Predictable Obstacles, Impossible Paths: Two Theses on Constitutional Order and Secession Drawn from the Catalan Crisis

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Abstract

The events surrounding Catalonia's independence referendum were far more violent than anyone expected. In global perspective, the violence was not so extreme, but in the contemporary European context, it was shocking – a sobering lesson and reminder of how little we actually understand what we do, and how easily things can escalate – how quickly the comfortable assumptions of modern civility can unravel.

Still, while Catalonia's crisis may seem volatile, the real lesson is its predictability. Things needn't have come to this, but that they could should never have been in doubt. It is the logical consequence of the state's Weberian power – which is precisely the thing the separatists wish to subvert and coopt.

When we talk about secession, which should recognize that it itself is coercive – a claim of the right to coerce, even to use violence. The Catalan government is attempting to coerce the Spanish state, as well as those Catalans who don't wish to secede. Any right to secede has to be articulated in relationship to the right to govern, which involves coercion. That is what it means to make a state. A secession crisis is therefore a choice of coercions. Why should we choose one over the other?

Using the Spanish-Catalan crisis as its study, in its first section, this essay advances an argument for giving normative priority to the coercive, state-formative project of separatists over the extant state, and describes the limits of that priority. It then situates that normative claim within and against the extant international legal order, which resists its logic and, although formally neutral in secession crises, in fact supports the exercise of police powers that favors the existing state. Thus a general truth of our system appears in this particular instance: The responsibility for this crisis rests not only with the Catalan separatists or the Spanish state, but with a global order that has not made pathways for peaceful change possible.

****In the second section, this essay considers the prospects for a revised politics and law governing this question. Assuming a preference for secession can be supported, what are the pathways in which it might be achieved?*

First Thesis: The Priority of Place

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I. The Predictability of the Crisis

Catalonia's October 2017 referendum was far more violent than anyone expected. In global perspective, the violence was not so extreme, but in the contemporary European context, it was shocking. That itself is a sobering lesson, a reminder of how little we actually understand what we are doing, and how easily things can escalate – how quickly the comfortable assumptions of modern, European civility can unravel. A few years ago, in Barcelona, I mentioned in an interview that no one had expected Yugoslavia to turn violent either – and immediately qualified my comment to say of course I wasn't making a direct comparison, only pointing out how unpredictable things can be. Spain is still nothing like that, and likely won't be – but the point is that these are the sorts of things that start as impossibilities and end with people trading tips on how to avoid snipers at checkpoints.

But apart from volatility, the real lesson of the Catalan crisis is the *predictability* – the baseline availability and ultimately the unavoidable risk – of coercion and violence. What we witnessed was the logical consequence of the Spanish state's Weberian power to control public order. Things needn't have come to this, but that they *could* – that the state could use force: that should never have been in doubt.

The referendum, like so much Catalans have done in the past two years, clearly violated the Spanish legal order. From the Spanish legal order's perspective, Catalan separatists' moves have been intolerable. In power at the provincial level, the separatist parties announced the nullification of court decisions, and established new institutions for a proto-state in advance of the referendum, based on their victory in the last regular elections. Spanish courts declared these steps illegal, but you don't have to be a legal expert to notice the many, many ways Catalonia has been defying clear provisions of the Spanish constitution. No state could be expected to watch such moves with equanimity.

Spain's response, in turn, has been entirely constitutional, fully consistent with its obligations to defend the territorial integrity and sovereignty of the Spanish state and people. States have the right to maintain public order and respect for the law – thus the predictable possibility of the very things that have now happened, including Spain's decision to suspend local autonomy and the prosecution of individuals for various offenses, ranging from rebellion*** to misuse of public funds.[2] The fact that the Catalan separatists themselves were non-violent is neither here nor there, because the state is not barred from using police power against non-violent actors; it doesn't have to wait for a physical escalation to prevent non-violent but illegal action (like holding an unauthorized election).

It does have to respect some limits defined by human rights commitments and the logic of proportionality. But the critique we must make – at least, if we are to say anything useful – is not that the Spanish state's reaction was disproportionate, but that it was unacceptable as such. But that is tantamount to saying Spain should have allowed the referendum to proceed. Can we say that, notwithstanding its own clear law, the state *should not* have prevented the referendum?

Let us put to the side one solution, which is the path of magisterial indifference: that Spain could have ignored the referendum, treating it as a private action without consequence. It had the chance to do this two years before, but instead cracked down on the notionally informal first referendum. And the October 2017*** referendum was different: it was officially sanctioned by the Catalan government, and had it proceeded unopposed, and had the separatists won, they would have

[2] There is legitimate debate about the application of rebellion and sedition*** charges to the activity of the separatists, on the theory that such charges require an element of violence that the separatists were not engaged in. (This is the view taken by German judges considering an extradition request for Catalonia's former President Carlos Puigdemont, for example.) To the degree one accepts these views, the Spanish state's actions appear yet more egregious and heavy-handed – and themselves push against the very norms of rule of law that mirror one of the principle critiques of the separatists' own actions. But the more general point that in the current international system states have the power to declare illegal and prosecute such actions is not seriously at issue.

declared independence (as they tried anyway), and forced the question. So we can refine our question: Can we say the state *should allow* a referendum knowing it could lead to independence?

II. The Responsibility of the Spanish State

The illegality of Catalonia's secession is obvious, and pointing that out is insufficient. It begs the question of why it is so obviously illegal – why Spain chooses not to allow such a vote or its consequences. Because all those intolerable moves would be entirely tolerable if Spain allowed them, the way Britain did in Scotland. In that respect – for precisely the same reasons that Spain points to when it justifies its actions as respect for legality – the responsibility for this crisis rests with the Spanish state, and with a global order that has not made pathways for peaceful change possible.

It would not have been easy to authorize a vote. Unlike in the United Kingdom, in Spain the constitutional order actually compels organs of the state to defend its integrity. The only constitutional path would be through a vote of the *Cortes* and a nation-wide referendum. But it is possible, and a great deal more is possible at the political level *** -- after all, Spain is master of its own constitutional order, which means it could craft a different one that facilitates or at least imposes less onerous obstacles to secession, and that it didn't is simply a political choice, however difficult in context.

And that choice was consequential. It is almost universally acknowledged that Spain's strategy has actually increased secessionist sentiment over the past decade, turning what was an endemic but minor theme into an active demand for about half the population.[3] The surest way to keep the situation from becoming volatile would have been to make the path to secession legal and regularized. All the objections – the uncertain status of the census used to count voters, the problem of who counts the votes, the illegality itself – would disappear if the state actively cooperated.

Spain's recalcitrant position is firmly grounded in the rule of law, but we should be troubled by any interpretation of the rule of law that precludes *any* change or that prefigures *all* outcomes. The challenge Catalan separatists pose is, by its nature, a challenge to Spain's constitutional order, so it proves too much, and says too little, to simply let that order answer the challenge itself. Respect for the rule of law cannot itself answer the question of why the law is what it is – why the thing many Catalans are trying to do is illegal, and why, whether, it should be. Its illegality is a question that Spanish state has to answer for.

In saying this, it's important to qualify the critique of what Spain has done. We shouldn't call just any legal order or constraint 'violence' – that is intellectually lazy, cheaply delegitimizes the consequences of living in society, and excuses radicalized reactions. But we *should* be attentive to the ways in which we default to the existing order, assigning blame for its violation, or rely on that order's normative power to tell ourselves stories about cause and effect.

In fact, precisely because we should be cautious about calling everything 'violence,' we should be suspicious of invoking 'order' as a justification for coercive acts – seizure of ballot boxes, suspension of autonomy, prosecution of officials and private individuals for non-violent actions – now that it has come to that. It was clear that the actual, literal violence during the referendum was, for the most part, an act of the state – that violence would not have happened but for the policy decision of the state. The Catalan separatists would have been more than happy to vote peaceably (this is not always the case, but was here), so what exactly was the Spanish state reacting to when it ordered its police forces into the streets of Barcelona and Girona? We might ask similar questions about the use of its power to arrest, prosecute and imprison individuals – the classic *Gewaltmonopol des Staates*.

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[3] Let us ignore the obvious fact that the Spanish state is not a monolith, and deploy the useful fiction that its actors and institutions are relatively uniform and act intentionally. As for Catalonia, we can employ the same fiction for its various separatist governments, recalling that popular sentiment there is clearly divided.

But this is not just a question of who hits first.[4] There is coercion on the Catalan side as well, and it is of very much the same type, or at least aspires to be. The separatists' explicit project, adopted as policy after the 2015 elections, of building nascent institutions of a Catalan state prior to independence, was nothing more than an attempt to create and harness the coercive power of the state – to become the very sort of thing against which it was rebelling. The unilateral declaration and all such steps over the preceding 18 months were coercive in that general, political sense. That they have stepped back from that project is solely a function of political weakness.

So when we talk about secession, which should recognize that it itself is coercive – a claim of the right to coerce, even to use violence. And in attempting to do this against the existing order, the Catalan government is attempting to coerce the Spanish state, as well as those Catalans who don't wish to secede. Although this latter coercion could be avoided if the Spanish constitutional order were more permissive, the underlying political claim – and end goal of the project – would still involve the exercise of coercive authority. Necessarily so: Any right to secede has to be articulated in relationship to the right to govern, which involves coercion. That is what it means to make a state. A secession crisis is therefore a choice of coercions. Why should we choose one over the other?

III. A Choice of Modes

Normally, in contests over policy between the existing state and a disaffected minority, we should choose the state: There are compelling philosophical, political and practical reasons to defer to recognized, legitimated authority. And indeed, the Spanish state has justified its actions on grounds of legality, as well as claims of democracy. Thus we might suppose that secession is troubling on democratic grounds, since after all the separatists are a minority. Even if we call it a 'local majority' – something Catalonia's separatists have not yet attained! – why should it have priority over the whole population of Spain, who constitute a legal, self-determining people? Similarly, many states describe themselves as indissoluble, with an indivisible people – why should one part of that unity be allowed to withdraw? Even if we say that both a legal 'people' and a democratic majority are merely a function of borders, which is true, why should we prefer the wishes of *another* people who are also merely a function of different borders? It would seem to leave us with no way to prefer either.

This is a collision of models – or perhaps more accurately, a confusion of different modes. Those modes concern the governance of a polity, and its formation or justification. Assuming the moral priority of a unitary people (and therefore its democratic decisional priority) is plausible for *governing* a shared community – the Kantian view that, so long as a state is minimally decent and respectful of people's fundamental rights, we ought to recognize its authority, including each person's duty to obey that authority. But that assumption is not a useful framework for evaluating claims that *challenge the existence* of the community. The question is not simply one of democracy or decent governance, but identification of (and with) the relevant unit. Secession is only undemocratic if we accept *a priori* the validity of the whole population as a *demos*, which is precisely the thing at issue.

The Spanish state's principle claim is one of legality – that nothing must happen outside the constitutional order – but that actually tells us very little in a secession crisis, because the recognition and legitimacy of authority is the very thing in question. That doesn't necessarily mean the separatists win the debate. After all, if we should not reflexively privilege the state, why privilege the separatists?

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[4] Obviously, one could carry this line too far. When the state arrests a drug dealer or a smuggler or a banker engaged in insider trading, it is introducing violence into an otherwise peaceful activity, but that does not necessarily lead us to the conclusion that the state is 'to blame' for the violence. Still, you may already imagine grounds for differentiating those examples from the separatist, grounds that do not depend solely on formal legality but something else. And, as we'll now see, my argument doesn't depend on a fiction that only the state is engaged in violent or coercive activity, nor that it is always, automatically wrong when it does.

This requires separate justification. We can find this justification if we consider the underlying, let us say pre-political basis for a claim of political identity. That basis has to do with place.

IV. The Priority of Place

People live in places, to which they have a special relationship. They also have a relationship to the broader community, which we call citizenship, because the place to which they have a relationship is part of a state. But when that changes – when the union of those places is the very thing challenged – then people have a natural, moral priority in deciding about the governance of the places they actually live. That priority is submerged within the larger unit for everyday governance, but necessarily and properly reasserts itself whenever the question arises: shall this community continue to be?[5] This priority arises because there is a moral and political difference between ruling *oneself* and ruling *others*. Secession alters the whole original community's circumstances, and this is an imposition, but the result is that more individuals will rule themselves, in communities reflecting both proximity and their preferences.

Demanding that others stay is morally different from claiming one's own right to leave.[6] If Catalans sincerely want to go, why would we interpret that as an imposition *on* other Spaniards, rather than a desire to escape the imposition *of* other Spaniards? It is the difference between the logic of marriage and divorce: Marriage is oriented towards joint decision; but divorces allow each party to decide if the marriage shall continue. The choice is not entirely free – there may be costs, and it will be hard on the kids – but it is each individual's to make. An imperfect analogy, as all analogies are, but it goes a long way before it fails. And that's no coincidence, for self-determination (which is what we are really talking about) was, in its earliest permutations, as much concerned with individuals as nations; its logic is rooted in each human's autonomy and responsibility for his own person and for the community of which he feels, and chooses to be, a part.

This local priority is limited: It applies only to questions about the union's existence, not its governance. Treating the state as a given makes sense for questions about what tax rates should be, which side of the road to drive on, when to go to war, whom to elect – and if a minority tries to nullify those decisions it can violate democratic principles. So the state can compel obedience, and it is only when the question concerns the existence of the state itself that it is unsatisfactory to assume the state in answering. Then it is necessary to take steps outside the normal governance process to make a claim of sovereignty – and that is the only time it is acceptable. For practical reasons, let alone philosophical ones, there cannot be a sustained gap in governance, and that means deference to existing authority until a transition can be completed. But equally that implies some duty on the existing state to cooperate, to facilitate the transfer of power and not obstruct it, because to refuse to countenance any discussion of secession is to force those with legitimate demands to desperate measures. None of this is new: It is the tension between the duty to obey and the right of revolution, which is ancient and ultimately irresolvable.

The Catalan separatists have their own cult of legality, and have been trying to use their existing autonomy to advance their claim, but this puts them at cross-purposes. Like the Kosovars (whose declaration of independence the International Court of Justice declared the work of private actors, even though those actors were Kosovo's president and parliament), Catalan separatists' claim is

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[5] 'Continue': I am not making some sort of Rousseauian or Lockean argument about a state of nature – one of the clunkier fictions of political philosophy, and one that, to the degree it draws on the logic of property law, fundamentally mis-describes the state and its power. The special relationship of people to place is a quality of human existence not solely constituted by the state, but describing it does not require us to imagine some prelapsarian age when political authority didn't exist and trace notional rights back to it.

[6] I mean 'leave the state and take your place with you' – not the old *jus emigrandi*, which doesn't address the underlying political question but simply provides a biological escape from the state.

outside the existing order. That is why the referendum – not a regular election, nor the institutions of autonomy themselves – was so important: as a popular expression outside the existing order, creating a new order and authority.

This put, and puts, the Catalan separatists in a difficult position – they must advance their claim before they are ready to undertake it. But that is simply the burden they bear, and there is a simple solution (one to which they have been forced by politics and the power of the Spanish state): to frame the decision not as independence but as the beginning of negotiations in good faith. Just as in Scotland – or indeed Brexit – the moment of decision is not the moment of action, but the initiation of a process.

The Catalan separatists should have followed Spain's law on every issue – save one: They should not have built the institutions of a separate state, but only demanded a vote. For its part, Spain should have demanded obedience to the law on every issue – save the very question of its existence: Then it should have allowed the question, the answer, and the consequences. And still should.

If it seems this formula favors separatists – choosing their right to coerce over the state's – it does: The right to withdraw should have priority. But this doesn't mean secession will prevail – as we saw in Scotland, union can win, and indeed, in Catalonia itself it has always been a close call. It does mean states have to actively justify themselves to their own populations, and this is a thing they actually can do.

And should: Too often, we focus on the illiberalism of separation, how it appears to give up on notions of shared humanity. We forget the illiberalism of staying: the imperious demand that the other must stay, in our shared country – by which we mean, of course, *our* country. It is not illiberal to wish an equal place. It is the most natural human desire to wish it for ourselves, and should be, if not our impulse, then our policy, to allow it for others. We should not forget the etymology of liberal: from the Latin, meaning 'free.'

Second Thesis: The Pathway (and the Obstacles)

Let us suppose you are convinced. The Spanish state is wrong to interfere with a peaceful decision-making deliberation about Catalan independence. More generally, a moral case for secession is possible and compelling, such that we should, to borrow from Jesuit liberation theology, exercise a preferential option for secession. What then? Being convinced is not the same as seeing the pathway forward. So, what are the prospects for such a revised politics of secession – what have the Catalan experience and other recent controversies taught us about those prospects?

The first lesson is that although Spain has been acting according to its own constitutional order, that order itself has a context. The broader international legal and political order is effectively hostile to the kinds of claims the Catalans are making, and deeply enabling of states, like Spain, in resisting. Though formally neutral or agnostic, in fact and in practice, the international order defers to states in their resistance to secession, whether peaceful or otherwise. Having come out decisively in favor of decolonization as an exercise of self-determination, that same order has settled into a highly conservative, territorially protective posture for existing states. The result is the predictable process we have seen, varying primarily due to domestic circumstance – the willingness of the government to use repression, the very rare instances in which a state tolerates secession.

There is little evidence that the international legal framework – derived primarily through treaty law and customary international law – is going to change in this respect in any foreseeable time frame. But law isn't only made through formal processes; nor is law the only vehicle for changing politics. Whatever the legal significance of recent secessions, as social and political facts, they matter. The bare fact that they happened changes arguments about the possibility and rightness of such things.

They may not constitute a new rule on their own, but the *experience* – the politics of negotiating secession, the diplomacy surrounding the attempt – serves as models for how these things can and should be done. Moments of exit normalize secession as an option: Even when contested, they demonstrate the possibility, the normalcy, of change. Controversies over Catalonia, Kurdistan, and Crimea – and Brexit – force the question onto the international agenda, and that makes claims of a changing norm more plausible. They can be the engine for expanding the right, because law is often the result of dynamic processes in which domestic politics, international diplomacy and transnational transmission of values interact. In this respect, the Catalan case – though as a matter of formal international law it probably reinforces the existing restrictive norm – can contribute to its eventual alteration.

V. Constitutional Entrenchment and Diffusion of Values

The Catalan case is defined by the two-fold action of international norms and a recalcitrant Spanish constitutional order. But although that municipal order is enabled by the international, it is not determined by it. States are free to otherwise, and indeed, the Scottish referendum suggests a more promising pathway to the broader recognition of secession in 100 smaller steps: through the constitutions of sympathetic states.

International law is not self-enforcing. Mostly it is realized through the actions of states. States would need to take steps to make it meaningful. They would have to change their constitutions, amend electoral laws, and do many practical things to support its exercise. An international rule may provide the normative justification for these steps, but they must be done at the state level. Domestic practice matters – and nothing in that otherwise hostile international environment prevents states from adopting a different domestic practice.

Some states already recognize a right of secession. Ethiopia allows secession with a supermajority in the regional legislature and a majority in a regional vote. Liechtenstein recognizes a right of secession for its individual communes: A majority must vote, and a second vote approving the result of negotiations is required.[7] Canada requires negotiations after a clear vote on a clear question. Burma's 1947 Constitution recognized a right to secede after ten years of independence (not that it was ever acknowledged). Some give asymmetrical rights: St. Kitts and Nevis' constitution allows Nevis to leave the federation, and Uzbekistan's allows autonomous Karakalpakstan to secede;[8] in the UK, Scotland's right to secede and Northern Ireland's right to join the Republic of Ireland are very different pathways, but both constitutionally acknowledged.

These provisions exist; some have been used. Whatever their value in law, observers can and will treat them as inspiration or threat: a challenge to the existing order. An advocate for a right of secession could ignore the doctrinal awkwardness and make use of that fact: If even a few significant powers adopted similar practices, it would bolster the claim that a practice is emerging. Nor is actual secession the only relevant event. Whenever a constitution is amended or a new constitution drafted, the opportunity to introduce language about secession – or just deemphasize references to indivisibility – presents itself. Likewise, each time a state expands autonomy or minority rights can be mobilized as indirect evidence that a protective norm is emerging.

A constitutionalizing strategy relies on pluralism. Some states might link the right to specific territories; others might define a domestic right similar to a general right of secession, but with varying content or procedures. But this is not a problem: A right of secession would be compatible with the

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[7] Const. Liechtenstein (1921), art. 4(2), *in* Zachary Ellkins, "The Logic and Design of a Low-Commitment Constitution (Or, How to Stop Worrying about the Right to Secede)," in *Nullification and Secession in Modern Constitutional Thought*, edited by Sanford Levinson. University Press of Kansas, 2016, at 302.

[8] Const. St. Kitts and Nevis, art. 113; Const. Uzbekistan, art. 74, *both in* Elkins, "Low-Commitment Constitution," 302.

widest range of state practice, and wouldn't limit the diverse possibilities for accommodating difference that constitutionalism offers. It is compatible with presidential or parliamentary systems, first-past-the-post or alternative transferable voting, unitary or federal or consociational governance, autonomy or identical rights for all – with all the models we know, except the one that says states' borders never change. There's no need for states to apply a uniform rule to contribute to an emerging norm – indeed, that's how international law normally proceeds.

Moreover, states that adopt a favorable view of secession at home can actively influence the position of others. States incorporate their domestic values into their foreign policy, advocating for their preferred positions in international fora, conditioning aid and trade on ancillary issues of governance, rights or the like. The British abolition movement is an example of how one society's moral intuitions powerfully shaped a global rights revolution. More generally, when states support reform abroad or establish an international administration, they often impose systems like their own: When the US occupied Iraq, it introduced a new traffic code, in English, modeled on Maryland's.[9] (Guess where its author was from.) History is full of examples of states offering their own quirks as universal models. States accepting a right to secession for themselves could do the same, promoting adoption of similar policies abroad, or protesting attempts to suppress secessions.

This isn't a matter of coercion and bribery. International law used to speak of 'civilized nations,' but while the phrasing is archaic, the idea of a shared community – and unequal power – remains. States are social entities, concerned with prestige and position; they take cues about state-like behavior from each other, mimicking and acculturating to each other.[10] Cultural, political and legal values travel; states tend to adopt human rights standards in regional clusters. So secession can have a demonstration effect: The Scottish referendum doesn't directly constitute a customary rule, but it's a model for how states can, even ought to behave, and like-minded states might align their behavior over time. That's equally true of the reaction to the Catalan attempt, including the widespread revultion at the level of force Spain used.

Progress would be piecemeal, ad hoc, and opportunistic. A global secession movement is implausible – indeed, quite apart from the general hostility, there are practical reasons why a movement for a *general* right is unlikely – but coalitions to support particular secessions will predictably form, and are opportunities to make general arguments arising out of specific cases. Each secession, and each change in domestic practice, is a development in its own right, providing evidence of a broadening pattern.

States are the predominant actors, but not the only ones, and they aren't monolithic. During the anti-apartheid movement, cities, federal states, universities, corporations, unions and churches adopted divestment policies even when their governments did not, and had a real economic effect on South Africa. More recently, actors have acted on climate change at trans- and sub-national levels; when the Trump administration withdrew from the Paris Accords, California's governor met the Chinese president to affirm shared policy commitments. On secession – whether as a general right or in particular cases – we could expect non- or sub-state actors to mobilize coalitions based on their own shared values, advocating positions their governments wouldn't.[11] Networks of similarly situated actors can deploy translated, transnational norms; court cases – in large ways, as the *Quebec Reference*, or in small, as in the German extradition decision for Puigdemont – can constitute valuable evidence for changing norms in transnational contexts.

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[9] William Langewiesche, "Welcome to the Green Zone," *The Atlantic*, November 2004.

[10] *See* Ryan Goodman & Derek Jinks, *Socializing States*: P*romoting Human Rights through International Law*. Oxford: Oxford University Press, 2013.

[11] *See* Margaret E. Keck & Kathryn Sikkink. *Activists beyond Borders: Advocacy Networks in International Politics*. London: Cornell University Press, 1998.

And although a general movement is very unlikely, the broadest levels of support could center on democratic values. The Catalan movement quite successfully mobilized around a 'right to decide,' rather than simply a particular historical or ethnic claim. That was savvy, because the strongest case for a right to secession is grounded in popular democratic logic that could attract allies even if they are uninterested in, or suspicious of, secession as a practical solution. Even actors opposed to particular secessions are more favorable to the right to decide. More Spaniards favor Catalonia's right to vote than favor its secession, and a similar sentiment governed the politics of the Scottish referendum.

Each secessionist movement is a potential constituent for other movements, as are their advocates and allies.[12] Mainstream human rights NGOs are unlikely to support a general right, which would seem too political, but they might advocate for individual cases – which in turn can bolster general arguments – and groups focused on minority rights would be more receptive. Tibet, for example, has a global network of committed supporters who would welcome a general legal and political framework supporting their aims. Even those with entirely different agendas may be attracted to support a norm that could leverage better outcomes – a right of exit alters the negotiating calculus, and this benefits those seeking to get better specific outcomes in a diverse range of policy realms. A secession norm's pluralistic compatibility with a variety of governance models means it could be useful to many actors when it converges with their agendas.

Cross-cutting coalitions are possible, because the persistence of claims that sound Wilsonian isn't just a mistaken conceptual survivor; it represents the seepage of ideas. Confronted with the international law's narrow, arbitrary definition of 'peoples,' humans naturally ask why it can't and shouldn't apply to other groups. Rights are naturally expansive, and a right to secession – the dignity to determine one's own political destiny in a democratic process – arises plausibly out of the rights we already recognize.

VI. Obstacles to Transnational Diffusion

Still, there is hardly an overwhelming trend, and the Catalan case is more typical for its failure than for any inroads into the solid support for existing states. Far from a broad movement, only a few states allow secession. Many more states prohibit or criminalize separatism – five times as many, either through specific prohibitions (Ecuador), references to indivisibility (Luxembourg), or the military's obligation to defend territorial integrity (Bolivia[13]). Spain's constitution, with its provisions about defense of the state's integrity, is solidly in the mainstream. Even constitutions that are silent have been interpreted to preclude secession (Germany, US[14]), and international law's own silence enables states to ignore or suppress separatism. Nor do the few constitutions that allow secession contemplate anything like a generalized right of secession: None give the right to self-organizing groups – instead, they typically give it to a usually defined list of existing sub-units. If we rely on the accretion of sympathetic states, we might wait a very long time: A global norm won't be built on cooperative states and generalized advocacy alone. The hard cases of self-determination are precisely those in which the

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[12] Solidarity is hardly guaranteed. I recall a quite enlightening conversation in Barcelona, before the referendum crisis but around the time of the Scottish referendum, in which a strategist for the government explained why Catalonia wasn't vocally supporting Scottish independence: Catalonia needed allies, states are the actors who matter, and Scotland wasn't a state yet, whereas the UK was.

[13] Elkins, "Low-Commitment Constitution," 306. "Under no circumstances shall the exercise of autonomy allow for secession from the national territory." Const. Ecuador (2008), art. 238.

[14] *See* Kohlhaas v. Alaska, 147 P. 3d 714 (Alaska 2006)(drawing on *Texas v. White* to refuse to certify a petition proposing a referendum on secession or instructing the state to work for its constitutionalization); Adam Taylor, "German Court Shuts Down Hopes for a Breakaway Bavaria." *Washington Post*, January 4, 2017.

state is resistant to secession. A robust, globalized right would require those states' acquiescence, otherwise, only in those rare, enlightened states that are prepared to accept it would the right exist, and that is no right at all.

A strategy of constitutional entrenchment also faces conceptual obstacles. Far from states' being open to the virtues of "low-commitment" constitutions that have lower bars to exit, "the opposite mindset – territorial insecurity – is a common preoccupation in national constitutions. Constitution makers are in the business of building, not demolishing, states."[15] The dominant view cautions against constitutionalizing secession – preferring to leave constitutions silent or even explicitly rejecting any right.[16] This is a structural feature: Constitutions are products of domestic negotiation, subject to the logic of a system in which exit is not possible and majorities have limited incentives to accommodate minorities. Almost by definition, separatism's supporters will be outnumbered, and usually outgunned, by supporters of state sovereignty and unity.

And if constitutionalization doesn't work alone, neither will diffusion of values. International socialization can only do so much work – and socialization works both ways: Current global norms not only allow states to ignore secession, they enable its suppression, even with violence. Transnational advocacy coalitions' ability to affect this logic is quite limited. On other issues – climate, gender and so on – sub-state actors can have a real impact; they can adopt parts of international treaties in local practice, even if their states don't. Secession and recognition of new states seem harder to disaggregate in this way. The issues that affect secession are not merely linked to the state system – they *constitute* the system. They must at some point resolve itself at that level, and that means in international law.

In the absence of an overarching norm supporting the right of secession – in the way human rights exist independently of individual states – domestic and transnational advocacy will produce pro-secession constitutions only in places where such ideas are otherwise already part of domestic politics, like the UK. And not in places they aren't, because there already is a global norm shaping those negotiations: territorial integrity. The constitutional politics of each state will be decisive, and without an external point of triangulation, there is no escape from the logic of secession's unconstitutionality. The challenge is to move from a position in which secession is disfavored – and states are free to suppress it – to one in which states are willing, even obliged, to tolerate or facilitate a right to decide.

A right of secession would often function as a mechanism to enable better results in negotiations within states. Much of the time, the result would not be secession, but autonomy, federalism, increased rights – but without a credible right of exit, those negotiating outcomes would predictably be less favorable. Strategically this means that in advocating for secession, it is critical to articulate an international legal basis, not merely a domestic one. Without a new norm, we will not see sufficiently improved results. The question is how to advance a credible claim that there is such a norm.

VII. The Interaction of Domestic Politics and International Law

Constitutional and international legal strategies aren't competing initiatives, rather complementary ones. A new global norm makes constitutionalization more possible, and constitutionalization provides evidence to advance a novel rule. Changing a global rule like territorial

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[15] Elkins, "Low-Commitment Constitution," 312-3.

[16] *See* Cass R. Sunstein, "Constitutionalism and Secession." 58 University of Chicago Law Review 633, 670 (1991) (arguing that sub-state units should waive any right to secede). Vicki C. Jackson, "Secession, Transnational Precedents, and Constitutional Silences." In *Nullification and Secession in Modern Constitutional Thought*, edited by Sanford Levinson. University Press of Kansas, 2016, at 336 ("secession should not be encouraged through law; but in the face of mobilized demand, a procedural approach to resolving such claims has obvious benefits over violence."); *see also* David Haljan, *Constitutionalizing Secession*. Portland: Hart Publishing, 2014, at 26 (secession is subject to constitutional law but "secession provisions are not and should not be incorporated expressly into a constitution").

integrity requires a new global rule, but that rule will be realized through constitutional enactments long before it is fully recognized at the international level.

The process is dynamic: a rule forms over time, and during its formation, has effects on the very processes that form it. Articulating a global norm facilitates constitutionalization, since, to the degree the norm is recognized as binding, it encourages states to bring their domestic regimes into compliance. Advocates of constitutional entrenchment could then make a case based on international legality as well as domestic preferences, by appealing to domestic institutions to apply global norms or to international institutions to pressure the state to act, in the way Black American civil rights groups appealed to the UN to put pressure on the US to reform Jim Crow – pressure intended to embarrass the US government into action even if the UN could not compel action.[17] Each time they do, they strengthen the very norm on which they rely. As more states adopt the practice, the idea that there might be an emerging right becomes more plausible, in turn creating more space for advocacy in other states. In international law – as in so many things – one has to claim the right before it actually exists.

States need not wait until they confront an actual secession crisis, but could instead amend their constitutions to include a right of exit. Doing so can actually reduce the risks of secession: "It is intuitive to think of. . . the right to secession as centrifugal, in the sense of [its] leading to a further disintegration of the state. However, there is also reason to think that these strategies might lead to a stronger sense of loyalty that comes from an active, voluntary commitment."[18]

But a dynamic constitutional-international strategy would include several elements beyond direct advocacy for a right of secession. One would be to remove references to territorial indivisibility or overt prohibition that encourage states to be rigid in negotiating with minorities. Even without authorizing secession, this would help shift the norm from prohibition to neutrality. Whenever a state moved from textual prohibition to constitutional silence, this would signal movement towards a position in which prohibition was disfavored, and eventually no longer possible. Unlikely as it is that Spain would agree to such constitutional reform, it might constitute a productive strategy for Catalan separatists simultaneously to reaffirm their support for legality and to insist that the only obstacle to their morally legitimate demand is a constitutional order Spain is fully empowered to change.

Another move would be to adopt procedural models that, without affirmatively supporting secession as a right, anticipate its possibility and provide an orderly pathway if a claim arises. Even without advocating secession, "law has the flexibility to develop constitutionally permissible legal procedures to resolve claims of secession. . . . [I]n the face of mobilized demand, a procedural approach to resolving such claims has obvious benefits over violence."[19] This is what Canada has done, and what Spain has failed to do in responding to Catalan claims, relying instead on constitutional prohibitions to uphold a policy of neglect and resistance, which has predictably enflamed secessionist sentiment: "[A] constitutional text that explicitly prohibits the possibility, which can be invoked as a reason sounding in authority for not considering the option, is not likely in the long run to be persuasive, and insistence on it may be more likely to discredit the constitution than to discourage secession."[20]

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[17] Judith Resnik, "Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry." 115 *Yale Law Journal* 1564, 1591-3, 1598-1606 (2005–06) (discussing attempts to invoke the Charter in US courts).

[18] Elkins, "Low-Commitment Constitution," 312. *See also* Wayne Norman, *Negotiating Nationalism: Nation-building, Federalism, and Secession in the Multinational State*. Oxford: Oxford University Press, 2006 (secession clauses can "reduce incentives for secessionist politics while enhancing. . . political stability for the national majority").

[19] Jackson, "Constitutional Silences," 335-6.

[20] Jackson, "Constitutional Silences," 336. *See* Jason Sorens,*Secessionism: Identity, Interest, and Strategy*. McGill-Queens University Press, 2007 (arguing that providing legal pathways for secession rather than prohibiting it leads to less violent outcomes).

The Scottish case shows the pathways a state could follow. Negotiating the terms of a referendum with a sovereign that opposes the outcome but concedes the principle – and treating the exercise as a sequence of decisions, rather than a single moment – is a model that can be emulated. As Scotland showed, even the most permissive case involves close, hard negotiation, both of the process leading to decision and beyond. Indeed, it is precisely the cooperative cases in which negotiations will be most prominent; in divisive, violent secessions, negotiations will be minimized, though at great cost – though even then, there's no escaping the need to deal with the new neighbors.

Scotland suggests an evolutionary process, political in nature but guided by existing institutions. The alternative, like Kosovo or Bangladesh or the US Civil War, is a revolutionary process, in which new institutions make decisions about the organization of society, under enormous, often violent pressure in conditions of considerable uncertainty about legality and legitimacy. Although the UK and Scottish governments disagreed strongly about what would follow a yes vote, both accepted that the post-referendum, pre-independence period would be one of negotiation to determine the contours of the new state's authority. By contrast, in a contested secession, many of these are things the new state simply does under its own authority, in the teeth of resistance from the parent state. The Scottish case – more precisely, the British case – is instructive of the attitudes states would need in order to foster an international norm. The world has not yet embraced its model, but a model it nonetheless may be.

VIII. Effectiveness and Recognition – Quebec

A further reason not to restrict secession to a domestic constitutional project – and a further pathway – is that states exist in a broader international context. States recognize each other, which means they have to decide when to. Recognition may not formally constitute a state, but it is vital to a new state's prospects in an interdependent global order. That order is hostile to but doesn't actually prohibit secession, and in this empty space there is room for maneuver. Secessions happen, and states need to respond. Some cases garner sympathy and diplomatic support. A few succeed in withdrawing by force of arms. Either way, states are practically forced to take positions, often making arguments that have more general application. Europe's states have been quite uniform in signaling against Catalan secession, but if it were somehow to secede in fact – a political crisis, a weakening of Spanish resolve (if only an unwillingness to use force) – then the fact of independence would, sooner or later, create an opening and an incentive for those states to recognize Catalonia.

We have indications about how that path might work in law. In its opinion about Quebec, Canada's Supreme Court noted that beyond a certain point, the question ceases to be one of domestic law; it enters the realm of international politics. Although Canada's constitution doesn't allow for unilateral secession, the court acknowledged that

> Secession of a province from Canada, if successful in the streets, might well lead to the creation of a new state. Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states. That process of recognition is guided by legal norms. . . .
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> [O]ne of the legal norms which may be recognized by states in granting or withholding recognition of emergent states is the legitimacy of the process by which the *de facto* secession is, or was, being pursued.[21]

[21] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ¶¶ 142-3.

The court is describing conditions a unilateral secession must meet to gain – and deserve – recognition. If s seceding entity fails to negotiate in good faith, other states might refuse to recognize it:

> an emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition. . . . On the other hand, compliance by the seceding province with such legitimate obligations would weigh in favour of international recognition.[22]

It is a matter of secessionists' good faith. But equally, if the *state* doesn't negotiate in good faith, the case for other states to recognize the secession is stronger – in the same way that persecution can give rise to remedial secession. There are consequences to rejecting a good faith effort to secede, and however unsympathetic the formal legal order is to Catalonia's claim, it has better odds in the world of political rhetoric and marketing, in which its case could look more sympathetic than Spain's.

Even unrecognized, de facto states can conduct themselves in ways that can bolster the right to secede. Well-ordered, peaceful units that contribute to regional stability will be tolerated; the principle of effectivity suggests that eventually other states need to make their peace with the fact of secession – and when they do, claims that the law has changed will become more plausible. Still, 'eventually' can be a long time: some de facto states have existed for decades unrecognized. Some have garnered recognition, but only from a small number of states – such as Russia's recognition of South Ossetia or Turkey's of Northern Cyprus – which argue against an expanded right. Yet the mere fact that 'frozen conflicts' persist suggests the system of territorial integrity is under challenge. This is not a pretty process, but it opens space for a more ordered, principled norm that might challenge the monolithic hostility of the current norm.

. . .

The obstacles to a recognized right of secession are considerable, and the most promising path is one of slow transformation in values and perspectives. It is a very long game, and every move faces considerable obstacles. As the Catalan government discovered with its aborted declaration, a good idea is not enough; it needs favorable material conditions. The moral case for decolonization was available long before it gained traction, and that only happened once the colonial empires were gravely weakened, increasingly irrational as political and economic projects. The same is true for the abolition of slavery, human rights, or democracy. But that simply shows that material conditions precede and shape doctrinal shifts. Perhaps those conditions have changed: The collapse of the Cold War order and the rise of globalized society have reduced the felt necessity of rigid territorial integrity. That is a terrifying prospect, but also an opportunity. Besides, there is no avoiding it: If conditions have changed, we can expect law to follow – slowly, painfully, but inexorably.

These are not necessarily winning strategies, merely plausible ones. Opponents of secession will always be able to make powerful arguments against it, and can point to the lack of treaty or custom to deny that a proposed right of secession has legal force. But the same structure they rely on does not prohibit secession, and its plural quality precludes them from anathematizing arguments in favor of any particular secession, or even a right in general. Advocates for a new right are in a position like many guerrilla movements: They cannot win outright, but neither can they be defeated. And that is all that is required.

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[22] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ¶ 143.

The goal, after all, is not necessarily a new legal rule, but changed practice. A sensible strategy, if one is thinking about the long game and the global, rather than any single case, should not focus on doctrine for its own sake, but rather encourage practice, and let law follow. A world in which secession was regularly accepted as part of how we decide on governance, even without a formal rule, would be better than this one; that would be a world in which a state like Spain might, on its own, decide that it makes sense not to create obstacles to its own people's deliberating on *the* essential political question. And deciding it, on its own, it would also be contributing to change in the rule governing us all. That's how legal change works: We don't live in such a world, but if enough of us act as if we do, we actually already would, and think it reasonable and just.