency was a principal rationale for the separation of powers, in the view of influential Framers such as John Adams, Thomas Jefferson, John Jay, and James Wilson).

<sup>21</sup> See Federalist 70 (Hamilton), in Rossiter, ed, *The Federalist Papers* 423-31 (cited in

by allowing the sovereign people to pursue a strategy, against their government, of divide and conquer. So long as it is understood that no branch of government is actually "the people," a system of separation of powers can allow the citizenry to monitor and constrain their inevitably imperfect agents. In general, the entrenchment of established institutional arrangements enables rather than merely constrains present and future generations by creating a settled framework under which people may make decisions.

Thus far I have suggested that constitutions might create rights and institutions that follow from some independent theory of what individuals are owed, that are a natural corollary of the commitment to democracy, or that help to facilitate the democratic process by establishing the basic structures under which political arrangements can take place. Constitutional provisions may be facilitative in quite another sense: a decision to take certain issues off the ordinary political agenda may be indispensable to the political process.<sup>22</sup>

For example, the initial decision to create a system of private property places severe constraints on the scope of any political deliberations on that fundamental issue, and often serves to keep issues of private property off the political agenda completely. Indeed, Madison understood the protection of rights of property largely as a mechanism for limiting factional conflict in government, not as a means of protecting "rights" and much less as a means of ensuring against redistribution.<sup>23</sup> The removal of the issue from politics serves, perhaps ironically, to ensure that politics may continue.

So too, a nation might protect questions of religion against resolution by democratic processes, not only because there is a right to freedom of religious conscience, but also because the democratic process works best if the fundamental and potentially explosive question of religion does not intrude into day-to-day decisions. More narrowly and no doubt more controversially, the decision to constitutionalize the right to abortion might be justified because it minimizes the chances that this intractable and polariz-

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note 17) (describing need for a vigorous, unitary executive).

<sup>22</sup> See Holmes, *Gag rules*, in Elster and Slagstad, eds, *Constitutionalism and Democracy* (cited in note 14).

<sup>23</sup> See Meyers, ed, *The Mind of the Founder* 502-09 (cited in note 12). In fact, the failure of the Framers to eliminate slavery in the original Constitution was attributable to ideas of this sort. The example reveals that the decision to take an issue off the political agenda is also a decision to resolve that issue one way rather than another. Such a decision may well be objectionable on democratic or other grounds.

ing question will intrude into and thus disable the political process.

Yet another set of facilitative constitutional precommitment strategies includes provisions that are designed to solve collective action problems or prisoners' dilemmas, that is, situations in which the pursuit of rational self-interest by each individual actor produces outcomes that are destructive to all actors considered together, and that could be avoided if all actors agreed in advance to coercion, assuring cooperation.<sup>24</sup> People who are creating their government might voluntarily waive a right whose existence would re-materialize, and create serious risks, without the waiver. A decision to relinquish an otherwise available right advances the interests of all or most who are involved.<sup>25</sup>

This idea has played a large role in the American constitutional experience. The leading example is the Full Faith and Credit Clause,<sup>26</sup> which requires each state to enforce judgments rendered in other states. Every state might have an incentive to refuse to enforce the judgments of other states; if Massachusetts chooses not to honor the judgment of a New York court against a Massachusetts citizen, then Massachusetts receives a short-term gain because the resources its citizen needs to satisfy any judgment remain within the borders of Massachusetts. But all states would be better off if the law bound each of them to respect the judgments of others. The Full Faith and Credit Clause ensures precisely this outcome, effectively solving a conventional prisoners' dilemma.

Another illustration is the Commerce Clause.<sup>27</sup> The Supreme Court has consistently interpreted the clause as disabling the states from regulating interstate commerce.<sup>28</sup> In the period between the Articles of Confederation and the Constitution, battles among the states produced mutually destructive tariffs and other protectionist measures. The adoption of each of these measures may well have furthered the interest of each state considered in isolation.<sup>29</sup> Collectively, this system proved disastrous.<sup>30</sup>

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<sup>24</sup> See generally Jon Elster, *The Cement of Society* (Cambridge, 1989); Edna Ullmann-Margalit, *The Emergence of Norms* (Oxford, 1977).

<sup>25</sup> Compare Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge, 1986).

<sup>26</sup> US Const, Art IV, § 1, cl 1.

<sup>27</sup> US Const, Art I, § 8, cl 3.

<sup>28</sup> See, for example, *Gibbons v Ogden*, 22 US 1 (1824).

<sup>29</sup> Though protectionism can be self-destructive as well, the mere perception of self-interest is sufficient for purposes of this argument.

<sup>30</sup> For a standard treatment, see John Fiske, *The Critical Period of American History, 1783-89* 144-45 (Houghton Mifflin, 1916) ("[T]he different states, with their different tariff

Especially in light of the strong emotional attachments that fuel perceptions of state self-interest, a system in which each state can choose whether to initiate protectionist measures might well lead many states to do so. But an agreement by all states to refrain from protectionism, and thus to waive their antecedent right under the Articles of Confederation, should further the collective interest. The constitutional decision to remove control of interstate commerce from state authority solves the problem.<sup>31</sup> In this case, as with the Full Faith and Credit Clause, a relinquishment of what appears to be state sovereignty very likely furthers the interest of all states concerned.

This example illustrates both the importance of precommitment strategies in resolving prisoners' dilemmas, and the potential value of judicial review in a healthy constitutional system. The Supreme Court's conclusion that the Commerce Clause contains an implicit limitation on state power over interstate commerce—a "negative" federal power—was controversial at first and still raises thorny problems for the Court from time to time.<sup>32</sup> The Commerce Clause on its face provides the federal government with only the positive power to regulate, and locates this power in the legislature, not the courts. But the negative commerce power follows naturally from the structural logic of the Constitution. Its enforcement by the judiciary has been an important means of remaining faithful to that logic.<sup>33</sup>

Finally, constitutional precommitment strategies might serve to overcome myopia or weakness of will on the part of the collectivity, or to ensure that representatives follow the considered judgments of the people. Protection of freedom of speech, or from un-

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and tonnage acts, began to make commercial war upon one another."'). For a revisionist view, see Edmund W. Kitch, *Regulation and the American Common Market*, in A. Dan Tarlock, ed, *Regulation, Federalism, and Interstate Commerce* 9-19 (Oelgeschlager, Gunn & Hain, 1981) (states under Articles of Confederation actually cooperated to promote freedom of trade).

<sup>31</sup> There is a close parallel here in the recent experience of the European Community with regard to the 1992 economic union. See, for example, Wayne Sandholtz and John Zysman, 1992: *Recasting the European Bargain*, 42 *World Pol* 95 (1989).

<sup>32</sup> See, for example, *Hunt v Washington State Apple Advertising Commission*, 432 US 333 (1977) (North Carolina statute requiring only federal grades on all closed containers of apples shipped into state violated Commerce Clause because it burdened interstate sales of Washington apples and discriminated against such sales).

<sup>33</sup> In the United States, judicial review is itself a product of reasoning based on constitutional structure rather than text. See *Marbury v Madison*, 5 US 137 (1803). It would be far simpler, however, to make that power explicit.

reasonable searches and seizures, might represent an effort by the people themselves to provide safeguards against the impulsive behavior of majorities. Here the goal is to ensure that the deliberative sense of the community will prevail over momentary passions.<sup>34</sup> Similarly, a constitution might represent a firm acknowledgement that the desires of the government, even in a well-functioning republic, do not always match those of the people.<sup>35</sup> Constitutional limits, introduced by something like the people themselves, therefore respond to the agency problem created by a system in which government officials inevitably have interests of their own. This problem arises in all systems of government, including democracies. In countries emerging from communist rule, without established principles of democratic representation, it is likely to pose a special danger, against which constitutional provisions should guard.

In all of these cases, the decision to take certain questions off the political agenda might be understood as a means not of disabling but of protecting politics, by reducing the power of highly controversial questions to create factionalism, instability, impulsiveness, chaos, stalemate, collective action problems, myopia, strategic behavior, or hostilities so serious and fundamental as to endanger the governmental process itself. In this respect, the decision to use constitutionalism to remove certain issues from politics is often profoundly democratic.

We can also see many constitutional provisions as mechanisms for ensuring discussion and deliberation oriented toward agreement about the general good rather than factionalism and self-interested bargaining. The states' relinquishment of their preexisting sovereign right to control the entry and exit of goods is the most prominent example. But the institutions of representation and checks and balances have frequently been designed to promote general discussion and compromise, to diminish the influence of particular segments of society, and to produce the incentives for and possibility of agreement. These principles largely guided the development of the United States Constitution. They bear directly

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<sup>34</sup> This theme runs throughout *The Federalist*. See, for example, Federalist 10 (Madison), in Rossiter, ed, *The Federalist Papers* 77-84 (cited in note 17) (representative government, spread over a large and diverse electorate, can prevent factional passions from dominating public affairs); Federalist 78 (Hamilton), in *id* at 464-69 (independent, life-tenured judiciary with authority to proclaim unconstitutional acts void is an important check on majority power).

<sup>35</sup> See Federalist 78 (Hamilton), in *id* at 464, 467 (judicial review of the constitutionality of laws maintains primacy of "intention of the people" over "intention of their agents").

on the attempts of Eastern European countries to meld constitutionalism with democracy in the midst of extraordinary diversity and pluralism.<sup>36</sup>

## B. Secession

### 1. Eastern Europe: Some background.

Secession has become an extremely prominent issue in Eastern Europe. As of this writing, the situation is highly fluid, indeed changing almost daily. Anything said here about the situation will likely be significantly out of date by the time of publication. But a brief review of the current situation will serve as a useful prelude to the discussion.

The future of Yugoslavia, which has six republics, remains in severe doubt in light of strong pressures for independence in Slovenia and Croatia. Polls have shown more than 80 percent support for independence in the Slovenian Republic.<sup>37</sup> The Slovenian Parliament voted in February 1991 to "invalidate" all federal laws, with Slovenian President Milan Kucan claiming that the vote means that Yugoslavia "has ceased to exist."<sup>38</sup> If Slovenia secedes, Croatia will probably do so as well.<sup>39</sup> The Croatian Parliament has given itself veto power over national laws.<sup>40</sup> The new Serbian President, Slobodan Milosevic, is a firm Serbian nationalist who has awakened fears of oppression among non-Serbs.<sup>41</sup> He has claimed that "every Serb must live in a Serbian state."<sup>42</sup> Milosevic has refused to recognize the supremacy of the eight-member Yugoslavian Presidency.<sup>43</sup> The Yugoslavian government has nonetheless claimed that it may use military force to ensure against secession.<sup>44</sup> Secessionist pressures may be moving Yugoslavia toward civil

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<sup>36</sup> See Federalist 51 (Madison), in id at 320, 324-25 ("multiplicity of interests, and . . . multiplicity of sects" can promote democratic government through a system of checks and balances).

<sup>37</sup> Celestine Bohlen, *Serbian Voting Today Could Signal a Major Turn in Yugoslavia's Future*, NY Times A22 (Dec 9, 1990) ("Serbian Voting").

<sup>38</sup> Blaine Harden, *Slovenia 'Invalidates' Yugoslav Laws; Republic's Parliament Declares Disassociation from Federation*, NY Times A18 (Feb 20, 1991).

<sup>39</sup> Andrew Borowiec, *Belgrade System on Verge of Falling*, Wash Times A8 (Dec 13, 1990).

<sup>40</sup> Chuck Sudetic, *Another Yugoslav State Breaks Ties*, NY Times A3 (Feb 21, 1991).

<sup>41</sup> Id.

<sup>42</sup> Boro Dropulic, *Is There A Yugoslavia?*, NY Times A22 (Mar 22, 1991).

<sup>43</sup> Blaine Harden, *Yugoslav President Resigns Amid Crisis; Jovic Warns of Political 'Disintegration'*, NY Times A15 (Mar 15, 1991).

<sup>44</sup> Bohlen, *Serbian Voting* (cited in note 37).

war.<sup>45</sup> Widespread ethnic violence and ultimate disintegration seem possible,<sup>46</sup> despite recent signs of greater moderation.<sup>47</sup>

The federal structure of the Czech and Slovak Federative Republic is also under considerable pressure. The current solution is a new provisional, nonconstitutional arrangement that dramatically limits the authority of the national government, placing it in the two republics.<sup>48</sup> Under the new arrangement, the national government has power over defense, foreign policy, and monetary policy, with most other powers placed elsewhere.<sup>49</sup>

It appears that only a small percentage of the Slovaks favor secession.<sup>50</sup> In December 1990, however, President Vaclav Havel sought dramatic new powers to respond to the claim by leaders in Slovakia that their laws had primacy over those of the national parliament.<sup>51</sup> Vladimir Meciar, until recently the Prime Minister of the Slovak Republic, had on occasion argued for Slovakian legal primacy.<sup>52</sup> According to Havel, the consequence of such primacy would be that "our constitution will be broken and our state would inevitably fall into legal chaos."<sup>53</sup> Indeed, Havel argued, a system of Slovenian legal primacy would "destabilize all of Europe."<sup>54</sup>

The Soviet Union, of course, is in the most jeopardy of all. Here some believe that civil war is a realistic threat. In all, fourteen of the fifteen Soviet republics have asserted their sovereignty in one form or another. Citizens of the Baltic states and several other Soviet republics overwhelmingly support independence.<sup>55</sup>

<sup>45</sup> See, for example, David Lawday, *Croatia braces itself for the expected civil war*, U.S. News & World Rep 38 (Apr 1, 1991).

<sup>46</sup> Chuck Sudetic, *Rebel Serbs Complicate Rift on Yugoslav Unity*, NY Times A2 (Apr 2, 1991); Jim Fish, *Yugoslavs' Talks End in Apparent Impasse*, NY Times A22 (Mar 29, 1991); Dropulic, *Is There A Yugoslavia?* (cited in note 42).

<sup>47</sup> David Binder, *Yugoslavia Edges Away From the Brink*, NY Times A3 (Mar 21, 1991).

<sup>48</sup> Bohlen, *East Europe's Past* (cited in note 5); Michael Z. Wise, *Czechs, Slovaks Reach Agreement on Federal, Regional Power-Sharing Plan*, Wash Post A24 (Nov 14, 1990). The draft constitutions take quite different approaches (on file with U Chi L Rev).

<sup>49</sup> Wise, *Czechs, Slovaks Reach Agreement on Federal, Regional Power-Sharing Plan* (cited in note 48).

<sup>50</sup> Bohlen, *East Europe's Past* (cited in note 5) (noting that recent poll showed 16 percent support for secession).

<sup>51</sup> Peter Greer, *Havel Seeks Extra Powers to Preserve Single State*, The Times (London) 11 (Dec 11, 1990).

<sup>52</sup> John Tagliabue, *Slovakia's Separatist Premier Facing Political Counterattack*, NY Times § 1 at 13 (Mar 17, 1991).

<sup>53</sup> Greer, *Havel Seeks Extra Powers* (cited in note 51).

<sup>54</sup> Simon Pellar, *Czechs Fear for Federation as Slovaks Press for Sovereignty*, Reuters Library Report (Dec 7, 1990).

<sup>55</sup> Bohlen, *East Europe's Past* (cited in note 5).

The most highly publicized secession movements have occurred in the Baltic states, and secessionist pressures have placed the future of the Soviet Union in serious doubt. Article 72—guaranteeing a right of secession—has been an important part of the debate. Until recently, however, it provided no firm basis for secession, in part because of the absence of a legal mechanism for its enforcement.<sup>66</sup> Unilateral secession movements were said to violate Articles 73 and 74, which provide for the supremacy of Soviet law and for Soviet sovereignty.<sup>67</sup> In April 1990, however, legislation was enacted to provide for secession through a two-thirds majority in a referendum and a five-year transition period.<sup>68</sup>

The most vigorous secession movements have taken place in Lithuania, Estonia, and Latvia. The Soviet Union incorporated these states by force in 1940, after they had enjoyed two decades of independence. All three have seen vigorous secession movements. The Estonian Congress has asked the United Nations and the Soviet Parliament to restore “the free and independent republic of Estonia.”<sup>69</sup> There was 78 percent support for independence among Estonians.<sup>60</sup> The Lithuanian Parliament unanimously approved a formal declaration of independence.<sup>61</sup> Over 90 percent of Lithuanian citizens support independence.<sup>62</sup> The Soviet Union responded with a damaging economic blockade,<sup>63</sup> and also with military force.<sup>64</sup> Soviet troops captured the main publishing center in Vilnius and also assaulted broadcasting stations, killing and

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<sup>66</sup> Victor Danilenko, *Vilnius: Its Own Worst Enemy*, NY Times A25 (Apr 17, 1991).

<sup>67</sup> Id.

<sup>68</sup> Id; Michael Dobbs, *Latvians, Estonians Vote to Support Independence; Non-Binding Ballots Conducted to Show Support for Secession From the Soviet Union*, NY Times A8 (Mar 4, 1991).

<sup>69</sup> Esther B. Fein, *Estonian Congress Calls for a Republic*, NY Times A10 (Mar 12, 1990).

<sup>60</sup> Dobbs, *Latvians, Estonians Vote to Support Independence* (cited in note 58).

<sup>61</sup> Bill Keller, *Parliament in Lithuania, 124-0, Declares Nation Independent*, NY Times A1 (Mar 12, 1990).

<sup>62</sup> Peter Maass, *Vote Buys Lithuanians But Goal Is Still Elusive; Nationalists Seek Forceful Foreign Support*, Wash Post A11 (Feb 10, 1991); Francis X. Clines, *Lithuania Votes Overwhelmingly For Independence From Moscow*, NY Times § 1 at 1 (Feb 10, 1991); Michael Dobbs, *Baltic Crackdown Leaves Gorbachev With Room to Maneuver*, Wash Post A14 (Feb 10, 1991).

<sup>63</sup> Bill Keller, *Lithuania Agrees to 100-Day Delay on Independence*, NY Times A1 (June 30, 1990).

<sup>64</sup> Bill Keller, *The Crushing of Lithuania's Independence Drive: A Precise Script Is Detected*, NY Times A8 (Jan 16, 1991).

wounding unarmed civilians in the process.<sup>65</sup> Non-binding plebiscites in Latvia showed 77 percent support for independence.<sup>66</sup>

An important opposition movement in the Ukraine has asked for complete independence from Moscow and the creation of an independent Ukrainian state.<sup>67</sup> The actual government of the Ukraine has not gone so far, but it did proclaim itself a sovereign state, one whose laws took precedence over those issuing from Moscow and extended to the control of troops on Ukrainian territory.<sup>68</sup> Without issuing a formal statement of independence, the Parliament of the Ukraine invoked the "supremacy, independence, fullness and indivisibility of the republic's power on its territory and its independence and equality in external relations."<sup>69</sup>

Arguments for eventual secession have been made in Soviet Georgia as well.<sup>70</sup> In March 1991, the citizens of Georgia voted overwhelmingly (with 95 percent in favor) for independence,<sup>71</sup> and in April, the Parliament unanimously declared independence.<sup>72</sup> The Soviet Parliament responded with a recommendation that Gorbachev impose a state of emergency,<sup>73</sup> and troops have been dispatched to stop internal fighting.<sup>74</sup> The Chuvash Autonomous Republic has claimed sovereignty over its own natural resources; the Mari Autonomous Republic has declared sovereignty; and Russia itself has considered the possibility of secession.<sup>75</sup> Buryatia has proclaimed that its laws take precedence over those of the Soviet Union. Moldavia has sought greater autonomy.<sup>76</sup> Byelorussia has declared its sovereignty as well.<sup>77</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> Dobbs, *Latvians, Estonians Vote to Support Independence* (cited in note 58).

<sup>67</sup> Michael Dobbs, *Group Calls for Ukrainian Independence*, Wash Post A1 (Oct 29, 1990).

<sup>68</sup> Francis X. Clines, *Ukrainians Declare Republic Sovereign Inside Soviet System*, NY Times A1 (July 17, 1990).

<sup>69</sup> *Id.*

<sup>70</sup> *Georgian Nationalist Wins*, NY Times A16 (Nov 15, 1990).

<sup>71</sup> *Send Army to Georgia, Gorbachev is Advised*, NY Times A3 (Apr 2, 1991); Michael Dobbs, *Soviet Georgians Vote For Independence By Margin of 9 to 1*, NY Times A14 (Apr 1, 1991); Elizabeth Shogren, *Soviet Georgians Probably Will Vote Today to Secede*, LA Times A5 (Mar 31, 1991).

<sup>72</sup> *Soviet Georgia OKs autonomy; Moscow sends forces*, Chicago Tribune § 1 at 5 (Apr 2, 1991).

<sup>73</sup> *Send Army to Georgia* (cited in note 71); Dobbs, *Soviet Georgians Vote For Independence* (cited in note 71).

<sup>74</sup> *Soviet Georgia OKs autonomy* (cited in note 72).

<sup>75</sup> Francis X. Clines, *In Soviet Union, Dizzying Disunion*, NY Times A6 (Oct 26, 1990) ("*Dizzying Disunion*").

<sup>76</sup> *Id.*

<sup>77</sup> Francis X. Clines, *Byelorussia Joins Sovereignty Move*, NY Times A4 (July 28,

Movements for secession in the Soviet Union promise to bring about substantial changes in existing institutional arrangements. President Gorbachev attempted to respond with a union plan<sup>78</sup> and an ambiguously worded referendum question.<sup>79</sup> Even if all 15 Soviet republics ultimately remain part of a federal union, it seems certain that secessionist pressures will diminish the central government's power over its subunits in major and potentially destructive ways.<sup>80</sup> In any case, these pressures have diverted energy and attention from the effort to bring about democratic self-government and economic prosperity in the wake of the downfall of the previous system. This seems clear even if the grounds for secession are in some or many cases substantial—a question I take up below.<sup>81</sup>

## 2. Precommitment and secession.

For the moment I will not speak to the issue of whether and when secession is desirable or just. Instead I want to ask whether a Constitution ought to recognize a right to secede. I will understand a constitutional right to secede as encompassing (a) an explicit textual provision guaranteeing such a right or (b) an implicit understanding that the constitution creates that right, accompanied in either case by (c) a willingness to enforce that right by a court with the power of judicial review—that is, a court capable of granting and enforcing a subunit's request to secede despite the objections of the central government. As the Soviet experience has shown in the context of individual rights as well as the context of secession, constitutional guarantees on paper often mean nothing without institutions available to vindicate them.<sup>82</sup>

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1990).

<sup>78</sup> Serge Schmemmann, *Moscow Publishes New Plan of Union*, NY Times § 1 at 1 (Mar 10, 1991).

<sup>79</sup> The referendum asked: "Do you consider it necessary to preserve the Union of Soviet Socialist Republics as a renewed federation of equal Soviet republics, in which the rights and freedoms of people of any nationality will be fully guaranteed?" Michael Dobbs, *Gorbachev Appeals to Preserve Union; President Launches Campaign For Referendum, Hits Separatists*, Wash Post A1 (Feb 7, 1991).

<sup>80</sup> See the discussion of the union plan in Schmemmann, *Moscow Publishes New Plan of Union* (cited in note 78).

<sup>81</sup> See Part II.

<sup>82</sup> The Soviet Constitution guarantees a panoply of individual rights that makes our Bill of Rights pale by comparison, though neither the courts nor other branches of government have traditionally respected or enforced most of these rights. Article 39, for example, guarantees full "social, economic, political and personal rights"; Article 40 guarantees the right to work; Article 41 recognizes a right to rest and leisure; Article 49 guarantees a right to petition for redress of grievances; and Article 50 guarantees freedom of speech, press, and assembly. See generally Chapter 7 of the Soviet Constitution, reprinted in Hazard, *The*

At first glance, the argument for a right to secede seems straightforward. If a subunit no longer wants to exist within the nation, why should it have to do so? This initial challenge draws strength from a number of arguments, spelled out below, including the need for local self-determination, the history of unjust acquisition in Eastern Europe and elsewhere, the claims of ethnic and cultural integrity, and the threat of abridgement of basic rights and liberties.

The issue of secession is, however, an unusually good candidate for an analysis that stresses the use of constitutionalism as a precommitment strategy. Indeed, the problem of secession closely parallels the problems solved by the Full Faith and Credit Clause and the Commerce Clause, and in some respects follows naturally from those examples. The initial point is that constitutional recognition of a right to secede might well have a range of harmful consequences for democratic politics. In the face of such a right, a threat to secede could under certain conditions be plausible at any given time, allowing the exit of the subunit from the nation to be a relevant factor in every important decision. It is not difficult to imagine circumstances in which it will be in a subunit's interest to issue that threat. Rather than working to achieve compromise, or to solve common problems, subunits holding a right to secede might well succumb to the temptation of self-dealing, and hold out for whatever they can get.<sup>83</sup> It is quite possible that some such self-dealing has already occurred in Eastern Europe.<sup>84</sup>

A right to secede will encourage strategic behavior, that is, efforts to seek benefits or diminish burdens by making threats that are strategically useful and based on power over matters technically unrelated to the particular question at issue. Subunits with economic power might well be able to extract large gains in every

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*Union of Soviet Socialist Republics* 27-30, in Blaustein and Flanz, eds, 18 *Constitutions of the World* (cited in note 1).

<sup>83</sup> This was Lincoln's view:

If the minority will not acquiesce, the majority must, or the government must cease.

...

If a minority in such case will secede rather than acquiesce, they make a precedent which in turn will divide and ruin them; for a minority of their own will secede from them whenever a majority refuses to be controlled by such minority.

First Inaugural Address (Mar 4, 1861), in Williams, ed, *Lincoln Writings* 114, 120 (cited in note 4).

<sup>84</sup> See, for example, Clines, *Ukrainians Declare Republic Sovereign* (cited in note 68) ("[T]he declarations of sovereignty thus far are laying out a kind of negotiating agenda for Mr. Gorbachev's promised attempt to redefine the union more favorably for the republics . . .").

decision involving the geographic distribution of benefits and burdens. A constitutional system that recognizes and is prepared to respect the right to secede will find its very existence at issue in every case in which a subunit's interests are seriously at stake. In practice, that threat could operate as a prohibition on any national decision adverse to the subunit's interests.

A temporarily disaffected subunit could, in short, raise the stakes in ordinary political and economic decisions simply by threatening to leave. The threat would be especially credible and therefore disruptive if the subunit can or might prefer to exist on its own. The recognition of a right of exit on the part of the subunit could thus prevent fair dealing on the nation's part, by allowing the subunit to veto policies that are justified on balance.

It might also lead to undue caution. The threat to secede might deter the government from taking action that offends a subunit but is on balance justified. Consider, for example, the issue of taxation. A tobacco-growing subunit equipped with the right to secede might be able to veto a decision to raise taxes on (say) cigarettes even if that decision would further the nation's long-term interest. Similar considerations apply to the decision to enter into war, to enact environmental regulation, or to increase or decrease aid to agriculture. A secession right cannot plausibly be justified on the ground that it is a necessary check on national policies designed to ensure that those policies are in the general interest; the fact that a state wants to secede is neither a necessary nor a sufficient reason to believe that the general interest is being violated.

Family law supplies a helpful analogy. In a marriage, the understanding that the unit is not divisible because of current dissatisfaction, but only in extraordinary circumstances, can serve to promote compromise, to encourage people to live together, to lower the stakes during disagreements, and to prevent any particular person from achieving an excessively strong bargaining position. A decision to stigmatize divorce or to make it available only under certain conditions—as virtually every state in the United States has done—may lead to happier as well as more stable marriages, by providing an incentive for spouses to adapt their behavior and even their desires to promote long-term harmony.<sup>85</sup> I intend to

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<sup>85</sup> See, for example, Jon Elster, *Sour Grapes* (Cambridge, 1983) (discussing adaptive preferences). Family law also supplies a ready counter-argument: restrictions on divorce may increase the power of the stronger party by denying exit to the weaker. It may also, by adapting desires, produce one of the most pernicious forms of inequality, in which the dis-

make no sweeping comment here on the structure of divorce law; I argue only that in the secession context there are strong reasons for making exit difficult.

Recognition of a right to secede would also ensure that any subunit whose resources are at the moment indispensable, and that might be able to exist on its own, is in an extraordinary position to obtain benefits or to diminish burdens on matters formally unrelated to its comparative advantage. Moreover, the shared knowledge that the nation is terminable at the option of any subunit would promote instability.

In these circumstances, we might understand a waiver of the right to secede as a solution to a collective action problem or a prisoners' dilemma. For each subunit, acting individually, recognition of the right might increase its authority to obtain a large share of the collective assets during any general allocation. But if the right to secede exists, each subunit will be vulnerable to threats of secession by the others. If the considerations marshalled thus far are persuasive, all or most subunits are quite plausibly better off if each of them waives its right to secede. More generally, the difficulty or impossibility of exit from the nation will encourage cooperation for the long term, providing an incentive to adapt conduct and even preferences to that goal.

Of course, the existence of a right to secede will have few such consequences if a threat to secede is not credible. Under some conditions, however, the threat will be a real one. Some subunits might well find it in their economic interest to exist on their own. If independence is economically preferable, the threat of secession will be fully plausible. Other subunits will suffer some economic loss if they secede, but still find independence worthwhile because of gains in terms of cultural or geographical autonomy or capacity for self-governance. Here a threat of secession might be credible even if the seceding subunit would be an economic loser.

In the context of secession, the practical political problem goes especially deep. The right to secede is different from other potential vetoes on national legislative action precisely because it raises fundamental and often emotional issues having to do with the claims of ethnicity, territory, and history to separation and self-determination. These issues have a peculiar tendency to inflame both subunits and those who want them to remain part of the nation. They tend to raise the emotional stakes in such a way as to

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advantaged accept their fate because there is no alternative. There are undoubtedly parallels here as well in the secession setting.

make the ordinary work of politics—not to mention day-to-day interactions in other spheres—extremely hard to undertake.<sup>86</sup>

In Eastern Europe, divisions of this kind promise to be among the most important questions for constitutional resolution in the next generation.<sup>87</sup> Those divisions threaten not only to split nations into subunits—which may or may not be good—but also to paralyze national and local governments and to deflect them from dealing with the enormous current social and economic problems. Deliberation is often an inadequate check, and it comes at a high price. A waiver of the right to secede protects against inflamed or impulsive behavior.<sup>88</sup> On some occasions, the emotional stakes should be raised in precisely this way. But constitutional recognition of a right to secede accomplishes the relevant goals at great risk to the fundamental task of creating healthy, long-term constitutional structures.

The large destabilizing effects of a right to secede may also disrupt expectations whose existence is indispensable both to economic prosperity and democratic self-determination. After secession, it will be extremely hard to disentangle the contributions of the subunit and the nation in order to decide who should be paying whom for what. The sheer volume of the costs of allocation provide at least a consideration against recognition of a right to secede. Much more fundamentally, a nation whose subunits may secede will be far less likely to engage in long-term planning. Interdependence will be both threatening and risky, and thus will be discouraged.

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<sup>86</sup> It might be responded that the presence of a secession right may actually tend to enable rather than disable politics; a subunit might be more inclined to accept impositions by the central government as long as it is assured that when the impositions become cumulatively intolerable it can leave. In a well-functioning democracy, however, there is no problem with subunit "acceptance" of national decrees. Because the decrees are unlikely to be punitive, and because the subunit will participate in forming them, acceptance by subunits is generally forthcoming. A secession right is therefore unnecessary to promote acceptable legislation.

<sup>87</sup> See Bohlen, *East Europe's Past* (cited in note 5); *Gorbachev Explains Proposed Union Pact to Party*, NY Times A11 (Dec 11, 1990).

<sup>88</sup> These considerations point out the asymmetry between two seemingly parallel rights, that of emigration and that of secession. The right to emigrate is an important check on tyranny—as, plausibly, is the right to secede. But the right to emigrate does not create the twin and related risks of strategic behavior and inflamed ethnic or cultural conflict. The right to secede, unlike the right to emigrate, is exercised by subunits rather than individuals, aggregates a number of citizens at once, and thus solves a collective action problem faced by individual people who seek to emigrate. This solution to the collective action problem poses the difficulties of strategic behavior and inflamed conflict.

For Eastern European countries, it is imperative to develop institutions that can ensure confidence in the long-term health of the newly democratized governmental systems. Without such institutions, the emerging market economies will fail.<sup>89</sup> A waiver of the right to secede should be seen as part of a set of strategies designed to bring about stable institutional arrangements. In this light it should be unsurprising to observe proposed institutional reforms designed to foster stability in the face of separatist appeals, such as the Czechoslovakian plan to allocate much more power to the republics and the "union treaty" proposal in the Soviet Union.<sup>90</sup>

There is an analogy here in the history of the American Constitution. The Framers deemed it necessary to protect contractual agreements against state impairment not to help creditors as a class, but to ensure that commercial interactions would occur in the first place.<sup>91</sup> A system in which states can impair contracts will discourage their formation in the first instance, and thus have harmful long-term effects on the economy as a whole. So too, legal protection of national unity should have an important coordinating effect, creating expectations of long-term interaction indispensable to national self-government.

Thus far I have argued that a waiver of the right to secede is a sensible precommitment strategy, one that is likely to remove a serious threat to democratic processes. There are at least two possible responses to this line of argument. The first is that if the existence of the nation confers mutual benefits—an assumed precondition for its continuation—then subunits will rarely threaten to secede even if constitutionally authorized to do so, and the threat will rarely be credible even if made. The costs of secession will usually be at least as large for the subunit as for the nation. On this view, recognition of a right to secede would never or rarely have the adverse effects claimed for it. A well-functioning nation simply will not face serious secession threats; subunits will invoke the right only in the most extraordinary circumstances. Indeed, in those circumstances the right is a necessary corrective to the status quo.

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<sup>89</sup> For a discussion of the economic difficulties facing these countries, see Steven Greenhouse, *East Europe Finds Pain on Journey to Capitalism*, NY Times A1 (Nov 10, 1990).

<sup>90</sup> See, for example, Wise, *Czechs, Slovaks Reach Agreement on Federal, Regional Power-Sharing Plan* (cited in note 48); *Gorbachev Explains Proposed Union Pact* (cited in note 87).

<sup>91</sup> US Const, Art I, § 10, cl 1 (barring the states from passing "any . . . Law impairing the Obligation of Contracts"). See also Federalist 44 (Madison), in Rossiter, ed, *The Federalist Papers* 280, 282-83 (cited in note 17).

This rejoinder may be correct. Under certain circumstances, recognition of a right to secede would probably make little difference. But the rejoinder seems too optimistic. Sometimes secession may well further the economic interest of the subunit, or the threat might be credible because an economic loss would be counteracted by gains in terms of symbolism or subunit autonomy. Moreover, national politics affecting multiple subunits are subject to unpredictable and often highly emotional factors. Technocratic rationality does not characterize deliberations in which the specter of secession is involved. The mere possibility of secession may prevent calm negotiation.<sup>92</sup>

There can be no assurance that secession will not be threatened simply because things are generally going well and there is mutual interdependence. Inflamed subunit sentiments have been a characteristic feature of recent developments in constitution-making, in Eastern Europe and elsewhere.<sup>93</sup> And in Eastern Europe in particular, social, economic, and environmental problems—many demanding strong action from the central government—have been quite severe, further fueling ethnic and regional conflicts. In these circumstances a right to secede would be especially dangerous.

The second response would generalize the first, claiming that the case against a constitutional right to secession is simply too speculative. All of the harmful effects are possible, but there is no good reason to think that they will occur. Perhaps a right to secede is a necessary inducement to persuade subunits to enter the nation at all. Perhaps subunits will rarely invoke the right to secede, because social and political norms will deter them from doing so. Perhaps the costs of secession to all subunits will be so high as to make the threat implausible. The greater the degree of interdependence and cohesion, of course, the higher the costs of secession. Perhaps strategic behavior will be collectively punished, so that it will occur rarely if at all. Perhaps the right to secede will be in-

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<sup>92</sup> For an example from the American experience, see David M. Potter, *The Impending Crisis, 1848-1861* 209-11 (Harper & Row, 1976) (describing the breakdown of reasoned deliberation that occurred when Senator Charles Sumner, the prominent Massachusetts abolitionist, was beaten with a cane by South Carolina Representative Preston Brooks after Sumner ridiculed the "loose exhortation" in the speech of Brooks's relative, Senator Andrew Butler, a supporter of slavery).

<sup>93</sup> See Bohlen, *East Europe's Past* (cited in note 5); Clines, *Dizzying Disunion* (cited in note 75) Jonathan Kaufman, *Tunnel at the End of the Light for E. Europe*, Boston Globe 1 (Oct 21, 1990); Chuck Sudetic, *Ethnic Rivalries Push Yugoslavia to Edge*, NY Times A14 (Oct 14, 1990) ("*Ethnic Rivalries*"); Simon Jenkins, *Nationalism's Dark Cloud over the Democratic Battlefield of Europe*, The Sunday Times (London) C3 (Jan 7, 1990).

voked only in cases in which it is an important safeguard.

These suggestions are plausible. Under certain conditions, the right to secession would have few deleterious effects, and it may prevent serious harms. This is especially so in cases involving a weak or loose confederation without substantial interdependencies—the very concept now gaining popularity in Yugoslavia, Czechoslovakia, and the Soviet Union. In such cases, the risks posed by strategic behavior and inflamed ethnic and other passions will be less severe. For the European Community, for example, a right to secede may therefore be more sensible, and indeed it will provide a greater incentive to join in the first instance.

For those deciding on the contents of a constitution, the questions are which scenarios are most likely and which provide the worst case. The most that one can do here is to point to the often large emotional attachments to subunits, the possibility of financial gains from strategic behavior, the familiar frailties of human nature, the rational and irrational factors that can make subunits press secession claims, and the potentially debilitating effects of such claims on subunit and national processes of self-government.

In view of these considerations, it seems highly likely that recognition of a constitutional right to secede would create serious difficulties. In Eastern Europe, where strong nationalist passions persist and threaten to infect daily politics if given an explicit constitutional home, a right to secede would be especially damaging to the prospects for democratic government. All this suggests a strong presumption against a constitutional right to secede.

## II. REASONS FOR SECESSION

Even if a constitutional right to secede would create risks for democratic politics, the case against such a right has hardly been completed. It might well be that the countervailing considerations, justifying a right to secede, outweigh any such adverse effects.

To explore this question, it will be useful to examine why a subunit of a country might want to secede. The reasons fall into five basic categories. All of them have played a prominent role in discussions of this subject in Eastern Europe. Thus, for example, infringement of civil liberties has played a role in Yugoslavia, where the fear of Serbian oppression partly motivates Slovenian and Croatian secessionism, and in the Ukraine, where Soviet suppression of the Ukrainian Church has played a similar role. Economic self-interest has been a motivating factor in the wealthier

republics of Yugoslavia and also in the Soviet Union.<sup>94</sup> Economic exploitation has been relevant in the Ukraine.<sup>95</sup> The injustice of the original acquisition is of special importance in Lithuania, Estonia, and Latvia. Claims of cultural and ethnic integrity have played a role in the Soviet Union, Yugoslavia, and the Czech and Slovak Federative Republic.<sup>96</sup>

Many of these arguments provide plausible grounds for secession as a matter of political morality.<sup>97</sup> I evaluate them briefly here, with special attention to their relationship to a claimed constitutional right to secede.

#### A. Abridgement of Civil Rights or Civil Liberties

A subunit might want to secede because its people are being oppressed, according to (let us assume) traditional liberal understandings of oppression.<sup>98</sup> In the Soviet Union, for example, the

<sup>94</sup> See Clines, *Byelorussia Joins Sovereignty Move* (cited in note 77).

<sup>95</sup> See Clines, *Ukrainians Declare Republic Sovereign* (cited in note 68).

<sup>96</sup> See *Ukrainians Rally Against Moscow*, NY Times A10 (Oct 1, 1990); Sudetic, *Ethnic Rivalries* (cited in note 93); Pellar, *Czechs Fear for Federation* (cited in note 54).

<sup>97</sup> For an especially helpful discussion, overlapping with the argument here, see Allen Buchanan, *Toward a Theory of Secession*, 101 *Ethics* 322 (1991). The credibility of the moral case makes it especially troublesome to suggest that military force should be used to stop secession—a difficult problem that I cannot discuss in detail here. Sometimes military force will be justified because the ground for secession is itself weak or involves oppression, as in the case of the American Civil War. Sometimes such force will deter other secession movements, and this will justify force when the secession movements are not, all things considered, legitimate ones. But the consequences of the use of military force are generally unpredictable and often worse than first anticipated. In this light the question whether a nation should be kept together through official violence cannot be sensibly answered in the abstract. At any rate, one need not and should not extrapolate from the American experience the proposition that civil war is always preferable to secession.

<sup>98</sup> By traditional liberal understandings, I mean to include rights to freedom of speech, freedom of religion, freedom from unreasonable searches and seizures, private property, and the rule of law. See Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism* 131-38 (Yale, 1984). I do not discuss here the more particular view that secession is necessary to prevent (what some consider to be) abuses of government in the form of redistribution of resources, social and economic regulation, and taxation methods that are characteristic of western industrialized democracies. This view, associated with the ideas about the state set out in different forms in Robert Nozick, *Anarchy, State, and Utopia* (Basic, 1974), and Richard A. Epstein, *Takings* (Harvard, 1985), might on certain assumptions argue powerfully in favor of a secession right as a means of disabling government. If one wants to disable government in this broad way, a secession right might be more easily justified—though even here alternative mechanisms might be preferable, and the cure might be worse than the disease.

Note also that a right to secede might be sought, not to disable modern government, but to establish a territorial right vindicated by history, or to ensure self-government by ethnic or other groups. See also Part II.B. (arguing that economic self-interest of a subunit is not a sufficient reason for a right to secede).

history of widespread abridgement of free speech, of political liberty as a whole, and of basic guarantees of individual independence and security might well have supported a claim to secede, certainly before the increasing freedom encouraged by the Gorbachev regime in the late 1980s.

Governmental oppression of this sort might be limited to a subunit, or it might be part of a general pattern of governmental abuse. For example, the government may have limited the right to freedom of speech in only one part of the nation. Alternatively, the oppression might be quite general, and the subunit might want to secede because it sees itself as subject, like other subunits, to an intolerable regime.

In this latter case, something other than the fact of oppression must also be at work in order to justify secession as distinct from, say, civil disobedience or revolution. If the oppression is general, some independent factor—like cultural homogeneity or a claim to territorial integrity based on history—is necessary to unite one of the many subunits that are, by hypothesis, being oppressed. For this reason, I focus here on the case of a subunit that is singled out for injustice, in the form of abridgement of civil liberties or civil rights.

When oppression is pervasive, and not otherwise remediable, secession is a justified response; it is fully plausible to say that a subunit is entitled to leave a nation that is oppressing it. Standing alone, however, injustice or oppression does not provide a powerful case for creating a constitutional right to secede. If the central government suspends civil rights and civil liberties, the preferable response is to restore rights and liberties through the pressure of domestic or international law. A selective abridgement of the right of free speech is far more naturally countered by a restoration of that right than by permitting exit from the nation. Abridgement of civil rights or civil liberties appears to provide no good argument for a constitutional right to secede, but instead furnishes reasons for a constitutional order that makes abridgement unlikely.

If restoration is for some reason impossible, of course, secession might be necessary. In Eastern European nations without a recent history of protection of civil rights and civil liberties, such novel institutions as checks and balances and judicial review may take a long time to develop, and provide weak safeguards, especially at first.<sup>99</sup> In such cases a constitutional right to secede could

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<sup>99</sup> In America, judicial review—itsself an extratextual practice—did not take root until fourteen years after the enactment of the written Constitution. *Marbury v Madison*, 5 US 137 (1803).

be understood as an indirect, second-best means of reducing the risk of oppression. The oppression is not by itself a sufficient ground for secession, but the secession right is necessary to forestall it, buttressing the other constitutional safeguards: A possible preliminary conclusion, then, is that the risk that a central government will abridge the liberties of members of a subunit, or a history of such abridgement, combined with the infeasibility of eliminating the oppression, can justify both secession as a matter of political morality and the creation of a right to secede.

The implications for constitutional practice are twofold. The first and most obvious is that constitutional systems should contain powerful safeguards against the abridgement of civil rights and civil liberties. The most important such safeguards are checks and balances, federalism, a specification of protected rights, and judicial review. If the constitution establishes these safeguards and the central government observes them, this ground for secession will disappear altogether. This is admittedly a large task in Eastern Europe, but it is far more likely than a secession right to produce sound long-term results.

The second and more complex implication is that a constitutional right to secede may be necessary to deter the abridgement of civil rights and civil liberties. This argument has foundations in the work of Thomas Jefferson, who favored both small political units and occasional therapeutic rebellions—views that led him to endorse a right to secede. Thus Jefferson wrote in 1816, “If any State in the Union will declare that it prefers separation . . . to a continuance in union . . . I have no hesitation in saying, ‘let us separate.’”<sup>100</sup>

We can find a parallel to this argument in the continuing debates over federalism and rights of interstate mobility. Any society that constitutes its government through a federal system—one that embodies a decision to allow for movement among states and to limit the scope of national law—necessarily creates a built-in safeguard against political or economic oppression. A government that oppresses its citizenry will soon find itself without citizens at all. In Eastern Europe, for example, the existence of national controls that could not be escaped through rights of exit served as an extremely powerful check against change. The denial of the right to travel was therefore the denial of a crucial political right, one that

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<sup>100</sup> Thomas Jefferson, Letter to W. Crawford (June 20, 1816), quoted in Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* 109 (Yale, 1978).

belongs on the same plane as voting.<sup>101</sup> The recent history of Germany powerfully illustrates this proposition.

In a healthy federal system, states will often compete to attract citizens by offering better services. The result should be a beneficial “race” to provide a mix of laws and regulations that maximize liberty and security. Indeed, the fact of interstate mobility in the United States is probably a far more powerful check against many forms of state tyranny than the existence of judicial review. Of course, there is a dark side to this process. The “race” can be harmful as well as beneficial. Consider cases in which states compete for revenue-providing industry by eliminating environmental or occupational regulation that would in fact be optimal; here the competition is destructive, and the national government accordingly must be authorized to impose uniform regulation on its subunits. But there can be no doubt that the right of exit operates as a powerful check on tyranny of various sorts. It might follow that a right to secede could be justified as a similar and quite valuable mechanism for ensuring against oppression by the national government. The fact that the method is indirect does not mean that it is not extremely effective.

In some contexts, a right to secede might well be justified on this ground. Especially when it seems clear that other institutions cannot protect civil rights and civil liberties, a secession right might be justifiable. But in general, it is doubtful whether the argument overcomes the considerations against a constitutional right traced in Part I. I have noted that there are far more direct and less dangerous means of protecting against the abridgement of civil rights and civil liberties. A good constitution will contain those means. Rights of interstate mobility and a federal structure will operate as additional safeguards.

At least most of the time, a constitutional right to secede would create severe risks without at the same time conferring benefits that cannot be largely or entirely achieved through other strategies. In Eastern Europe in particular, secession movements have arisen at a time when the abridgement of civil rights and liberties has been dramatically decreased, a point that suggests that

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<sup>101</sup> See, for example, *Shapiro v Thompson*, 394 US 618 (1969) (holding unconstitutional a state statutory provision denying welfare to residents who have not resided in the jurisdiction for at least one year on grounds that personal liberty includes freedom to travel throughout country without unreasonable burdens or restrictions); *Kramer v Union Free School District*, 395 US 621 (1969) (invalidating state statute limiting right to vote in school district elections to those who own or lease taxable real property in the district or who are parents of children enrolled in the schools).

the secession right is usually not founded on this form of oppression at all. Secession was not a feasible option in Eastern Europe as long as central governments consistently denied civil rights and liberties. For this reason, an attempted justification of a secession right based on those grounds seems unpersuasive.

#### B. Economic Self-interest

A subunit might want to secede because economic self-interest suggests it ought to proceed on its own. The subunit may be subsidizing other people of the nation in various ways; for example, it may have valuable natural resources that are being used by outsiders at costs lower than the subunit would like to charge, or its members may be especially productive. Members of the subunit might come to believe that they will be financially better off if they create their own country.

In Eastern Europe, this sort of argument appears to have played at least some role in recent discussions. In Yugoslavia, the comparatively rich and developed northern republics of Slovenia and Croatia have sought to secede. Many Slovaks appear to fear that the Czechs will take a disproportionate share of the benefits of western investment, and that the government of President Havel will not protect Slovakian economic interests.

Whether or not economic self-interest justifies secession as a matter of political morality is a complex question. The answer will turn, at least in part, on whether there is a justification for the economic harms faced by the subunit. This judgment will depend in turn on theories about what the state may do. For example, some appealing to the rule of the state attempt to justify redistribution from rich subunits to poor ones. If such redistribution is indeed justified, then the fact that the economic self-interest of the rich subunit has been jeopardized is not a good basis for secession.

Regardless of one's view of the propriety of redistribution, however, the fact that secession might further a subunit's economic self-interest provides insufficient reason to create a right to secede. At any given time a subunit may be contributing more than what seems its fair share, and perhaps some subunits will be doing so for very long periods. But unless there is some kind of injustice, the mere fact that secession is in a subunit's self-interest does not justify creation of that right. Self-interest is usually a controversial grounds for political action at the individual level, unless translated into terms that invoke reasons other than self-interest alone; it is all the more difficult to support secession of subunits on this ground.

This is especially so in light of the fact that to allow self-interest to be a justification would produce a range of risks, canvassed above, to the successful operation of the polity. Economic self-interest is an especially weak basis for creating a constitutional right to secede in light of the multiple deleterious effects that such a right would have for the process of national self-government, which may well be in the long-term interest of all subunits of the country. A precommitment strategy is therefore appropriate.

### C. Economic Exploitation

A more serious argument for a right to secession would stress economic exploitation. By this term I mean not that a subunit is simply losing, but that it can claim, with reasons, that the central government is treating it unfairly. We might hypothesize that the nation is systematically depleting the subunit's resources for the general good, thus reducing the subunit's wealth far below what it would be if the subunit stood alone; or the nation might be unfairly discriminating against the subunit in the distribution of general benefits and burdens. A claim for secession might well be based on this sort of behavior from the nation's center. Indeed, a right to secede—as in the case of abridgement of civil liberties and civil rights—might be justified as a means of deterring economic exploitation of subunits. In Yugoslavia, this idea has played an important role. Slovenia and Croatia are economically advantaged, and they fear that they will have to submit to a Serbian-controlled national government, which they will have to subsidize.

In some cases, economic exploitation might indeed justify secession as a matter of political morality. But does the prospect of exploitation argue for a constitutional right to secede? There are several possible answers here. The first is that it is hard to define the baseline against which to measure a claim of exploitation; the term itself is a placeholder for ideas that must be substantively defended. No subunit has an antecedent right to a stream of welfare identical to what it would have received if it had not been a member of the nation. Moreover, it is extraordinarily difficult to calculate benefits and burdens, especially over long periods of time. In many cases the question of exploitation will be hard to assess in light of the many links by which subunits in a nation become economically interdependent.

Suppose that in some cases we might agree that a subunit is being exploited by the nation. In such cases, a good constitution will provide both structural and rights-based provisions designed to prevent discrimination against certain subunits, and these pro-

visions will make a right to secede unnecessary. The subunit should, for example, be granted full representation in the legislature; this is a built-in, if partial, corrective. (It is only partial because other parts of the nation may unite against the subunit—hardly an unfamiliar phenomenon.) The United States Constitution achieves this goal in part through the establishment of a bicameral legislature in which all states, regardless of size, have equal representation in one house. This requirement is, in fact, the only element of the Constitution specifically protected by the document itself against amendment without the consent of the affected state.<sup>102</sup> The constitution could also ban discriminatory taxation, or require unanimous consent to certain measures raising a risk of exploitation.

These strategies pose dangers as well. Perhaps discriminatory taxation is justified as a redistributive strategy or as a means of taking account of differences in initial endowments. Perhaps discriminatory taxation is a reasonable response to the nature of the object of the tax. Suppose, for example, that a nation decides, out of concern for the environment and the public health, to limit through taxation the growing of tobacco or the mining of high-sulfur coal. Those regions that produce the relevant commodities will bear the brunt of the tax, but this disparate impact does not necessarily make the tax bad or secession justifiable. Moreover, a unanimity or supermajority requirement may forestall desirable national action. In this sense such a requirement poses some of the risks of a secession right. But the basic point is that a right to secede is a second-best and highly indirect remedy, one that creates a range of problems independent of economic exploitation and whose purposes might be accomplished through other means.

#### D. History and Territory: The Injustice of the Original Acquisition

Secession might be sought by a subunit that claims that its membership in the nation originally resulted from unjustified aggression, and that sees itself as having territorial integrity as a matter of history and international law, properly construed. Often some understanding of this kind plays a role in secession claims. Suppose Subunit A existed as an independent entity at an earlier period. The larger unit absorbed Subunit A through war or aggres-

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<sup>102</sup> US Const, Art V.

sion. The subunit now seeks to separate from the nation as a way of undoing an historical wrong.

In Eastern Europe, of course, ideas of this sort have surfaced prominently and provided an important impetus for secession movements, especially in the Baltic states. Formerly independent Lithuania was forcibly incorporated into the Soviet Union in 1940 as a result of the Nazi-Soviet Pact, and the incorporation was clearly unlawful. Latvia and Estonia claim, plausibly, that they too were forcibly and illegally incorporated as a result of the same agreement. For these states, the Soviets are an occupying power, and their inclusion in the union resulted from duress in the form of a threatened Soviet attack.

Arguments of this kind may well provide a sufficient moral reason for secession. Certainly if little time has passed since the original aggression, a right to secede seems self-evident; it corrects the original injustice. But for three reasons, it is doubtful whether the existence of historic abuses is a sufficient reason to create a constitutional right to secede.

The first is that a well-functioning system of international law is the best, most direct way to prevent and to respond to aggression.<sup>103</sup> A right to secede is too general, applying in cases when there has not been aggression at all. At most the phenomenon of aggression justifies a moral right to secede in some narrowly defined class of cases in which membership in the nation was originally involuntary. Something like that right already exists as a matter of international law.<sup>104</sup> A generalized constitutional right to secession is unnecessary to recognize a right to exit from a union created by force.

The second problem is a practical one. A nation that takes other countries by force, and incorporates them, is unlikely to re-

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<sup>103</sup> The Iraqi annexation of Kuwait is a recent example, though here it was necessary to resort to force to bring about compliance with principles of international law.

<sup>104</sup> This is the ambiguous and controversial right of self-determination. See Buchheit, *Secession: The Legitimacy of Self-Determination* at 8-20 (cited in note 100). The principle of self-determination, recognized in the United Nations Charter and in numerous U.N. Declarations, came to have great importance in the era of decolonization, though the contours of the right—particularly with respect to armed intervention by third parties intent on furthering the right—remain unclear. See also United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, which proclaims "The principle of equal rights and self-determination of peoples" ("[A]ll peoples have the right freely to determine, without external interference, their political status . . . and every State has the duty to respect this right in accordance with the provisions of the Charter.") UN Res 2625 (Oct 24, 1970), in Dusan J. Djonovich, ed, 13 *United Nations Resolutions, Series I (General Assembly Resolutions)* 337, 339 (Oceana, 1976).

spect any right to secede that it has formally recognized. The Soviet Union is at least a partial example.<sup>105</sup> In the event of incorporation by force, a right to secede is especially prone to becoming an ineffectual "parchment barrier."<sup>106</sup>

The third problem is that the origins of many, perhaps most, nations often involve aggression and abuse at some point in the past, and it is not easy to decide which such abuses provide a sufficient basis for a right to secede. The category of cases in which secession can plausibly be justified on such grounds is simply enormous, and if secession is generally to be permitted, the result would be an intolerable disruption of established arrangements. This consideration suggests that while the injustice of the original acquisition will often provide a good basis for a secession right, a system that would allow secession in all such circumstances would be hard to defend.<sup>107</sup>

In cases of subunits absorbed through aggression, then, the preferable remedy is a system of international law, including an internationally recognized right to restore original borders when sufficiently little time has passed and when exercise of that right would not unduly disrupt existing arrangements.<sup>108</sup> Sometimes a right to secede is in fact justified on this ground as a matter of political morality, and this factor argues in favor of some secession movements now occurring in Eastern Europe, especially in the Baltic states. But a domestic constitutional provision guaranteeing the right to secede is both too small and too large a way to deal with this problem.

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<sup>105</sup> See, for example, Keller, *Lithuania Agrees to Delay* (cited in note 63); Celestine Bohlen, *Gorbachev Bars Independence Bids of 2 Baltic Lands*, NY Times A1 (May 15, 1990); Bill Keller, *Moscow Lays Out Terms for Baltics*, NY Times A18 (June 13, 1990).

<sup>106</sup> This term originated with Madison. See Federalist 48 (Madison), in Rossiter, ed, *The Federalist Papers* 308, 338 (cited in note 17).

<sup>107</sup> For purposes of law and morality, it is both necessary and difficult to make temporal and other distinctions. Subunits initially absorbed by aggression or other unjust means often become well-integrated into a union over time and come to enjoy many benefits from membership in the union. (Hawaii is an example.) At least when a good deal of time has passed, it is hardly clear that injustices of several generations past by themselves justify secession.

<sup>108</sup> The phrasing here is deliberately vague. A detailed discussion of when subunits once annexed through aggression have a good moral justification for secession would take me far beyond the current discussion. For a valuable discussion of the crucial territorial dimension to secession claims, see Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 Yale J Intl L 177 (1991).

## E. Cultural Integrity and Self-determination

Often a claimed right to secede is built on an understanding that the subunit has a cultural integrity that entitles it to self-determination. The subunit perceives itself as both homogeneous and substantially different in terms of basic norms and commitments. The very fact that it is governed by a broader entity appears to be a form of tyranny or an unjustifiable absorption by foreigners. Rule by outsiders eviscerates the subunit's distinct identity.

Ideas of this sort have frequently fueled secession movements in Eastern Europe and elsewhere. Slovakia, for example, is more agricultural and devoutly Roman Catholic than is the Czech Republic, and the cultural difference certainly plays a role in the secession movement. Often a claim to cultural integrity is accompanied by a perception that the subunit had territorial integrity in the past, and was the object of unjustifiable aggression. As a practical matter, the two arguments tend to go hand in hand.

Whether a claim to cultural integrity justifies secession as a matter of political morality is a complex matter. Certainly ethnic homogeneity can make rule by outsiders impossible or oppressive. Just as certainly, productive interactions among heterogeneous groups can make for an especially successful democracy. History offers examples of both phenomena. It is therefore impossible to say, in the abstract, whether secession can be justified on this ground. Much will depend on how culturally homogenous groups are treated by the larger nation, the nature of the differences between the subunit and the nation, and the forms their homogeneity takes. For example, a cultural group that oppresses others in its region can hardly make a powerful moral claim for a right to self-governance if the larger nation prizes civil liberties.<sup>109</sup>

Here, as before, any legitimate claims that underlie a right to secession might be accommodated by narrower and less dangerous strategies—in particular, federalism and representation mechanisms. A system of federalism often guards against precisely the problem of rule by remote leaders having insufficient identification with or knowledge of subunits. In the American experience, federalism was designed to ensure local self-determination while at the same time providing and thus benefiting from governance at the national level. Federal systems can allow a large degree of govern-

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<sup>109</sup> The attempt at secession by the American South is an example. In such a case, secession would be unjustified even as a matter of political morality. A desire to oppress all or part of the citizenry is not a good basis for secession. The American Civil War was of course fought partly over these grounds.

ance by subunits claiming cultural and territorial integrity. Indeed, the national constitution may restrict the central government to certain enumerated powers, including provision of national defense or regulation of interstate commerce,<sup>110</sup> or it may expressly reserve certain powers of internal self-governance to the subunits. It may well be that through these routes, federal systems can accommodate many of the concerns that underlie claims to secession based on cultural integrity.

Systems of representation might also supply a corrective here. Seats in the national legislature might be set aside for subunit representatives, to ensure that the views of subunits are expressed on an ongoing basis during the deliberative process. Such seats might provide a form of proportional or even super-proportional representation. Perhaps a minority veto should be ensured on certain issues.

In some circumstances, however, these solutions will be inadequate. Sometimes nationhood demands interference with local self-determination, as in regulation of intrastate commerce having interstate effects. Sometimes the claim for self-determination is largely an emotional one, coming from a group affronted by the very fact of national incorporation and national rule. Sometimes nationhood involves an inevitable surrender of components of sovereignty claimed by subunits. If full self-determination is the goal, the only remedy will be secession, enabling the subunit to escape entirely from the legal authority of the nation.

It may be that this argument is sufficient, as a matter of political morality, to justify secession in some contexts. It is surely strengthened if the argument from cultural integrity is accompanied by a claim to territorial integrity in the past. But it is doubtful that, standing alone, the argument from cultural integrity justifies a constitutional right to secede. In such cases, we are often dealing, by hypothesis, with subunits that voluntarily agreed to enter the nation at some earlier time.<sup>111</sup> In such cases, the claim of cultural integrity will frequently be inadequate, because sufficient commonalities with the nation will likely exist, justifying the original agreement. Whether or not this is so, recognition of a right to secede, based on grounds of cultural integrity, will probably pose

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<sup>110</sup> This is, of course, the strategy followed by the United States Constitution. See US Const, Art I.

<sup>111</sup> If the argument emphasizes the injustice of the original entry, as in the case of the Baltic states, then it is not simply based on cultural integrity and should be analyzed as in Part II.D.

dangers to national self-determination that are not counterbalanced by the advantages to the various subunits themselves. Whether or not the interest in cultural integrity provides a good moral justification for secession, it does not support a decision to place a right to secede in a founding document.

Indeed, cultural integrity is a particularly weak reason to constitutionalize the right to secede insofar as it is precisely the cultural integrity of subunits that most dramatically threatens processes of national self-determination. In the most extreme cases, revolution or a negotiated settlement may be justified. But constitutional recognition of a right to secede would be a cure worse than the disease.

The right to revolt differs in interesting ways from the right to secede. It would be plausible to constitutionalize the former right as, in a sense, the United States Constitution has done through the right of amendment,<sup>112</sup> which in theory could be used by Congress and the states to rewrite the founding document in fundamental ways. But since the point of a revolution is to reject the established order, it is unclear why constitutionalization of any such right would be a useful step at all. If the argument above is persuasive, however, it is even less plausible to constitutionalize the right to secede. The latter right is usually defined in the discrete terms of some subunit—geographical, ethnic, or religious, or some combination of these—and these features of the relevant right pose the distinctive risks of strategic bargaining or an inflamed polity. A right of revolution does not create these risks in an even vaguely similar fashion.

Nor does a negotiated settlement pose the difficulties involved in a right to secede. The whole point of such a right is that there is no need for the approval of others in order for the right to be exercised. A negotiated settlement can be brought about without a constitutionalized secession right.<sup>113</sup>

### III. A QUALIFIED RIGHT TO SECEDE?

A possible response to the discussion thus far would be that the right to secede should indeed be constitutionalized, but hedged with qualifications and limitations that minimize the risk of strategic behavior. At least four possibilities seem plausible. One strat-

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<sup>112</sup> US Const, Art V.

<sup>113</sup> Such a settlement might of course be blocked with a constitutional prohibition against secession, even of the voluntary kind. But it is unclear how such a prohibition could be beneficial.

egy would allow secession if and only if a large majority of the subunit sought it. Another would allow secession only under certain enumerated circumstances, as, for example, in cases of suspension of civil liberties or economic exploitation. Yet another would create a requirement of prolonged deliberation before secession would be lawful. Such a system might involve, for example, multiple popular votes, with substantial waiting periods between votes.<sup>114</sup> A fourth approach would create a right to secede, either absolute or qualified, but make it nonjusticiable. Each of these possibilities raises difficult and general questions about constitutionalism. I deal with them only briefly here.

All of these routes have large advantages over an unqualified right to secede, but it is doubtful whether the advantages justify constitutionalization of even a qualified right to secede. A requirement of a supermajority would certainly limit the occasions for, and seriousness of, secession threats. But in cases in which the subunit can be energized—for reasons of economic self-interest or ethnic and territorial self-identification—the protection would be inadequate. It is true that a subunit may want to secede for good reasons, but as discussed above, there are better and less disruptive means of ensuring that the good motivations that sometimes underlie secession movements can be addressed. These involve, above all, federalism, checks and balances, entrenchment of civil rights and civil liberties, and judicial review. If these protections are inadequate, it is highly doubtful that a qualified right to secede will do the job.

There is something to be said in favor of a secession provision that would be limited to specified causes. Such a provision might be treated as ancillary to the nondiscrimination principles and basic protections of liberties. It would furnish a powerful and self-enforcing mechanism against violations of the relevant rights. But to accomplish these purposes, the right to secede is probably too blunt and dangerous an instrument. One might hope that the direct provisions discussed above will be sufficient. More fundamentally, the recognition on paper of a right to secede is unlikely to be a useful supplement if they are not. A state that violates its textual

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<sup>114</sup> The State of New York has created such a process for dealing with the secessionist demands of Staten Island, a subunit of the City of New York that may prefer to become an independent municipality. Staten Island residents must first approve secession in two referenda, with a period for hearings between the two votes; the state legislature would then have to pass legislation approving the secession. See *City of New York v State of New York*, 557 NYS2d 914, 158 AD2d 169 (1990) (rejecting equal protection challenge to this scheme).

commitments to civil rights and liberties will probably not respect its textual commitment to secession.

A right to secede after an extended period of deliberation would probably be the best of the various alternatives. Through this route it would be possible to reduce some of the risks of an inflamed polity. Indeed, the very difficulty of obtaining secession would deter efforts to seek that remedy unless it seemed necessary, and would diminish the possibility that any threat of secession could disrupt democratic and deliberative processes. For this reason it could not be said, a priori, that such a system would necessarily be undesirable. But in Eastern European nations with a history of ethnic and religious tensions, even a secession right modified in this way would pose significant risks to self-governance. A prolonged deliberative period over the question of continued ties to the nation could create all of the threats emphasized above. Probably the best result is not to create the right at all.

A final possibility would be to create a right to secede but to make it nonjusticiable—that is, to make the right one that courts will not recognize or enforce. India's Constitution follows this strategy mainly with respect to certain "positive" rights, including the right to subsistence.<sup>115</sup> Such rights are recognized in the sense that the constitution makes them binding on the legislature, but the courts are unable to protect them. The argument for entrenched but nonenforceable rights is that their entrenchment establishes norms that government is morally and politically obliged to respect, but whose judicial enforcement would create, in especially severe forms, the various difficulties produced when judges lacking policymaking competence or a good electoral pedigree are responsible for the vindication of constitutional rights.<sup>116</sup> The right to subsistence is a plausible candidate for this strategy because of

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<sup>115</sup> Part IV of the Indian Constitution includes "Directive Principles of State Policy," which are nonjusticiable. See Art 37: "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." These provisions include minimalization of inequalities in income and elimination of inequalities in status, facilities, and opportunities (Art 38, cl 2); "equal pay for equal work for both men and women" (Art 39(d)); free and compulsory elementary education (Art 45); the securing of a "living wage" for all workers (Art 43). The right to subsistence is most directly stated in Art 39, which provides: "The State shall, in particular, direct its policy towards securing: (a) that the citizens, men and women equally, have the right to an adequate means of livelihood . . ." Constitution of India (1949), reprinted in Albert P. Blaustein, et al, *India* 62-64, in Blaustein and Flanz, eds, 7 *Constitutions of the Countries of the World* (cited in note 1).

<sup>116</sup> See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv L Rev 1212 (1978).

the vagueness of the right and, more fundamentally, the obvious problems in its judicial definition and implementation. Perhaps the right to secede should be placed in this category.

The principal difficulty with this claim is that nonjusticiable rights are usually those whose elaboration would strain judicial capacities. Here there is no such problem. To make the right to secession nonjusticiable would reflect not a problem of definition or implementation, but instead ambivalence about the right itself. As distinguished from the right to subsistence, there is nothing vague about the right to secede. Moreover, as the recent experiences of constitutionalism in Eastern Europe and China reveal, judicially unenforceable constitutional rights are frequently not rights at all. By itself this consideration makes it important to ensure that constitutional rights are generally enforceable, lest the specification of unenforceable rights lead, in a system unaccustomed to such rights at all, to a process in which constitutional rights are generally not subject to real-world vindication.

If the case for a right to secede is persuasive, then the right should be both entrenched in the text and judicially enforceable. If the case is weak, then an unenforceable right is no better than no right at all. In any case, the right to secede does not have the characteristics that sometimes justify entrenched but unenforceable rights.

#### CONCLUSION

Claims for recognition of a constitutional right to secede raise large questions about the nature of constitutional protections in the emerging Eastern European democracies. I have suggested that constitutional protections should often be understood as an effort to facilitate rather than merely to frustrate democratic processes. Such efforts take many forms: the protection of rights central to self-government; the creation of fixed and stable arrangements by which people might order their affairs; the removal of especially charged or intractable questions from the public agenda; the creation of incentives for compromise, deliberation, and agreement; and the solution of problems posed by collective action problems, myopia, impulsiveness, and prisoners' dilemmas. Ideas of this sort provide a helpful if partial foundation for considering possible provisions in new constitutions. In any case, they suggest that a right to secede does not belong in a founding document.

In some cases, a right to secede will be fully justified as a matter of political morality. Nothing I have said argues against the view that subunits sometimes have good reasons for seceding. On

the contrary, I have attempted to catalog the reasons for secession and in the process to show that those reasons are often powerful. But the existence of occasionally powerful moral claims supplies insufficient reason for constitutional recognition of the right to secede. A nation that recognizes this right, and is prepared to respect it, may well find that it has thereby endangered ordinary democratic processes. A decision to allow a right of exit from the nation will divert attention from matters at hand, allow minority vetoes on important issues, encourage strategic and myopic behavior, and generally compromise the system of self-government. For this reason, a waiver of the right to secede should be seen as a natural part of constitutionalism, which frequently amounts to a precommitment strategy directed against problems of precisely this sort. People deciding on constitutional provisions often choose, in advance, to waive seemingly important rights when the waiver would serve the general interest.

To say this is not, I emphasize, to deny that there are good reasons why a subunit might want to secede. In Eastern Europe, it is plausible to say that such reasons exist in several places. I have suggested that even when this is so, there are generally more direct means of accomplishing the desired goals, such as local self-determination through federalism, firm protection of civil rights and civil liberties, and institutional and substantive guarantees against economic exploitation. It may be that the more direct means are in some circumstances inadequate. In such cases, however, the proper remedy is to reach a negotiated solution, to exercise the unwritten right to revolt, or to apply the pressure of domestic and international law, rather than to create a constitutional right to secede.