

The Constitutional Right of Secession in Political Theory and History
Mises Institute Working Paper
August 18, 2003

Andrei Kreptul kreptua@seattleu.edu
Seattle University School of Law

Table of Contents

Introduction	3
I. The Constitutional Right of Secession in Political Theory.....	6
A. The Place of Secession in Political Order: Hobbes vs. Althusius.....	6
B. Liberal Democratic Theory of the Morality and Constitutionality of Secession (The Hobbesian Paradigm)	8
C. Austro-Libertarian Theory of the Morality and Constitutionality of Secession (The Althusian Paradigm)	19
II. The Constitutional Right of Secession in History and the Present Day.....	28
A. Historical Overview of the Constitutional Right of Secession	28
B. Constitutional Provisions for Secession in the Present Day	40
i. Countries with Express Constitutional Rights of Secession.....	41
a) Ethiopia	41
b) European Union.....	42
c) St. Kitts and Nevis	43
ii. Countries with Procedures for Changing Territorial Borders.....	45
a) Austria.....	45
b) Singapore	46
c) Switzerland: The Jura Procedure	46
iii. Countries with a Quasi-Constitutional Right of Secession	48
a) Canada.....	48
C. Constitutional Provisions for Secession in the Present Day: Problems and Solutions	51
i. Problems	51
ii. Solutions: Secession De Jure	58
a) Ex-Ante Constitutional Amendment	58
b) Specify in the Constitution who can secede	60
c) Permit Secessionists to Determine the Territorial Area for a Secession Vote.....	60
iii. Solutions: Secession De Facto.....	64
a) Unilateral Declaration of Independence: the Effectivity Principle or Guerilla Warfare?	64
Conclusion	67

Introduction

In the early 1990s, the fall of communism in Eastern Europe resulted in the emergence of smaller independent ethically based political entities. In the years since, academics from various disciplines have renewed their interest in the topic of secession. A lively discussion in the academic mainstream on the morality and legality of secession has emerged among a group of predominantly liberal democratic political philosophers – a phenomenon that was simply non-existent prior to the fall of the Berlin Wall. The topic of secession has also spurred greater theoretical interest and discussion among libertarian political economists, historians, and philosophers largely affiliated with the Austrian school of economic thought.¹ The work done by these libertarians, which includes the contribution of important historical insights into the treatment of secession during the American War Between the States, both complements and serves as an important counterpoint to the ahistorical, abstract theories of secession constructed by mainstream liberal democrats, heavily influenced by what they perceive as the arrival of global democracy, also known as “the End of History.”²

Discussion of secession as a political concept requires a firm understanding of what secession means. Just what is secession anyway? It is instructive to note the manner in which scholars choose to define secession. Their definitions are affected to some extent by how they perceive the true nature of political authority. For instance, liberal democratic legal scholar Lea Brilmayer defines secession to include not only the

¹ For an excellent overview of libertarian views on secession, see the collection of essays in David Gordon, ed. (1998). *Secession, State, and Liberty*, New Brunswick, NJ: Transaction Publishers. Some of the scholars with contributions in this series include Austrian economists Murray Rothbard, Hans-Hermann Hoppe and Thomas J. DiLorenzo; philosophers Donald W. Livingston, Steven Yates, and Scott Boykin; and historians Clyde Wilson and Joseph Stromberg.

² For a full treatment of this thesis, see Francis Fukuyama, (1993). *The End of History and the Last Man*, New York: Avon Books.

“repudiation by a group of persons of their obligation to obey the state’s laws,” but also “the taking of a part of the territory claimed by an existing state.”³ The most prominent liberal democratic philosopher of secession, Allen Buchanan, makes a similar argument, pointing out that secession includes the “severance of a government’s control over territory.”⁴

Unlike contemporary liberal democrats, libertarian scholars treat secession more as an act of liberation from the hegemonic bonds of the state, which allows individuals a genuine means of external exit. In stark contrast to Brilmayer and Buchanan, Austrian School economist Jorg Guido Hulsmann defines secession as “a one-sided disruption of bonds with a larger organized whole to which the secessionists have been tied. Thus, secession from a state would mean that a person or a group of persons withdraws from the *state as a larger whole* to which they have been attached.”⁵ Hulsmann concludes that the ultimate purpose of secession is “to break the compulsory ties between the secessionists and a government which they no longer accept.”⁶

While arguments concerning the morality of the right of secession will be touched on here, they will be only insofar as they impact the constitutionality of secession. The real purpose of this paper is to examine the legal aspects of secession, especially as it relates to the domestic constitutional public law of sovereign states. Accordingly, the right of secession within international law will not be discussed here since a full and fair treatment of this issue would require a separate paper.

³ Allen Buchanan, “Secession – Section 2.1 The right to secede as a right to territory” In *Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta. (Stanford CA: The Metaphysics Research Lab, Center for the Study of Language and Information, Ventura Hall), website: <http://plato.stanford.edu/entries/secession>.

⁴ Allen Buchanan, “Theories of Secession,” *Philosophy and Public Affairs*, Vol. 26, no. 1., p. 35.

⁵ Jorg Guido Hulsmann, (forthcoming) “Secession and the Production of Defense.” In *The Myth of National Defense*, edited by Hans-Hermann Hoppe. Auburn AL: Ludwig von Mises Institute.

⁶ *Ibid.*

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

Section II consists of an investigation into the historical basis for a constitutional right of secession. The purpose of this investigation is to present a historical account of constitutional secession in light of the contemporary theoretical discussion of the subject. The historical investigation is followed by a survey and a categorization of secession rights or provisions that exist in present-day constitutions. The survey of existing constitutional secession provisions is conducted in order to help answer a number of key questions. For instance, what is the true nature of a constitutional right of secession? Is it substantive or procedural? Is the right explicit or implicit? Does a right of secession act to legitimize or to obstruct secession in practice? What does it mean to have a constitutional

right of secession? Is it an absolute right or a qualified right? Additionally, how does the existence or non-existence of a constitutional right of secession affect the behavior of secessionists?

Finally, with the list of existing constitutional rights of secession in hand, an analysis is made of the procedural problems in constitutional design of these rights, followed by a short list (not exhaustive, by any means) of proposed solutions.

I. The Constitutional Right of Secession in Political Theory

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

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

Donald Livingston perceptively grounds the debate over the gradual delegitimization of the right of secession in political theory and history as “the story of a conflict beginning in the seventeenth century between two ideal conceptions of legitimate political order.” This conflict involves the competition between the Hobbesian paradigm, as influenced by English philosopher Thomas Hobbes and his seminal political work, *Leviathan*, published in 1651; and the Althusian paradigm, as influenced by Dutch philosopher Johannes Althusius and his seminal political work, *Politica*, published in 1603.⁷

As Livingston describes it, the Hobbesian paradigm involves a contract among “egoistically motivated individuals” within a state of nature, who unanimously consent to

⁷ See Donald Livingston, “The Very Idea of Secession,” *Society*, July-August 1998, Volume 35, number 5, p. 38.

transfer their individual sovereign wills to that of a third party ruler. The sovereign ruler's power over individuals is considered to be "indivisible, infallible, and irresistible."⁸

Alternatively, the Althusian paradigm conceives of political order as federative in nature. A single state institution does not monopolize political authority. Rather, government is pluralized, with sovereign power shared by multiple social units, starting at the lowest level of authority, namely the family. Families consent to become members of guilds and colleges. Guilds and colleges consent to forming cities and provinces, which consent to uniting in a universal commonwealth. According to Thomas Hueglin, a prominent Althusius scholar:

At each level of this multilevel consociation of consociations, the smaller units are the constituent members of the larger one. At each level, governance is subjected to consent and social solidarity. In this sense, the term "consociation" may capture the essence of Althusius' intent better than that of association since the latter can be confused with the modern liberal pluralist notion of associationalism based on individualized and voluntary membership. One can easily join or withdraw from such a voluntary association, but one belongs to a consociational community in a much more committed sense (even though there is an ultimate right of resistance and secession as Althusius greatly emphasizes in particular reference to the Dutch Revolt and secession from Spain).⁹

Since politics in Althusius' conception are plural, the state is not the ultimate arbiter of what constitutes law and justice. Political authority is decentralized in such a way that lower levels of authority are able to retain their sovereign power. While consent to political authority in Hobbes' conception is unitary and irrevocable, consent for Althusius is "continuous and may be withdrawn at any time. Any of the social units having the means to do so may legally secede from the higher social unit to which it has delegated authority."¹⁰ The social units of authority in the Althusian paradigm are able to unite and secede at will because they enter into higher levels of social units by compact, as entities

⁸ Ibid.

⁹ Thomas O. Hueglin, "Politica. (book review)." *Publius*, Winter 1997, Vol. 27, No. 1, p. 150.

¹⁰ Livingston, "The Very Idea of Secession," p.

that do not lose their sovereign character at the time of political union. Whereas Hobbesian order requires the elimination or marginalization of competing independent social authorities such as the family, church, or guild, the pluralism of Althusian order makes the option of secession both viable and legitimate.

B. Liberal Democratic Theory of the Morality and Constitutionality of Secession (The Hobbesian Paradigm)

Given the current push in international relations toward the establishment of a Hobbesian-style global democratic order, countries with active secessionist movements will most likely be influenced by prevailing liberal democratic ideology regarding the issue of inserting a right of secession in their constitutions. These governments will look to the current academic literature on constitutionalizing secession and will want to know what the leading liberal democratic political philosophers have to say on the matter.¹¹

However, before delving directly into the liberal democratic arguments on constitutionalizing secession, it is important to have a solid grasp of the underlying premises behind these arguments. Since the act of seceding from an existing state involves the withdrawal of both people and territory, a keen awareness of the liberal democratic theory of the state and the role of its citizens is crucial to comprehending liberal democratic arguments both for and against a constitutional right of secession.

As a general matter, liberal democrats view the existence of a state, and in particular a constitutional democratic state, as the necessary means for establishing a society that functions based on certain principles of justice. This view of the state is really

¹¹ For instance, the government of Canada consulted with noted Rawlsian political philosopher and secession scholar Allen Buchanan to write a paper on the Supreme Court of Canada's handling of the constitutionality of secession and its relation to liberal democratic political values. See Allen Buchanan, "The Quebec Secession Issue: Democracy, the Rule of Law, and Minority Rights," paper presented for Department of Intergovernmental Affairs, Office of the Privy Council, Government of Canada, 2000.

the modern incarnation of the Hobbesian paradigm previously discussed. The state results from a social contract among the people themselves to be ruled by a sovereign monarch or democratic legislative body. Membership in such a state is permanent and irrevocable. As such, the likelihood of incorporating a legal right of secession into the constitutional framework of the state is at best highly problematic.¹²

The most common contemporary view of liberal democratic justice involves the idea of distributive justice as propounded by the late philosopher John Rawls.¹³ A constitutional democratic state is a just state because it is the only type of political organization that can secure and protect basic human and political rights equally for all citizens. In addition, a constitutional democracy possesses the institutional structure required to distribute the economic products of society in such a way that the only allowable inequalities are those that result in providing a minimal standard of living to the least well-off members of society.

The liberal democratic understanding of concepts like justice and constitutional democracy provides further clues as to why liberal democrats treat the issue of secession the way they do. Allen Buchanan refers to the ideal of the “perfectly just state” as a

¹² Explains Daniel McCarthy, “Who Wants to Die for Liberal Democracy?” www.lewrockwell.com October 31, 2001:

The logic of liberal democracy is that there must be a supreme arbiter, the State, to uphold a universal set of rights. It follows from that that the State must be universal as well. If multiple arbiters are permitted in the world, if there are other states (or non-states) with different procedures and values, then the authority of the liberal democratic State is in question. For the same reason, liberal democracy cannot permit secession.

¹³ See John Rawls. (1999). *A Theory of Justice: Revised Edition*, Harvard University Press. Rawls’ general idea is that individuals participate in a hypothetical contract to form the “basic structure of society.” From an “original position” shorn of any knowledge of each individual’s social, cultural or economic background, each individual, as if they act behind “a veil of ignorance,” would have every incentive to choose principles of justice that: 1) assure the equal enjoyment of basic fundamental social and political rights for all members of society; and 2) minimize naturally -resulting social and economic inequalities by a) assuring every person equality of opportunity to all available positions in society; and b) distributing social and economic benefits among members of society such that the resulting inequalities work “to the greatest benefit of the least advantaged members of society,” a concept known as the “difference principle.”

measuring stick for whether secession is justified.¹⁴ Buchanan uses the perfectly just standard of constitutional democracy in order to limit the moral utility of a secession right.¹⁵ After all, according to liberal democratic justice, any state that entrenches fundamental civil and political rights in their constitutions is a just state. Therefore, why would anyone want to secede from such a state? This line of thinking leaves only very few occasions where it would make any moral sense for a group of citizens to secede: either the state is in violation of “relatively uncontroversial individual moral rights, including above all human rights”¹⁶ or the state engages “in uncontroversially discriminatory policies toward minorities.”¹⁷ Additionally, these moral limits on secession act to prevent the proliferation of theoretically ceaseless secessions or

¹⁴ See Allen Buchanan, “Theories of Secession,” *Philosophy and Public Affairs*, Vol. 26, no. 1., pp. 30-61.

¹⁵ The model for discussing the liberal democratic view of secession in this paper will focus more on Buchanan’s Remedial Rights Only Theory, which he defines as giving a group of citizens “a general right to secede if and only if it has suffered certain injustices, for which secession is the appropriate remedy of last resort.” (Buchanan, p. 34-35) However, it should also be mentioned that there is another liberal democratic category of secession, what Buchanan calls the Primary Rights Theory of secession. The Primary Rights Theory is a more permissive general theory of secession, where “a group can have a general right to secede even if it suffers no injustices, and hence it may have a general right to secede from a perfectly just state.” (p. 40) While the Primary Rights Theory is a more liberal general theory of secession than Buchanan’s, each version of the Primary Rights Theory places a limit of how far secession can go. For instance, Harry Beran argues that if a seceding group cannot create a viable state, then secession is not permissible. Beran also allows for “recursive” secession, the idea that. (Beran, *A Liberal Theory of Secession*, p. 29) Another Primary Rights Theorist, Christopher Wellman, argues for a hybrid model of secession, which limits secession to those groups of individuals who can form a state. However, unlike Beran, Wellman opposes the possibility of recursive secessions because the proliferation of thousands of sovereign entities would make the state’s job of enforcing justice too difficult and chaotic. (Wellman, “A Defense of Secession and Political Self-Determination,” *Philosophy and Public Affairs*, p.156.) For a view, contra Wellman, of recursive or unlimited secessions as a positive phenomenon, see Hans-Hermann Hoppe, *Democracy: The God That Failed*, p. 118, pp. 237-238.

¹⁶ Buchanan, “Theories of Secession,” p. 40.

¹⁷ *Ibid.*, p. 40. Buchanan makes a point of stressing that his general theory of secession is not as restrictive as one might think because he also allows for a “special right to secede if (1) the state grants a right to secede, or if (2) the constitution of the state includes a right to secede...” (p. 36) For the purposes of this paper, we are most interested in what the right of constitutional secession mentioned under (2) of Buchanan’s scheme should consist of and why. If, for instance, the constitutional right of secession under (2) were plagued with procedural hurdles or limitations, then this would not necessarily make Buchanan’s overall secession theory less restrictive.

“recursive secessions,”¹⁸ which would be the logical consequence of a contrary theory of unlimited and unqualified secession, extending down to the level of the individual.

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

...individuals’ rights, the stability of individuals’ expectations, and ultimately their physical security, depend upon the effective enforcement of a legal order. Effective enforcement requires effective *jurisdiction*, and this in turn requires a clearly bounded territory that is recognized to be the domain of an identified political authority. Even if political authority strictly speaking is exercised only over person, not land, the effective exercise of political authority over persons depends, ultimately upon the establishment and maintenance of jurisdiction in the territorial sense. This fact rests upon an obvious but deep truth about human beings: They have bodies that occupy space, and the materials for living upon which they depend do so as well. Furthermore, if an effective legal order is to be possible, both the boundaries that define the jurisdiction and the identified political authority whose jurisdiction it is must persist over time.¹⁹

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

For Buchanan then, the primary utility of maintaining the territorial integrity of perfectly just constitutional democracies is to ensure the “effective exercise of political

¹⁸ For more on recursive secessions, see Beran, *A Liberal Theory of Secession*, pp. 29-30.

¹⁹ *Ibid.*, p. 47.

authority over those within it,²⁰ because “all citizens have a morally legitimate interest in the integrity of political participation.”²¹ Since Buchanan considers territorial integrity as vital to the enforcement of constitutional democracy, the taking of territory by secessionists becomes a second element to be satisfied in order for secession to occur, in addition to the right of individuals to consent to the political jurisdiction of their choosing.²²

To summarize, it seems to follow from the liberal democratic view of justice that the major constitutional democracies in North America and Western Europe would be considered real-world examples of “perfectly just” states – states where secession would not be justified or even thought desirable. Yet, if these states are so perfectly or reasonably just, what explains the emergence of secessionist movements in these very states? For instance, countries like Canada, Spain, Italy, the United Kingdom, Belgium, France, Germany, and even the world’s model constitutional democracy, the United States of America, all have secessionist movements.²³ Granted, most of these secessionist movements are politically weak, yet they exist nevertheless. Thus, a major problem faced by liberal democrats in the course of downplaying the secession option is trying to

²⁰ Buchanan, “Theories of Secession,” p. 49.

²¹ *Ibid.*, p. 49.

²² See Allen Buchanan. (2003). “The Making and Unmaking of Boundaries: What Liberalism Has to Say,” in *States, Nations, and Borders: The Ethics of Making Boundaries*, edited by Allen Buchanan and Margaret Moore, Cambridge: Cambridge University Press, pp. 231-261, and Lea Brilmayer. (1991). “Secession and Self-Determination: A Territorial Interpretation,” *Yale Journal of International Law*, Vol. 16, pp. 177-202. For a general critique of Buchanan and Brilmayer’s view, see Scott Boykin, (1998). “The Ethics of Secession.” In *Secession, State, and Liberty*, edited by David Gordon. New Brunswick, NJ: Transaction Publishers, p. 76, and Daniel Philpott, “In Defense of Self-Determination,” *Ethics*, Vol. 105, January 1995: p.370. Boykin argues that since only persons have the ability to determine the legitimacy of the state’s jurisdiction over territory, once a group of persons has rejected such jurisdiction through an act of secession, any claim by that state over territory withers away. Philpott makes the additional argument that once a group of persons demonstrate a grievance with the existing state and a right of secession is established, it makes no sense to require the group to make an additional claim to the territory in question before the secession of both persons and territory can be fully achieved.

²³ For more information on existing secessionist movements in the world, see www.secession.net.

explain why secessionist movements emerge within perfectly just constitutional democracies.

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

We start with the noted constitutional law scholar Cass Sunstein. Sunstein argues against granting any constitutional right of secession. According to Sunstein, a right of secession would promote strategic behavior by political subunits that are supposed to obediently carry out their democratic burden of providing the state with the “benefits” necessary to carry out distributive justice.²⁴ For instance, economically rich regions like Padania in Northern Italy or the Canadian province of Alberta would be trying to avoid the hard work it takes to create a healthy democracy by not supplying what the democratic state needs to justify its existence.

For Sunstein, the purpose of constitutional government is to promote democratic participation based on compromise, cooperation and deliberation.²⁵ Specifically, Sunstein believes that constitutionalizing secession would threaten what he calls “constitutional precommitment strategies”—a term that refers to the set of rights entrenched within a

²⁴ See Cass Sunstein, *Designing Democracy: What Constitutions Do*. New York: Oxford University Press, pp. 102-104.

²⁵ *Ibid.*, p. 96.

constitution designed to insulate minority groups from majoritarian politics.²⁶ The idea here is to use the constitution in ways that both protect and properly constrain the excesses of majoritarian democratic politics. For Sunstein, the mere introduction of a constitutional right of secession would clearly mean a disabling or disruption of the democratic process. Sunstein worries that “if the right to secede exists, each subunit will be vulnerable to threats of secession by the others.”²⁷ The result of institutionalizing such a right would be political instability and chaos because the democratic polity would be so bogged down with the prevailing secession issue, that day-to-day democratic policy making would be needlessly obstructed.

Given the disparaging effects on democratic deliberation as a consequence of constitutionalizing a right of secession, Sunstein naturally comes to the conclusion that the most effective way of dealing with secessionist concerns is by relying on the internal mechanisms that constitutional democracy can provide, namely “federalism, checks and balances, entrenchment of civil rights and civil liberties, and judicial review.”²⁸

Unlike their fellow liberal democrat Sunstein, Rawlsian philosophers Wayne Norman and Daniel Weinstock argue in favor of constitutionalizing the right of secession. They agree with Sunstein that secession from democratic states should be

²⁶ Ibid., see pp. 96-101. The constitutional precommitment strategies mentioned by Sunstein include: provisions like the right to free speech and the right to vote which are designed to ensure that majority rule does not become excessive; a healthy federalism that allows private liberty to flourish; structural provisions that allow for a healthy political “division of labor,” presumably through the separation of powers between the three branches of government; provisions that take morally sensitive issues away from the political process (i.e. abortion); and provisions that avoid

²⁷ Obviously, for a liberal democrat like Sunstein, the occurrence of multiple secession movements among provinces of a larger democratic state resulting from a constitution secession right would spell democratic disaster. However, for the libertarian interested in a world composed of a multitude of sovereign political entities of all sizes and forms (see Hoppe, *Democracy: The God That Failed*, esp. the chapter on “Centralization and Secession” pp. 107-119), such a state of affairs could conceivably lead to the dissolution of the central state’s authority and the emergence of a number of sovereign entities covering a territory where only one sovereign central state previously stood.

²⁸ Ibid., p. 112.

avoided if at all possible because they believe that most Western-style democracies are already “reasonably just,”²⁹ that is, most democratic states do a reasonably good job of Rawlsian distributive justice already and therefore, there is no moral reason to justify the secession of any groups of individuals from the modern democratic state.

Norman admits that Sunstein “is absolutely right about the pernicious effects of secessionist *politics* on democratic deliberation and political stability.”³⁰ He goes on to say, “the issue here is not whether secessionist politics is bad for democracy and justice, but rather, what can be done through the constitutional engineering of a multinational state to take away the incentives for minority leaders to engage in secessionist politics.”³¹ Here, Norman gives us the real reason why liberal democrats would ever consider inserting a right of secession into a democratic constitution in the first place. It is not to grant a group of citizens, who no longer consent to the authority of their government, a positive means of exit for the purpose of establishing a new political jurisdiction. Rather, a constitutional secession right is meant to act as a procedural means of forcibly keeping seceding groups within the prevailing territory of the democratic state.

Working with the assumption that secessionists are better off staying within the existing state, Norman makes a number of arguments in favor of constitutionally entrenching a secession right. First, Norman favors designing a secession procedure in such a way that it serves as a “choking mechanism” for secession. The most common choking mechanism would be the establishment of a high threshold supermajority

²⁹ Both Norman and Weinstock use the term “reasonably just” to describe a well-functioning Western-style liberal democracy in much the same way as Allen Buchanan uses the term “perfectly just” to describe the same thing, as demonstrated above.

³⁰ Wayne Norman, “Domesticating Secession,” p. 19.

³¹ *Ibid.*, p. 19-20.

requirement, most likely a two-thirds majority vote in a secession referendum.³² Making the “yes” vote requirement in a secession referendum higher than a simple majority would serve to deter secessionist movements with sub-50% popular support from proceeding further along the secessionist path. It would also ensure that only those secessions that are truly justified, (such as those that involve the violation of human rights or discrimination against a cultural or ethnic group and supported by the majority of the seceding population), are allowed to prevail.³³

Second, Norman argues that constitutionalizing a right of secession serves to ground secession in the rule of law, thereby reducing the chance of violence and disruption to the democratic process. Otherwise, if there were no constitutional rules in place governing secession, “a victory for secessionists in a referendum amounts to little more than the strengthening of the secessionists’ hand in a game of power politics.”³⁴ In other words, we do not want secessionists to get an advantage over the central government in claiming the legitimacy to secede in a situation where there are no legal rules in place to govern secession. Thus, it is better to have constitutional rules in place for secession rather than no rules at all.

³² Wayne Norman. (2001). “Secession and (Constitutional) Democracy.” In *Democracy and National Pluralism*, edited by F. Requejo, London: Routledge Press., p 4. Other possible types of choking mechanisms suggested by Norman to stave off secessionist demands include the enforcement of minority rights within a democratic state, and the brutal suppression of minority or ethnic secessionist leaders in non-democratic states.

³³ Norman, “Do mestivating Secession,” p. 6-7. Here, Norman has in mind “vanity secessions,” which he defines as “secessions by groups lacking just cause.” As an example of this, one could think of a group of relatively well-off citizens within a democratic state who no longer consent to being economically exploited and vote to secede to form their own government. This type of secession is considered vain by liberal democrats because these rich citizens are selfishly thinking only of themselves and not of others in the existing state who depend on their transfer of economic benefits.

³⁴ *Ibid.*, p. 6.

Another argument Norman makes is that the existence of a secession clause would be “evidence that the state is united by consent and not force.”³⁵ Here, Norman is essentially acknowledging the weak foundation of consent upon which the existence of the democratic state currently rests.³⁶ He admits “even in the democratic world, almost none of the existing national minorities ever gave their initial, democratic assent to their membership in the larger state; and few have had a formal opportunity to assent since.”³⁷ Instead of concluding that a constitutional right of secession should be a right used by non-consenting minority groups to correct the past injustice of non-consent, Norman instead justifies the legal right to secede as a tool to strengthen the seceding group’s consent to the existing democratic state. The logic here seems to be, “we, the benevolent central government, have given you, the secessionists, the legal right to secede; now that you have this right, you live in a more consensual democratic state than you did before with greater rights protection than you had before; therefore, you have less legitimate reason to leave the democratic state.”

Operating under the same Rawlsian liberal democratic idea of distributive justice and guarantees of minority rights as Norman, Daniel Weinstock also favors a qualified, procedural right of secession, involving a number of hurdles that groups would have to meet in order to successfully secede.

Weinstock’s reasons for a legal right to secede are both pragmatic and moral.³⁸ His pragmatic approach treats secession in the same way one might treat prostitution or

³⁵ Norman, “Secession and (Constitutional) Democracy,” p. 5-6.

³⁶ For a more detailed account of the non-consensual foundation for the modern democratic state, see Lysander Spooner, *No Treason: The Constitution of No Authority*. 1870. Reprint, Larkspur, Colo.: Pine Tree Press, 1966.

³⁷ Norman, “Domesticating Secession,” p. 25.

³⁸ Daniel Weinstock, “Toward a Proceduralist Theory of Secession.” *Canadian Journal of Law and Jurisprudence* 13 (July 2000) (cite 13 Can. J.L. & Juris. 251), pp. 261-262.

drug use—as a morally questionable vice that people are going to engage in regardless of whether the act is legalized or not. Therefore, it is better to legalize secession, in the same way it would be better to legalize prostitution or marijuana use because the government can regulate the behavior. Legalizing secession would present secessionists with “a cold and lucid cost/benefit analysis”³⁹ of seceding versus remaining in the existing state. The idea here is to give secessionists the hard truth about what sort of procedural hurdles they would have to clear in order to successfully secede. Without any constitutional provision for secession, seceding groups will have the incentive to leave because they feel there is no reason for them to stay.

To make his moral argument for constitutional secession, Weinstock relies on a modified version of the Rawlsian original position: participants to a constitutional contract know they represent a national group within a multination state, but they don’t know if they are the majority or minority national group. In other words, the participants are “placed behind a national veil of ignorance.”⁴⁰ Not knowing on which side they will fall, constitutional participants will want to avoid two extremes: on the one hand, they would not want to make secession too easy because they would be foregoing advantages of democratic cooperation (i.e. redistribution of wealth by the state); on the other hand, they would not want secession made too hard because if they are actually oppressed or discriminated against, they would not be able to legitimately leave the remaining state.

³⁹ Ibid., p. 262.

⁴⁰ Ibid.

Therefore, a balanced right of constitutional secession would be desired, which would necessarily entail the imposition of procedural hurdles.⁴¹

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

C. Austro-Libertarian Theory of the Morality and Constitutionality of Secession (The Althusian Paradigm)

Unlike contemporary liberal democrats, modern libertarian thinkers (especially those affiliated with the Austrian school of economics)⁴² are for the most part in favor of secession as an absolute right of individuals, not as a group right littered with procedural barriers and severely constrained by the almost universal legitimacy of constitutional democracy. Indeed, Donald Livingston makes the point that, “the prohibition against secession is internal to all forms of contract theory except anarcho-libertarianism.”⁴³ The

⁴¹ Ibid. Some of the procedural hurdles Weinstock has in mind include mandatory waiting periods between referendums, and mandatory waiting periods between referendum calls and the actual vote, in order to prevent impulsive, public opinion driven secessions.

⁴² Although the Austrian school of economics, as a tradition of economic thought, traces its roots back to the late Spanish Scholastics of the 16th and 17th centuries, it has evolved in the 20th and 21st centuries to include two major factions: the Ludwig von Mises wing (the Misesians) and the Friedrich A. von Hayek wing (the Hayekians). However, for the purposes of this paper, I place more focus on the secession arguments of Misesian thinkers, most notably Mises himself, Murray N. Rothbard, and more recently, Hans-Hermann Hoppe.

⁴³ Livingston, “The Very Idea of Secession,” p.

reason for this is that Austro-libertarians recognize the legitimate existence of independent social authorities as a counterweight to the coercive and monopolistic power of the state. This makes the Austro-libertarian political order much more analogous to the pluralized federative order embodied by the Althusian paradigm discussed previously.

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

We begin by looking at the views of the pre-eminent Austrian school economist of the 20th century, Ludwig von Mises. Like most modern liberal democrats, Mises accepted the existence and the legitimacy of the constitutional democratic state. However, Mises believed that the state was necessary only for the protection of private property rights as the most important building block for the establishment of a free society based on social cooperation through the free market.⁴⁴ It was Mises' belief that democracy, grounded and limited by constitutional rules, was the best possible system of political order because it made possible "the adaptation of the government to the wishes of the governed without violent struggles."⁴⁵ For Mises, the ability of citizens to change their government by consent included the possibility of a full right for a portion of a state's population to secede:

⁴⁴ See Ludwig von Mises. (1985). *Omnipotent Government: The Rise of the Total State and Total War*, Spring Mills, Penn.: Libertarian Press, pp. 46-47:

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

⁴⁵ Ludwig von Mises. (1985). *Liberalism*, third edition. Irvington-on-Hudson, N.Y., Foundation for Economic Education, and San Francisco: Cobden Press, p. 42.

If a democratic republic finds that its existing boundaries...no longer correspond to the political wishes of the people, they must be peacefully changed to conform to the results of a plebiscite expressing the people's will. It must always be possible to shift the boundaries of the state if the will of the inhabitants of an area to attach themselves to a state other than the one to which they presently belong has made itself clear known.⁴⁶

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

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

In distinct contrast, Mises' view of the right of self-determination always and at all times includes "the right of the inhabitants of every territory to decide on the state to which they wish to belong."⁴⁷ Mises' view that "a country can enjoy domestic peace only when a democratic constitution provides the guarantee that the adjustment of the

⁴⁶ Ibid., p. 108.

⁴⁷ Ludwig von Mises, *Liberalism*, third edition. Irvington-on-Hudson, N.Y., Foundation for Economic Education, and San Francisco: Cobden Press, 1985), p. 109.

government to the will of the citizens can take place without friction,”⁴⁸ seems to indicate that Mises advocated at least an implied constitutional right of individuals to secede. For Mises, unlike for Buchanan, the preservation of a fixed territorial area is not the most important factor in assuring a just democratic state. Rather, it is the consent of the governed, the will of the people themselves, that matters most under both constitutional and international law, not whether a state has acted unjustly, as Buchanan believes.

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

Whenever the inhabitants of a particular territory, whether it be a single village, a whole district, or a series of adjacent districts, make it known, by a freely conducted plebiscite, that they no longer wish to remain united to the state to which they belong at the time, but wish either to form an independent state or to attach themselves to some other state, their wishes are to be respected and complied with.⁴⁹

What is most telling about Mises’ view of secession is that the procedural rule required to change the territorial status quo is nothing more than a majority referendum vote, thereby making such a vote binding. This view stands in sharp contrast to the liberal democratic view in favor of constitutional secession, which treats secession referendum results as merely consultative, making a vote in favor of secession a prerequisite to subsequent constitutional negotiations – negotiations that may or may not result in a final outcome of actual secession.⁵⁰

We now move from the views of Mises to those of fellow libertarians and Austrian economists Murray Rothbard and Hans-Hermann Hoppe. Contrary to contemporary liberal democrats and even Mises himself, Rothbard and Hoppe premise

⁴⁸ Ibid., p. 108.

⁴⁹ Ibid., pp. 109-110.

⁵⁰ See Patrick J. Monahan and Michael J. Bryant with Nancy C. Cote. “Coming to Terms with Plan B: Ten Principles Governing Secession.” *C.D. Howe Institute Commentary* 83 (June 1996), pp. 12-13; pp. 15-16.

their views in favor of unlimited and unqualified secession on a fundamentally different theory of the origin of political order.

Most liberal democrats, as predominantly contractarian theorists, presuppose that the state emerges from a hypothetical contract. The contract comes first; and political authority, in the form of the coercive, monopolistic state as the guarantor of a just society, follows.

However, Austro-libertarians like Rothbard and Hoppe argue precisely the opposite point; namely that before an individual is in any position to contract for the provision of security and justice, the existence of the individual's right to self-ownership and to private property is presupposed.⁵¹ In essence, the state, as commonly believed, does not come prior to the institutions of private property and justice as a necessary condition for civil society and political order; rather, as a matter of political ethics, individuals have pre-existing property rights, which form the basis for their ability to contract privately with one another as a necessary condition for political order.⁵²

We see from the work of Murray Rothbard that he does not treat the existence of a constitutional democratic state over a fixed territory as a necessary condition for a just society. Instead of taking for granted that a state is necessary to avoid the undesirable consequence of the state of nature degenerating into a war of all against all, Rothbard seeks to dissect the nature of the state and question whether it is really necessary at all.

⁵¹ See Rothbard, *The Ethics of Liberty*, p. xxxiv.

⁵² Hoppe elaborates further on this point in his introduction to the reissued version of Murray Rothbard's *The Ethics of Liberty*:

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

Rothbard defines the state as:

“that organization which possesses either or both (in actual fact, almost always both) of the following characteristics: (a) it acquires its revenue by physical coercion (taxation); and (b) it achieves a compulsory monopoly of force and of ultimate decision-making power over a given territorial area.⁵³

Whereas liberal democrats simply assume the need for the state to have a monopoly over the use of coercive force as the only way to solve the problem of anarchy among individuals in the state of nature, Rothbard shows that the state’s monopoly over justice is actually the very source of the violation of individual liberties and the means used by the state to continuously expand its power, thus rendering impotent any existing constitutional check and balances on such power.

Hans-Hermann Hoppe takes Rothbard’s insights on the nature of the state and provides a detailed and perceptive reconstruction of the liberal democratic conception of the state. Hoppe does this by dispelling what he calls the “myth of collective security” or “the Hobbesian myth.”⁵⁴ Hoppe starts by rehashing the all too familiar Hobbesian paradigm:

In the state of nature, men would constantly be at each others’ throats...Each individual, left to his own devices and provisions, would spend “too little” on his own defense, resulting in permanent interpersonal warfare. The solution to his presumably intolerable situation, according to Hobbes and his followers, is the establishment of a state. In order to institute peaceful cooperation among themselves, two individuals, A and B, require a third independent party, S, as ultimate judge and peacemaker. However, this third party, S, is not just another individual, and the good provided by S, that of security, is not just another “private” good. Rather, S is a *sovereign*, and has as such two unique powers. On the one hand, S can insist that his *subjects*, A and B, not seek protection from anyone but him; that is, S is a compulsory territorial monopolist of protection. On the other hand, S can determine unilaterally how much A and B must spend on their own security; that is, S has the power to impose taxes in order to provide security “collectively.”⁵⁵

Here, Hoppe recites the Hobbesian assumption that a third party, S (the State), must be instituted as a sovereign power with a compulsory territorial monopoly over the provision

⁵³ Rothbard, *The Ethics of Liberty*, pp. 172-173.

⁵⁴ Hans-Hermann Hoppe, *Democracy: The God That Failed*, esp. chap.12 On Government and the Private Production of Defense, pp.239-247.

⁵⁵ *Ibid.*, pp. 239-240.

of justice. According to political and economic theorists past and present,⁵⁶ the monopolistic State arises as the result of a contract between individuals themselves or between individuals and the sovereign state. However, Hoppe cannot help but ask the following fundamental question:

...who is his right mind would agree to a contract that allowed one's protector to determine unilaterally – and irrevocably – the sum that the protected must pay for his protection? The *fact* is no one ever has!⁵⁷

Hoppe proceeds to emphasize that the monopolistic nature of the state results in an important economic consequence completely missed or ignored by liberal democratic thinkers. Since the state is the only institution to which citizens can turn to seek justice, the price of justice will tend to increase and the quality of justice provided will tend to fall. In addition, whatever justice is provided to members of society “will be perverted in favor of the government, constitutions and supreme courts notwithstanding.”⁵⁸ It is on this point that the liberal democratic argument in favor of imposing constitutions as a means to check the expansive tendency of monopolistic state power totally crumbles. As Hoppe explains:

Constitutions and supreme courts are government constitutions and agencies, and whatever limitations on government action they might contain or find is invariably decided by agents of the very institution under consideration. Predictably, the definition of property and protection will continually be expanded to the government's advantage.⁵⁹

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

⁵⁶ Social contract theorists of the state in the modern sense include figures like Hobbes, Locke, and Rousseau. More contemporary exponents of the contractarian theory of the state in its various forms includes the already mentioned John Rawls and Allen Buchanan, as well as Nobel Laureate economist James Buchanan, who originated the idea of the emergence of the state from a “constitutional contract.” For more on Buchanan's flawed view of constitutional contract, see Hoppe, *Democracy: The God That Failed*, pp. 104, 228-229.

⁵⁷ *Ibid.*, p. 240.

⁵⁸ *Ibid.*, p. 230.

⁵⁹ *Ibid.* p. 231.

No constitution can interpret or enforce itself: it must be interpreted by *men*. And if the ultimate power to interpret a constitution is given to the government's own Supreme Court, then the inevitable tendency is for the Court to continue to place its imprimatur on ever-broader powers for its own government. Furthermore, the highly touted "checks and balances" and "separations of powers" in the American government are flimsy indeed, since in the final analysis all of these divisions are part of the same government and are governed by the same set of rulers.⁶⁰

With these insights into the nature of constitutional government, Rothbard and Hoppe make a convincing demonstration of why the liberal democratic preference for internal checks and balances on state action is doomed to fail. Although liberal democratic scholars like Allen Buchanan and Cass Sunstein fear that guaranteeing a constitutional right of secession would work to undermine democracy, internal checks and balances are already ineffective in the face of the coercive and monopolistic state. As mentioned previously, Rothbard and Hoppe's analysis of constitutional checks and balances confirm this view. Since internal checks and balances fail to quell centralized democratic power, an alternative check is necessary. Thus, the only other check within the constitutional democratic framework that might be effective in limiting state power is one that is not internal in nature, but *external* – namely, the right of individuals to secede from the constitutional democratic state.

Now we arrive at Rothbard and Hoppe's views on secession. Both of them argue in favor of an unlimited moral right of secession. We find that Rothbard was quite clear on this matter:

Would a laissez-fairist recognize the right of a region of a country to *secede* from that country? Is it legitimate for West Ruritania to secede from Ruritania? If not, why not? And if so, then how can there be a logical stopping point to the secession? May not a small district secede, and then a city, then a borough of that city, and then a block, and then finally a particular individual? Once admit *any* right of secession whatever, and there is no logical stopping-point short of the right of *individual* secession, which logically entails anarchism, since then individuals may secede and patronize their own defense agencies, and the state has crumbled.⁶¹

⁶⁰ Murray Rothbard, *For A New Liberty*, p.

⁶¹ Murray Rothbard, *The Ethics of Liberty*. (New York: New York University Press, 1998), p. 182.

While Rothbard argues that a full moral right of secession would logically lead to anarchy and the withering away of the state, he is less explicit on whether secession should be treated as a constitutional right. It is presumed that Rothbard would have no objection to constitutionalizing the unlimited and unqualified right of any individual or group of individuals to secede. After assessing both Mises' and Rothbard's views on secession, Robert W. McGee concludes:

Who should be able to secede and how should secession be accomplished?...First, secession should be built into the constitution, and second, secession should be unilateral. The group wishing to secede should not need the permission of the political entity it wants to secede from...Third, the method by which secession can be achieved should be clearly spelled out.⁶²

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

Although the Austro-libertarian position in favor of constitutional secession seems obvious, there is some question about whether it is the most effective strategy by which to carry out secession in practice. For instance, according to McGee (and arguably Mises and Rothbard), secession should be constitutional, in addition to being unilateral. And yet, unlike Mises and Rothbard, Hans-Hermann Hoppe seems to favor an alternative strategy of putting secession into practice. Instead of arguing for constitutionalizing the right of secession as a way to make secession happen, Hoppe favors the simultaneous proliferation of small-scale secessionist movements across the entire territory of the democratic state, irrespective of whether such acts are considered constitutional or unconstitutional. In this way, the secession of smaller, sub-provincial groups of people

⁶² Robert W. McGee, "Secession Reconsidered." *Journal of Libertarian Studies* 11, no. 1 (Fall 1994), p. 23.

from the territory of a sovereign state is less threatening to the central government than the threat of secession by a larger province or even a group of provinces or states as happened during the American War Between the States in 1861.⁶³

II. The Constitutional Right of Secession in History and the Present Day

A. Historical Overview of the Constitutional Right of Secession

For most of human history and continuing into the present day, the only effective means of secession has been war. Though there are numerous historical examples of secessions, some successful and some failed, one starting point of interest is the secession of the Dutch states from the Spanish Empire in the 16th century. According to legal scholar Alexander Martinenko, the exercise by the Dutch of the right of secession against the Spanish led “to the creation of the first written document arguing the rightfulness of secession – the “Act on Secession,” which was adopted on July 22, 1581.”⁶⁴ Martinenko argues that the Act on Secession established for the first time a right of secession as a potential “inherent right of the Dutch people” that “had to be substantiated by a number of proofs” before it could be proclaimed “as a universal and unconditional right of all peoples.”⁶⁵ Certainly, if we take Donald Livingston’s thesis on secession to be true, the Dutch experience with secession appears to be a historical victory of the Althusian conception of plural and federative political order over the unitary and irrevocable Hobbesian political order.

⁶³ Hans-Hermann Hoppe, *Democracy: The God That Failed*, p. 291.

⁶⁴ Alexander Martinenko, “The Right of Secession as a Human Right,” *Annual Survey of International and Comparative Law*, Fall 1996, p. 20. (cite: 3 Ann. Surv. Int’l & Comp. L. 19)

⁶⁵ *Ibid.*

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

Although the American War of Secession from the British Empire counts as a seminal event in the emergence of a legally recognized right of peoples’ to secede and form their own sovereign state, John Remington Graham argues that the real precedent for the American Revolution was the Glorious Revolution of 1689.⁶⁷

According to Graham, the Glorious Revolution allowed for “a revolutionary but lawful and peaceful transformation of government in extraordinary circumstances, by the dignified means of a convention of the people and estates of the kingdom, assembled in as orderly a way as possible by a distinguished prince or the natural leaders of the realm for the purpose of reassuming the attributes of sovereign power, repairing the constitution so as to make it operable once again, and resettling the government of the land.”⁶⁸

Graham describes how James II, faced with growing opposition, including a competitor to his throne in William of Orange, summoned a “Magnum Concilium” of the House of Lords, which established a precedent for a convention to “promote moderation, justice, and reconciliation” during times of possible revolution.⁶⁹

Graham describes the secessions of the thirteen British colonies in America, most notably the election of the Virginia Convention of 1776 as the “conscious reenactment of

⁶⁶ Ibid.

⁶⁷ John Remington Graham. (2002). *A Constitutional History of Secession*. Gretna, LA: Pelican Publishing Company, Inc.

⁶⁸ Ibid., p. 58-59.

⁶⁹ Ibid., p. 49.

the call by William of Orange for the Convention Parliament of 1689.”⁷⁰ Like the convention of peers and estates in 1689 that revolutionized the fundamental law of England, the Virginia Convention established “the republican form of government” and the “fundamental law of Virginia” by adopting the Virginia Bill of Rights and Constitution.⁷¹ Soon, all of the colonies declared their independence from England as “free and independent states” and came together with the signing of the Articles of Confederation as “free and independent states.”

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

Graham goes on to demonstrate that though this union of sovereign States was expressly perpetual, this “did not prevent breaking up the Confederation by secession of

⁷⁰ Ibid., p. 91.

⁷¹ Ibid.

the several States so they might be free to form a new Union.” In addition, he shows that the Confederation never required a constitutional amendment nor did it require the unanimous consent of all the States for its dissolution.⁷² The evidence here suggests that the American Confederation, at least at the time of the founding of the United States, was treated much more like an Althusian order based on pluralist federalism, rather than a Hobbesian order that treated political union as unitary and irrevocable.

Finally, Graham makes the point that while the States seceded from the Confederation by means of legislative vote, it was thought at the time of the Philadelphia Convention that “the People in each State,” and not the legislatures, should be given the power to either form or secede from a union of states. It stands to reason from Graham’s analysis that, in spite of the lack of a clearly expressed constitutional right of secession, a precedent for lawful secession was created by the very act of the independent States breaking away from Confederation to form a more “perfect Union.”

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

⁷² Ibid., p. 100.

As part of its resistance to the Northern tariff, South Carolina began its constitutional objection with interposition, legitimized by the passing of the South Carolina Resolution of 1828 (similar to the Virginia Resolution of 1798). Graham defines interposition as “a political suggestion that the constitutional mechanisms of the Union had failed to work properly.” The purpose of interposition was as a political warning shot designed to communicate the readiness of the people of the Southern states to form a convention to exercise constitutional change.

When the effects of the tariff worsened in the South, an ordinance nullifying the tariff act was passed by a convention of South Carolinians (not by the South Carolina legislature) in November of 1832—a constitutional move perfectly in accord with Jefferson’s Kentucky Resolutions of 1798 and 1799. Faced with the nullification ordinance, President Andrew Jackson was pressured to sign two moderate tariff bills designed to repeal the oft-quoted “tariff of abominations.” Once the new bills were signed, the nullification ordinance was repealed and the tariff crisis was resolved, thus restoring the balance of power between the North and the South.

While South Carolina felt the need to resort to both interposition and nullification in response to Northern tariffs on Southern industry, Graham argues that implementation of constitutional secession by the South was successfully delayed by the Missouri Compromise of 1850, which served to maintain balance between the Northern and Southern states. The Compromise maintained balance by keeping the number of slave and free states in the Union at even par.

Eventually however, the effects of the Northern tariff on Southern cotton production took their toll and the Southern states felt they had no other alternative but to

secede from the Union. Just as they did during the American Revolution, the Southern states each called a convention of their people (and not of their legislatures) for the purpose of exercising their individual, constitutionally recognized sovereign power. One by one, through the adoption of ordinances at each of their conventions, the Southern states lawfully and peacefully seceded from the United States.⁷³ No constitutional amendment was necessary. No referendum was required. No negotiation with the Federal government was conducted.

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

President Abraham Lincoln responded to the secession of the Southern states with a war to preserve the Union. While many newspapers and media outlets both in the North and the South understood that the text of the United States Constitution implied a lawful right of the sovereign States to secede from the Union in the Althusian sense,⁷⁴ Lincoln took a more Hobbesian and nationalist view of the Constitution, arguing that “in the

⁷³ According to Graham, the constitutional basis for the Southern states’ assertion of their right of secession could be found in the details of the 1860 South Carolina Convention’s “Declaration of the Causes of Secession,” which justified secession by referring to “the Virginia and Kentucky Resolutions of 1798, the Report of the Hartford Convention in 1815, and the addresses to the people promulgated by the South Carolina Convention in 1832.” (Graham, p. 284).

⁷⁴ See Charles Adams, (2000). *When in the Course of Human Events: Arguing the Case for Southern Secession*. Lanham, MD: Rowman & Littlefield Publishers, Inc, pp. 14-16. See also William Rawle. 1825. [1998]. *A View of the Constitution of the United States of America*, second edition, Wiggins, Miss: Crown Rights Book Company, pp. 234-235.

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

With the Union victory over the South in 1865, the constitutional right of secession in the United States was effectively put to rest. The historical transition from Althusian to Hobbesian political order was complete, as was its subsequent effect of delegitimizing the act of secession. In the case of *Texas v. White* (1869), the Supreme Court of the United States effectively delegitimized secession as a viable constitutional option when it held that the unilateral secession of a state was unconstitutional.⁷⁶ The War Between the States came at a terrible cost in lives and property;⁷⁷ one that could have been avoided if there had been an express constitutional right of secession inserted in the U.S. Constitution, the war might have been averted.⁷⁸ Instead, the legality of the right of secession was mired in ceaseless debate between compact theorists and nationalist theorists of the Constitution.

Although the right of secession as an inherent right applicable to all people was effectively delegitimized by the Union victory over the South and by *Texas v. White*, peaceful secessions guided by the rule of law were not completely unknown. Robert A. Young cites three such examples: the secession of Hungary from Austria in 1867, the

⁷⁵ Graham, p. 291.

⁷⁶ Ibid., pp. 408-409.

⁷⁷ See DiLorenzo, *The Real Lincoln*, pp. 52-53, 176-177, 259-260.

⁷⁸ Robert W. McGee, "Secession Reconsidered," p. 23.

secession of Norway from Sweden in 1905, and the secession of Singapore from Malaysia in 1965.

In light of the weak state of the Austro-Hungarian Empire resulting from the war with Prussia in 1866, Emperor Franz Joseph agreed to negotiate Hungarian independence.⁷⁹ The Emperor restored the Hungarian Constitution and the Austrian Diet effected the secession of Hungary by passing the Ausgleich (Compromise), which was accepted by the Austrian Parliament in 1867.⁸⁰ Once negotiations with the Hungarians were completed, the Austrian Diet amended the Austrian Constitution to conform to the new political arrangement.⁸¹

In the case of Norway's secession from Sweden, the Swedes were initially taken aback by the Norwegian Parliament's vote to secede. According to Young, "Norwegian opinion was solid for sovereignty; war would be ruinous and the Great Powers would isolate Sweden if it tried forcibly to maintain the union. Negotiation represented the only viable course of action."⁸² A secession plebiscite was also held in Norway, where 99% of Norwegians voted to secede.⁸³ Once negotiations were completed, the secession of Norway was completed with the abrogation by both the Swedish and Norwegian legislature of the Act of Union and the abdication of the King of Sweden from the Norwegian throne and his replacement by the King of Denmark.⁸⁴

Unlike the Austria/Hungary and Sweden/Norway cases of secession, the secession of Singapore from Malaysia in 1965 actually involved the Federation of Malaya expelling

⁷⁹ Robert A. Young, "How Do Peaceful Secessions Happen?" *Canadian Journal of Political Science*, XXVII: 4, December 1994, p. 781.

⁸⁰ *Ibid.*, p. 787.

⁸¹ *Ibid.*

⁸² *Ibid.*, p. 781.

⁸³ *Ibid.*, p. 783. The actual vote result was 367,149 to 184 in favor of an independence Kingdom of Norway.

⁸⁴ *Ibid.*, p. 787,

Singapore from the political union.⁸⁵ The reasons for the expulsion involved racial and economic incompatibility between the Chinese Singaporeans and the majority Malayan population.⁸⁶ Amazingly, Singapore's secession was foisted upon it by Malaysia, after brief negotiations and a constitutional amendment effecting secession, passed by the Malaysian Parliament in only three hours.⁸⁷

In all three of the above cases, Young argues that the secessions were achieved constitutionally, through established fundamental law. The constitutional settlements achieved in each case were "a straightforward consequence of the predecessor state accepting the principle that secession will occur."⁸⁸

The trend that began in the 19th and early 20th centuries toward legally recognizing the right of cultural, ethnic, and national groups to exercise their rights of self-determination continued with the aftermath of World War I and the Treaty of Versailles. It was U.S. President Woodrow Wilson's hope that the right of national self-determination could provide for a lasting peace among the world's nations by granting national and ethnic groups their own states.⁸⁹

It was in this ideological context of national self-determination that prompted the fledgling Union of Soviet Socialist Republics to adopt a constitution that contained an express right of secession for all of its ethnic republics. After the Communist revolution of 1917, the USSR started out as a confederation of independent socialist republics. By 1922, the Treaty on the Formation of the Union of Soviet Socialist Republics was signed

⁸⁵ Ibid., p. 778-780.

⁸⁶ Ibid., p. 781.

⁸⁷ Ibid., p. 787.

⁸⁸ Ibid.

⁸⁹ For a more comprehensive account of Wilson's policy push for national self-determination and its disastrous consequences in the aftermath of the Treaty of Versailles, see Ralph Raico, "World War I: The Turning Point," in John V. Denson, ed. (1999). *The Costs of War: America's Pyrrhic Victories*, Second Expanded Edition, New Brunswick, NJ: Transactions Publishers, pp. 203-248.

by the sovereign Russian, Ukrainian, Byelorussian, and Transcaucasian socialist republics.⁹⁰ Included in the Treaty was a right of secession for each republic. Although the 1922 Treaty incorporated a right of secession, the real purpose of the Treaty was to induce the republics to enter into a confederation so that a true federation could be created.⁹¹ According to Lee Buchheit:

It was primarily Lenin's thesis that some expansive talk about secessionist rights was necessary to insure the acceptance of the early revolutionary movement by the many nationalities contained within tsarist Russia. By offering a protection of national rights, up to and including the right to secede, Lenin hoped to assuage the fears of the disparate populations within the Russian empire and woo them to the revolutionary cause.⁹²

Since the member republics were still concerned about the protection and influence of their nationalities, Lenin and Stalin did not go so far as to legally impose a unitary system of government.⁹³ Additionally, the promise to the republics of a legal right to secede also helped convince them of the need to unify politically for the purpose of carrying out the Communist New Economic Policy, which required a large internal economic market.⁹⁴

By 1924, a Union Constitution was drafted. It formalized the provisions of the 1922 Treaty, and proclaimed in its preamble "this Union is a voluntary association of peoples with equal right, that each republic is assured of the right of free secession from the Union..."⁹⁵ The Constitution further stated that "the right of secession, could not be amended, limited, or repealed without the prior consent of all of the republics."⁹⁶ In 1936

⁹⁰ Urs W. Saxer, "The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States," *Loyola of Los Angeles International and Comparative Law Journal*, July, 1992, p. 615.

⁹¹ *Ibid.*

⁹² Lee Buchheit, *Secession: The Legitimacy of Self-Determination*, New Haven: Yale University Press. p. 121.

⁹³ Saxer, p. 615.

⁹⁴ *Ibid.*, p.613.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

under Stalin and again in 1977 with the influence of Khrushchev, the Soviet Constitution was changed. Each time, the right of secession remained in the document.

Despite the legal recognition of the right of republics to secede from the Soviet Union in every version of the USSR Constitution, the right had no practical effect because the USSR was governed as a de facto unitary state. The right of secession was subverted by the centralized activities of political institutions like the Presidium of the Supreme Soviet, which had “the power to annul decrees of the union republics that failed to conform to the law.”⁹⁷ With no separate judicial branches acting as a check on political power, the Supreme Soviet had the exclusive means to override the autonomy of the republics “with the help of propaganda, secret police, and mass psychology.”⁹⁸

Additionally, the Soviet republics’ right of secession had no practical effect because it was never intended to be exerciseable. The existence of a right to secede was always in conflict with the Soviet imperative to internationalize communism. If Soviet republics were able to secede and become independent states, then the global communist movement would be hampered. When faced with this clash of legal and political values, the choice for Lenin and Stalin was clear: promotion of the proletarian revolution outweighed respect for the ethnic republics’ right to full self-determination.⁹⁹

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

⁹⁷ Ibid., p. 617.

⁹⁸ Ibid.

⁹⁹ Buchheit, pp. 123-125.

territories, the right of secession was dropped. The revised Chinese Constitution of 1975 provided that China was “a unitary multi-national state.”¹⁰⁰

Another historical example of a constitutional right of secession is Burma. Under the 1947 Constitution of the Union of Burma, chapter 10 contained “an express recognition that every state shall have the right to secede from the union ‘in accordance with conditions hereinafter prescribed.’”¹⁰¹ A number of procedural conditions were required to exercise the right: a waiting period of ten years after the constitution was enacted, a two-thirds vote for secession by the members of the State Council wishing to secede, and a plebiscite vote by the people of the seceding State.¹⁰² The right of secession lasted until it was repealed with the imposition of the Constitution of the Socialist Republic of the Union of Burma in 1974. Since then, only the exercise of “local autonomy under central leadership” has been constitutionally permissible.¹⁰³

The historical attempts to legalize the right of secession in national constitutions seem to show that secession rights are more often than not used as a tactic to attract smaller sovereign ethnic and national groups into a larger political union for the purpose of enjoying perceived economic and social benefits. However, once the political union is attained, the right of secession was often delegitimized either through practical politics or legal repeal. In cases where the right of secession was exercised, the result was most often a war by the central state to preserve political union. In cases where secession occurred peacefully, the central state accepted the reality and legitimacy of secession and negotiated a peaceful transition through established constitutional means.

¹⁰⁰ Ibid., p. 102.

¹⁰¹ Ibid., 99-100.

¹⁰² Ibid., p. 100.

¹⁰³ Ibid.

B. Constitutional Provisions for Secession in the Present Day

The vast majority of the world's sovereign states do not recognize any right of secession in their domestic constitutions. According to a 1996 study conducted by Canadian law professors Patrick Monahan and Michael Bryant, 82 of the 89 constitutions that were examined did not have any provisions allowing for the secession of any part of its people or territory.¹⁰⁴ Twenty-two constitutions expressly affirmed the maintenance of the state's territorial integrity, using terms like "inalienable," "indivisible," and "inviolable."¹⁰⁵ Some constitutions, like those of Cameroon, the Ivory Coast, and Rwanda, even go so far as to prohibit any constitutional amendment that would adjust the state's territory.¹⁰⁶

Monahan and Bryant found seven constitutions, both past and present, which contained or do contain, procedures for constitutional secession. These countries include Austria, Ethiopia, France, Singapore, St. Christopher and Nevis, the former Soviet Union, and the former Czech and Slovak Federative Republics. To this list, we can add Switzerland, which has a provision in place to allow for the secession and creation of new cantons¹⁰⁷, and the current draft of the European Union Constitution of 2003, which allows for the voluntary withdrawal of Member States from the Union.¹⁰⁸ Finally, we can add Canada, which now has a statute in force clarifying the steps required for a province

¹⁰⁴ Patrick J. Monahan and Michael J. Bryant with Nancy C. Cote. "Coming to Terms with Plan B: Ten Principles Governing Secession." *C.D. Howe Institute Commentary* 83 (June 1996), p. 7.

¹⁰⁵ *Ibid.*, p. 7.

¹⁰⁶ *Ibid.*, p. 7.

¹⁰⁷ See Monahan and Bryant, p. 14 and Thomas Fleiner, "Recent Developments of Swiss Federalism," *Publius*, Spring 2002, v. 32, i. 2, p.

¹⁰⁸ "Article I-59: Voluntary withdrawal from the Union," *Draft Text of the European Union Constitution*, Part One, Title I: Definition and Objectives of the Union, <http://european-convention.eu.int/docs/Treaty/CV00797-re01.EN03.pdf>.

to secede from the federation, based on a prior Supreme Court Opinion on the issue of Quebec's potential secession from the rest of Canada.¹⁰⁹

Since we are interested in analyzing constitutional procedures for secession that are relevant in today's post Cold War world, we can disregard Monahan and Bryant's discussion of the secession provisions found in the USSR and Czechoslovak Federation constitutions.¹¹⁰ In addition, we can rule out their discussion of the secession provisions in the French constitution because these provisions apply only to her overseas territories, not to her constitutionally "indivisible" domestic territory. Thus, we are left with looking more closely at the secession rights or provisions found in the constitutions of Austria, the European Union, Ethiopia, Singapore, St. Christopher and Nevis, Switzerland, and finally, Canada.

i. Countries with Express Constitutional Rights of Secession

a) Ethiopia

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

¹⁰⁹ See "Reference re Secession of Quebec." Supreme Court Reports at [1998] 2 S.C. 217, and Bill C-20, *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, (36th Parliament, Second Session) First Reading December 13, 1999.

¹¹⁰ For discussion of these constitutional provisions, see the *A Brief History of the Constitutional Right of Secession* section of this paper.

has the unconditional right to self-determination, including the right to secession.”¹¹¹

Thus, it is not just the nine sovereign ethnic states that enjoy this right. Rather, every minority tribal group in each of the nine states also has the right of secession.¹¹²

In addition to expressly acknowledging the right of secession itself, the Ethiopian Constitution contains the necessary procedures to effect secession in the constitutional text under Article 39(4). A two-thirds majority vote by the Legislative Council of the Nation, Nationality or People desiring secession is required before the issue is put to a referendum organized by the Federal Government and voted on by the seceding population. Once the referendum has passed in favor of secession, the terms of secession are negotiated, including the division of assets, which is “effected in a manner prescribed by law.”¹¹³ Territorial borders are negotiated between the seceding tribal state and the adjacent non-seceding tribal state. If agreement on borders between the states cannot be reached, the Federal Government decides the issue based on the settlement patterns and wishes of the peoples involved.¹¹⁴

b) European Union

At the end of June 2003, the European Convention has finished the work of completing the final draft of the new European Union (E.U.) Constitution, designed to legitimize the ongoing project of creating a politically united European superstate, what some commentators are calling the “United States of Europe.” Since the European

¹¹¹ Ethiopian Constitution, Article 39(1).

¹¹² Minasse Haile, “The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development,” *Suffolk Transnational Law Review* 2 (Winter, 1996), p. 32. (20 *Suffolk Transnat’l L. Rev.* Article 39(5) of the Ethiopian Constitution defines a nation, nationality or people as “a group of people who have or share large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.”

¹¹³ Ethiopian Constitution, Article 39(4)(e).

¹¹⁴ Monahan and Bryant, p. 13.

superstate is one of the largest multinational democratic states in the world, it would seem appropriate that the new Constitution contain a clause allowing its member states the right to secede or exit from the Union.

Such an exit clause is in fact contained under Article I-59 of the E.U. Constitution. Under Article I-59, any member state is allowed to withdraw from the E.U.¹¹⁵ Procedurally, the withdrawing member state must notify the European Council, whose job is to examine the notification. According to the European Council's guidelines, the E.U. has a duty to negotiate an agreement with the withdrawing Member State that outlines the terms of withdrawal and the future relations of both sovereign entities. The negotiated agreement is concluded by a qualified majority of the European Council when consent is received from the European Parliament, and without the participation of the Council representative of the withdrawing Member State.¹¹⁶

The secession of the withdrawing Member State from the E.U. becomes effective from the date that the negotiated agreement comes into force. If no agreement comes into force within two years from the time the withdrawing Member State notified the European Council of its intent to leave, then the secession will become effective. The Council and the Member State can agree to extend this period beyond two years.¹¹⁷ Finally, under Article, the E.U. Constitution gives the withdrawing Member State the option to re-join the E.U.¹¹⁸

c) St. Kitts and Nevis

¹¹⁵ European Constitution, Article I-59, paragraph 1.

¹¹⁶ European Constitution, Article I-59, paragraph 2.

¹¹⁷ European Constitution, Article I-59, paragraph 3.

¹¹⁸ European Constitution, Article I-59, paragraph 4.

St. Kitts and Nevis are two adjacent islands located in the Caribbean that currently form a two-island political federation. From the time it was joined with St. Kitts to be administered as one British colony in 1882, the island of Nevis has continuously had an active secessionist movement to become an independent and sovereign island state.¹¹⁹ As part of the decolonization process of the 1960s, the British island colonies moved toward independence from Britain. This movement resulted in St. Kitts and Nevis becoming a state in voluntary association with Britain. By the 1970s and early 1980s, the idea of Nevis secession enjoyed wide political support on the island and political pressure was put to bear for greater autonomy for Nevis within the two-island federal structure.

In 1983, the islands of St. Kitts and Nevis achieved political independence from Britain and drafted their first constitution. Like Article 39(1) of the Ethiopian Constitution, Section 113 of the St. Kitts and Nevis Constitution gives an express right of secession. The island of Nevis has the legal right to secede from the federation with St. Kitts at any time.¹²⁰

In the late 1990s, the people of Nevis enjoyed one opportunity to exercise their right to secede from St. Kitts. After the secessionist party in power attempted to pass a bill to enable the secession of Nevis, an election was called in February 1997 so that a mandate for secession could be achieved. The secessionist party won the election by a slim majority of seats.¹²¹ Under the Constitution, a two-thirds majority vote of the Nevis Legislative Assembly and a two-thirds majority vote of the Nevis electorate in a nationally organized referendum are required for secession to pass. In October 1997, the

¹¹⁹ For more information on the political history of Nevis independence, see <http://website.lineone.net/~stkittsnevis/nevis.htm>

¹²⁰ Ibid.

¹²¹ See <http://website.lineone.net/~stkittsnevis/nation.htm>

Nevis Legislative Assembly voted unanimously in favor of secession. However in August 1998, the referendum vote was 61.7% in favor of secession, just short of the two-thirds required.¹²² Had the referendum achieved a two-thirds vote in favor of secession, there would have been virtually no negotiation over new borders because the territorial arrangements of St. Kitts and of Nevis post-secession are set out under the Constitution ex-ante.¹²³ At present, both islands remain federated.

ii. Countries with Procedures for Changing Territorial Borders

a) Austria

The Austrian Constitution expressly recognizes the existence of Austria as a federal state¹²⁴ whose federal territory is composed of the territories of its 9 autonomous states.¹²⁵ More importantly however, is a constitutional recognition of the possibility for changes to the federal territory of Austria, which “can, apart from peace treaties, only be effected by corresponding constitutional laws of the Federation and the State whose territory undergoes change.”¹²⁶ The federal government determines the secession referendum question and the national population (including both the seceding and non-seceding groups) is eligible to vote on the question. A simple majority in favor of secession is enough to bring the matter to negotiations between the seceding territory and the national government, followed by a constitutional amendment requiring a two-thirds majority vote of the Austrian House of Representatives.¹²⁷ As part of a negotiated

¹²² Ibid.

¹²³ Monahan and Bryant, *chart* between p. 9 and p. 10.

¹²⁴ Article 2(1), Constitution of Austria (1983).

¹²⁵ Articles 2(2) and 3(1), Constitution of Austria (1983).

¹²⁶ Article 3(2), Constitution of Austria (1983).

¹²⁷ Monahan and Bryant, *chart* between p. 9 and p. 10.

secession package, the boundaries of the newly seceded territory require the agreement of both the national government and the seceding government.¹²⁸

b) Singapore

In light of its secession (some would say expulsion) from Malaysia in 1965,¹²⁹ it is interesting to note that the constitution of Singapore, while not expressly recognizing secession per se, does contain a provision governing the surrender of its sovereign territory.¹³⁰ The Constitution states that no part of the “sovereignty of the Republic of Singapore” can be surrendered or transferred in any way whatsoever (including joining another sovereign territory, i.e. a reunion with Malaysia) unless approval for such surrender or transfer is given by a two-thirds vote of the people of Singapore in a nationally organized referendum.¹³¹

c) Switzerland: The Jura Procedure

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

¹²⁸ Ibid., p. 13.

¹²⁹ For more on the secession of Singapore from Malaysia, see the *Brief Constitutional History of Secession* section of this paper.

¹³⁰ Singapore Constitution, Part III Protection of the Sovereignty, Article 6 No Surrender of Sovereignty, 1963.

¹³¹ Ibid. See also Monahan and Bryant, p. 13.

Before the creation of the Canton Jura in 1979, the French-speaking districts of Jura fell within the jurisdiction of the predominantly German-speaking Canton Berne. The Jura districts had clamored for secession from Canton Berne off and on since the late 18th century. Separatist sentiment was high at the time of the First World War, but died down until September 1947, when a Jura citizen was refused membership to the cantonal parliament because he was a French-speaker.¹³² By the 1950s, the Jura separatists petitioned successfully for a referendum vote on forming a new canton, but the canton-wide vote rejected the proposal and the Jura districts themselves voted against the proposal by a narrow margin.¹³³ The real problem was that the Northern Catholic Jura districts wanted to form a new canton while the Southern Protestant Jura districts did not.

Canton Berne passed a constitutional amendment in 1970 to allow only Jura districts to vote in a referendum on secession. In response to the continuing political crisis caused by Jura separatist aspirations, the Berne Executive Council set a referendum vote for June 23, 1974, where only 52 percent of the voters in the Jura districts voted to separate from Canton Berne.¹³⁴

One outstanding issue was how to determine the cantonal status of southern Jura districts where the majority voted to remain with Berne. Almost nine months after the first referendum, the Berne government received a petition for a second plebiscite. This plebiscite was held on March 16, 1975 and the majority of these districts voted overwhelmingly to remain with Canton Berne.¹³⁵

¹³² See Jonathan Steinberg, *Why Switzerland?*, 2nd edition, Cambridge University Press, 1996, pp. 89-90.

¹³³ *Ibid.*, p. 91.

¹³⁴ *Ibid.*, p. 93-94; Monahan and Bryant, p. 14.

¹³⁵ *Ibid.*, p. 95.

Finally, two more sets of plebiscites were held in September 1975 in the fifteen communes within the southern Jura districts that voted against remaining with Canton Berne in March 1975. Most of these districts voted to remain with Canton Berne. The outcome of these final two referenda resulted in the creation of a new Canton Jura, which drafted a new constitution in 1978 and came into being on January 1, 1979.¹³⁶

iii. Countries with a Quasi-Constitutional Right of Secession

a) Canada

Unlike the other countries mentioned here, Canada has no express constitutional right of secession or specific procedures that govern how a political subunit is to secede. Instead, Canada has a Supreme Court legal opinion on the legality of Quebec secession¹³⁷ and a statute called the Clarity Act¹³⁸, which essentially codifies the Supreme Court's opinion. So while Canada has legislative guidelines for secession in place, there is no right of secession, either substantive or procedural, that is constitutionally entrenched.

The Supreme Court Reference on Quebec Secession that came down in 1998 was requested by the Canadian federal government in reaction to an extremely close referendum vote on the secession of the province of Quebec from the rest of Canada in October 1995.¹³⁹ The government asked the court whether the unilateral secession of Quebec was legal under constitutional and international law. The Supreme Court

¹³⁶ Ibid, p. 96.

¹³⁷ For the full Supreme Court opinion on Quebec secession, see "Reference re Secession of Quebec." Supreme Court Reports at [1998] 2 S.C. 217.

¹³⁸ For the full statutory text, see Bill C-20, An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, (36th Parliament, Second Session) First Reading December 13, 1999.

¹³⁹ At the time the vote was taken, no constitutional right of secession and no procedures governing the secession of a province existed. The political thinking of the federal government was one of denial and delay since a previous referendum vote in Quebec in 1980 resulted in a decisive vote against secession.

responded by declaring that unilateral secession is illegal under both the Canadian constitution and under international law.

According to the Supreme Court, no province has the unilateral right to secede from the rest of Canada. And yet, secession is legal and conditional under the Canadian constitution. The Court held that secession requires three things: a referendum that shows a clear majority vote in favor of secession that expresses the will of Quebec citizens to secede, based on a clearly worded question; a duty on the part of the remaining federal and provincial governments of Canada to enter into negotiations with Quebec guided by four fundamental constitutional principles (democracy, federalism, constitutionalism and the rule of law, and protection of minority rights); and the passage by the federal and provincial governments of a constitutional amendment ratifying the secession of Quebec. The Court was careful in its opinion to stick to a legal interpretation of the right of secession and did not implement any concrete procedural rules. The Court made it clear that “it will be for the political actors to determine what constitutes “a clear majority on a clear question” in the circumstances under which a future referendum vote may be taken.”¹⁴⁰

Two years after the Secession Reference, the “political actors” took the Supreme Court’s advice, and the federal government passed the Clarity Act, 2000. The Clarity Act essentially reaffirms the constitutional secession process expounded by the Court: a clear referendum vote in favor of secession, followed by a negotiation agreement between Quebec and the rest of Canada, and concluded by the passage of a constitutional amendment which effects the secession itself.

¹⁴⁰ “Reference re Secession of Quebec.” Supreme Court Reports at [1998] 2 S.C. 217., para. 162.

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

Clearly, no uniform method exists for effecting secession in a constitutional manner. There is no "right" way to constitutionalize a right of secession. Some countries, like Ethiopia and St. Kitts and Nevis, provide both an express constitutional right to secede along with concrete procedural rules on how to secede. Other countries, like Singapore and Austria, do not refer to secession *per se*, but focus more on providing concrete procedures on how to effect changes in sovereign territory, which is basically an implied procedural right of secession. Switzerland has no explicit constitutional right of secession, yet it does provide an effective means of internal secession and creation of new cantons. Finally, Canada also has no express right of secession, but a Supreme Court legal opinion exists that gives a guideline for secession and there is a statute in force that seeks to clarify the constitutional principles for secession put forth by the Court.

C. Constitutional Provisions for Secession in the Present Day: Problems and Solutions

i. Problems

What should be clear from existing constitutional provisions for secession is that constitutional or consensual secession does not imply an absolute, unilateral right of secession.¹⁴¹ A unilateral declaration of independence (UDI) is a declaration of intent to separate from the existing state and create an independent sovereign state. Such a declaration is often supplemented with a secession referendum to give the secession added legitimacy. The key aspects of a UDI are that it is illegal under virtually all domestic constitutions and international law, and it is executed without the consent of, or negotiation with, the remaining state.

Judging from the various constitutional provisions for secession in existence, almost all of them do not allow for unilateral secession. The one exception is perhaps St. Kitts and Nevis. As mentioned previously, the St. Kitts and Nevis constitution provides that a referendum and legislative approval for secession be limited only to the seceding unit (the island of Nevis, in this case).

The St. Kitts and Nevis constitution also settles territorial issues ex-ante. This provision is fairly straightforward since the secession of one island from another is a fairly simple territorial matter. Granted, it would perhaps be asking a lot to expect larger multinational democratic states to insert ex-ante territorial provisions in the event of a secession, which would involve carving out new territorial borders for a newly seceded state out of a contiguous geographic landmass – a far cry from a two-island situation.

¹⁴¹ For more on the distinction between consensual and unilateral secession, see Allen Buchanan, “The Making and Unmaking of Boundaries: What Liberalism Has to Say,” in *States, Nations, and Borders: The Ethics of Making Boundaries*, edited by Allen Buchanan and Margaret Moore, Cambridge: Cambridge University Press, 2003, pp. 246-258.

However, as the case of St. Kitts and Nevis shows, ex-ante constitutional provision for post-secession territorial frontiers is conceivable if the political will exists to implement such a provision.

However, St. Kitts and Nevis is the exception. In every other case where secession is constitutionally recognized, constitutional secession entails not just a referendum vote, but also a negotiated settlement. This is true of Austria, Singapore, Ethiopia, and Switzerland. In the case of Canada, a formal constitutional amendment is an additional requirement necessary to make the secession of a province effective.

Thus, we notice that the results of secession referendums in most cases are not meant to be binding, but are merely consultative. Monahan and Bryant explain why this is the case:

It is impossible to generalize about the effect of a secession referendum without resort to a nation's constitution. Basically, if it is silent on the subject, a referendum is consultative, if only because there is no legal basis for making it binding. Thus, most referendums are consultative in the sense that the legal status quo remains until a resulting negotiation and eventual legislative measure addresses the referendum result. As one study concludes, "binding referendums are rare in parliamentary democracies, and are best suited to countries with a tradition of direct democracy, such as Switzerland."¹⁴²

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

Although the Constitution (of Canada) does not itself address the use of a referendum procedure, *and the results of a referendum have no direct role or legal effect in our constitutional scheme*, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion.¹⁴³

¹⁴² Monahan and Bryant, p. 12. Monahan and Bryant mention Denmark, which requires a qualified majority vote to make constitutional amendments that would allow for secession, but such a vote is a binding vote. The United Kingdom is mentioned as an example of a country where "a binding referendum is an impossibility there since parliament cannot bind itself." (p. 12).

¹⁴³ "Reference re Secession of Quebec." Supreme Court Reports at [1998] 2 S.C. 217., para. 92.

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

Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own...¹⁴⁴

The reason why most referenda on issues like secession are treated by constitutional democracies as consultative is easy to see. It is in every state's self-interest to maintain its territorial integrity; indeed, under current international law, the preservation of a state's territorial integrity is the overarching value.¹⁴⁵ The treatment of referendum results as consultative instead of binding allows the remaining state to control the secession process, by adding extra hurdles, such as the attainment of a negotiated agreement on secession terms, that secessionists must meet before the territorial and jurisdictional status quo can be changed. At best, a consultative referendum vote in favor of secession may certainly give the seceding group the legitimacy it needs as a source of leverage in the negotiation process with the central state government. However, the legitimacy of even an overwhelming "yes" vote may not be enough to clear the hurdle of negotiation.¹⁴⁶ Thus, secessionists would obviously prefer a binding referendum vote, which would have the legal effect of changing the status quo without the need for subsequent negotiation with the central state government.

¹⁴⁴ Ibid., para. 160.

¹⁴⁵ A whole host of United Nations articles, declarations and resolutions exist that reaffirm the protection and maintenance of territorial integrity under modern positivist international law. Some of these declarations include: Article 1(2) of the United Nations Charter—

¹⁴⁶ In its opinion on Quebec secession, the Supreme Court of Canada says, "No one can predict the course that such negotiations (concerning secession) might take. The possibility that they might not lead to an agreement amongst the parties must be recognized... While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached." "Reference re Secession of Quebec." Supreme Court Reports at [1998] 2 S.C. 217., para. ?

It is apparent from looking at the constitutional provisions for secession in existence that the central governments charged with the creation of these rules and procedures designed them in such a way as to make secession extremely difficult or virtually impossible. Though the right of secession may exist in principle, there is little expectation on the part of actors within political institutions that such a right would actually be exercised in practice. For instance, liberal democratic philosophers Wayne Norman and Daniel Weinstock favor the legalization of secession in order to prevent its occurrence by shutting down the political momentum of secessionist movements. Thus, secession is made more costly to secessionist groups, thereby making cheaper political accommodation in the form of greater autonomy within the democratic state.

Norman in particular argues in favor of creating a constitutional secession clause to act as a choking mechanism for secessionist politics. As an example of how a choking mechanism can successfully prevent secession, Norman cites the use of a two-thirds majority vote requirement in the case of the failed secession of the island of Nevis from the federation of St. Kitts and Nevis:

A two-thirds majority requirement for a vote on secession is a feature of one of the world's only explicit secession procedures, in the Constitution of St. Kitts-Nevis, a microstate consisting of two islands in the Caribbean. In 1998 a majority, but less than two-thirds, of the voters in Nevis voted to secede and the referendum therefore failed. I am not arguing that a democratic secession procedure would have a two-thirds-majority requirement, but only that it would make secession more difficult than fifty-percent-plus-one on a question drawn up by the secessionists themselves.¹⁴⁷

One problem with using a high supermajority requirement as a way to choke off secession is in the arbitrary nature of the rule. For how can one argue that the “yes” vote of 61.7% in the Nevis secession attempt was not indicative of a substantial level of popular support necessary to enact (or to legitimize in preparation for further

¹⁴⁷ Wayne Norman, “Secession and (Constitutional) Democracy,” p. 4.

constitutional negotiation, as the case may be) secession? Is a 61.7% vote really so significantly different than a two-thirds vote requirement that the seceding side must concede defeat?¹⁴⁸ On the other hand, one may argue that so long as a two-thirds requirement is clear to all parties ex-ante, then all parties agree to respect the final result, even if it is 66.6%, which would still fall short of a two-thirds requirement.

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

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

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

¹⁴⁸ See Murray Rothbard, *Power and Market*,

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?¹⁴⁹

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

...the State has been able to transform judicial review itself from a limiting device into a powerful instrument for gaining legitimacy for its actions in the minds of the public. If a judicial decree of “unconstitutional” is a mighty check on governmental power, so too a verdict of “constitutional” is an equally mighty weapon for fostering public acceptance of ever greater governmental power.¹⁵⁰

Applying Rothbard’s insight to the Quebec Secession Reference, we see that the Canadian federal government used the Supreme Court’s power of judicial review to create legitimacy for the idea that unilateral secession is illegal under domestic and international law. In this case, the Court’s judgment of unilateral secession as “unconstitutional” is the “mighty weapon for fostering public acceptance” of the idea that the secession of Quebec from Canada requires a legal duty on the part of Quebec and the federal government and other provinces to negotiate secession as a prerequisite to a constitutional amendment could be passed ratifying Quebec secession.¹⁵¹

¹⁴⁹ “Reference re Secession of Quebec.” Supreme Court Reports at [1998] 2 S.C. 217., para. 2.

¹⁵⁰ Murray Rothbard, *For a New Liberty*, New York: Macmillan Publishing Co., Inc., 1978, p.65.

¹⁵¹ In its Reference on Quebec Secession, the Supreme Court claims to have discovered the duty to negotiate as resulting from four constitutional principles of equal weight: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. Although most scholars treat the Court’s analysis of these four principles as a given, there are a few who question the Court’s basis for choosing these principles as the ones that imply a duty on Quebec and the rest of Canada to negotiate secession. This flimsiness in the Court’s reasoning raises further doubt as to whether the Court, in its Reference on Secession, engaged in serious legal analysis or as a legitimizer of a heavily qualified secession procedure. For more on this, see Dan Usher, “The New Constitutional Duty to Negotiate.” *Policy Options* (Montreal: Institute for Research on Public Policy, January-February 1999); idem., “Profundity

The federal government could have gone ahead without the consent of the judiciary and amended the Constitution ex-ante to allow for the secession of a province by using the appropriate constitutional amending formula. However, it chose to refer the question of secession to the Court instead so it could legitimize the idea of conditional, negotiated secession as opposed to unilateral secession. Unlike the Canadian experience with secession, the Swiss Canton Berne took the decisive step of passing an actual constitutional amendment allowing for cantonal districts and communes to vote on whether to remain with their existing canton or create a new one.¹⁵²

The ability of the Canadian federal government to use its Supreme Court in this way is also easily explained by Rothbard when he notes that “the concept of parliamentary democracy began as a popular check on the absolute rule of the monarch. The king was limited by the power of parliament to grant him tax revenues. Gradually, however, as parliament displaced the king as head of State, the parliament itself became the unchecked State sovereign.”¹⁵³ This transfer of power from King to Parliament is exactly what has occurred in Canada. In fact, the power has transferred even further, from Parliament to the Prime Minister himself.¹⁵⁴ The Prime Minister of Canada, as the “unchecked State sovereign” of Canada, was thus able to use the Supreme Court to get the desired legal opinion on the issue of Quebec secession.¹⁵⁵

Rampant: Secession and the Court, II,” *Policy Options* (Montreal: Institute for Research on Public Policy, September 1999).

¹⁵² For more on the procedure used to create Canton Jura, see the *Contemporary Constitutional Rights of Secession* section of this paper.

¹⁵³ Rothbard, *For a New Liberty*, p.

¹⁵⁴ For more information on the collapse of parliamentary democracy and the emergence of prime ministerial dominated government in Canada, see Donald J. Savoie, (1999). *Governing from the Centre: The Concentration of Power of Canadian Politics*, Toronto: University of Toronto Press.

¹⁵⁵ Although the Quebec secessionists treated the Supreme Court’s opinion as a vindication of their right to secede and thereby claimed a political victory, this fact should not in any way change the validity of the

Upon receiving the Supreme Court’s opinion on secession in 1998, the federal government passed the Clarity Act two years later. Although the Clarity Act is supposed to “clarify” the meaning of the Supreme Court’s Secession Reference, the Act gives the federal House of Commons the power to decide whether a province’s referendum vote to secede results in a clear majority to secede based on a clearly-worded question. The Act does not specify whether the referendum decision rule is to be a simple majority or a supermajority requirement. Nor does not give more specifics as to how secession negotiations are to be handled. It merely stipulates that the federal government would be the key negotiator in the event a province votes to secede from Canada. And the Act does not specify which amending formula is to be used to ratify the secession of Quebec from Canada. Ironically it seems, the final consequence of the Canadian federal government’s treatment of the secession issue is more ambiguity and less clarity.¹⁵⁶

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

ii. Solutions: De Jure Secession

a) Ex-Ante Constitutional Amendment

preceding Rothbardian analysis of the State’s ability to use the judiciary as a way to legitimate its actions in the minds of the public.

¹⁵⁶ For the Canadian federalist/anti-secessionist perspective on the “clarity” of the Clarity Act, see Patrick Monahan, “Doing the Rules: An Assessment of the Federal Clarity Act in Light of the Quebec Secession Reference.” *C.D. Howe Commentary* 135 (February 2000). For the Quebec nationalist perspective, see Claude Ryan, “Consequences of the Quebec Secession Reference: The Clarity Bill and Beyond,” *C.D. Howe Commentary* 139 (April 2000).

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

A normal constitutional amending procedure could always be used to write a subunit out of the constitution, so to speak, by changing the international frontiers of the state to exclude the territory in question. This procedure would not always be fair to secessionist regions, however, because a typical amending formula gives veto powers to the central government, and in federations to the other subunits.¹⁵⁷

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

Of course, the successful application of an ex-ante constitutional right of secession is a separate issue. After all, there is no guarantee that the remaining state

¹⁵⁷ Wayne Norman, "Secession and (Constitutional) Democracy," p. 5.

would consent to the reality of secession. The War Between the States from 1861 – 1865 is a testament to that. Nevertheless, Robert McGee has argued that had there been an explicit constitutional right of secession in the U.S. Constitution at the time of the War Between the States, it is possible that war and the resulting deaths and property damage could have been avoided.¹⁵⁸

b) Specify in the Constitution who can secede

Virtually no constitution today that contains some provision for secession makes an express mention of who can secede. In most cases, it is assumed that any political subunit with constitutional status, like a state or a province, has the right to secede, or at least the right to attempt to secede. The one exception to this might be the Ethiopian Constitution, which allows smaller tribal groups as well as larger sovereign ethnic States to secede. However, no constitutions with secession provisions expressly state that a city, or a district, or a community, or a neighborhood, or even any individual has the right to secede from the existing central state.

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

c) Permit Secessionists to Determine the Territorial Area for a Secession Vote

¹⁵⁸ See Robert W. McGee, “Secession Reconsidered,” p. 23.

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

Let there be a separatist movement in North Wysteria, a region of the State of Wysteria. In a plebiscite the majority of North Wysterians vote for secession. So, perhaps, North Wysteria should be allowed to secede. But let there also be a region of North Wysteria, called North West Wysteria, in which a majority voted against secession. Therefore, perhaps North Wysteria should not be allowed to take this part of its territory into independence. So, it seems, the majority principle gives incompatible results unless the potentially seceding region can be specified independently of the majority principle to be used for determining whether a presumption for permitting secession exists.¹⁵⁹

A noteworthy real world example of Beran's Wysteria case involves the close secession referendum result in Quebec in 1995.¹⁶⁰ The major reason why the 1995 vote result turned out the way it did was because the eligible voting population spanned the entire provincial territory of Quebec, which included heavily non-secessionist communities in Northern Quebec, the city of Montreal, and the Eastern Townships. It turned out that the overwhelming vote against secession in heavily-Anglophone Montreal was the deciding factor in the narrow defeat of the secession initiative.

¹⁵⁹ Beran, p. 29.

¹⁶⁰ Since there was no established vote rule in place at that time, it was an open question whether a simple majority of 50% plus one would be enough for Quebec to begin secession negotiations with the rest of Canada. The Quebec separatist side certainly felt that the simple majority was enough, but the federalist side hedged on whether a 51% "yes" vote would have prompted the Canadian federal government to negotiate. As Wayne Norman notes, "on the question of secession, successive federal governments, like the Constitution itself, largely remained silent. Senior federal politicians played active roles in both "sovereigntist" referendum campaigns (in 1980 and in 1995, on the "No" side), thus legitimizing them to a significant extent. But they never laid out an official policy about how they would respond if more than 50% of the voters voted Yes. They (literally) prayed that that would not happen, and were shocked when it almost did." (Norman, "Domesticating Secession," p. 12) Thus, if the Quebec separatists had won the 1995 referendum vote, it would have been an example of Norman's fear that "if there are no explicit constitutional rules in place to govern (secession)...then secessionists will be able to set and in some sense legitimize many of the "rules" themselves." (Norman, "Domesticating Secession," p. 13) Fortunately for Norman and his fellow federalists, and unfortunately for the Quebec secessionists, the opportunity in 1995 for Quebec secessionists to legitimize the rules of secession never came to pass.

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

This difficulty can be overcome by making the use of the majority principle ‘recursive.’ Let the separatist movement specify the area in which a plebiscite is to be held, e.g. North Wysteria. Assume there is a majority for secession and that secession is granted in principle. Now any area of North Wysteria must in turn be permitted to vote on whether it wishes to secede from North Wysteria (and stay with what is left of Wysteria, if they wish). If the majority of say North West Wysterians does not wish to be part of the independent state of North Wysteria, any region of North West Wysteria could in turn vote whether to secede from North West Wysteria etc. This ‘recursive’ use of the majority principle over any territory specified by a separatist movement must give a determinate and consistent result.¹⁶¹

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

Certainly, under all existing Canadian legal treaties, the current territorial borders of Quebec fall under the jurisdiction of the Quebec provincial government. Some analysts, like John Remington Graham, argue that any threat to take territory from Quebec during secession negotiations would be a violation of the international law protection of a state’s territorial integrity.¹⁶² While it is possible that Graham’s analysis may be legally correct, if the Quebec government is truly serious about seceding from Canada, the practicality of achieving Quebec secession may mean sacrificing the territory

¹⁶¹ Beran, p. 29.

¹⁶² Graham, *A Constitutional History of Secession*, p. 441.

encompassing northern Quebec and Montreal. It is quite possible that the Quebec government's refusal to hold a secession referendum only in Francophone Quebec was an indication that Quebec was not truly serious about seceding, and more concerned with trying to extract greater internal political autonomy from the federal government and remain within the Canadian state. Therefore, even Quebec secessionists may favor a legal rule that limits who can secede from Canada to only provinces and no smaller group.

The likelihood that any constitutional democracy would adopt a constitutional rule allowing for any small group of citizens or even an individual to specify the territorial area for secession is of course extremely low. No central state government wants to lose jurisdiction over any part of its territory because it is not in their nature to do so.¹⁶³ Additionally, no seceding subunit, like a province, wants to lose jurisdiction over any part of its territory for the same reason. As long as only provinces with constitutional status are allowed to attempt secession, the chance of secession grounded in the rule of law ever happening is virtually zero. Thus, the limitation of eligibility for secession to relatively large-size provinces with constitutional status, acts as a means for the central state (and in some cases, even the seceding province) to delegitimize and defuse secessionist political movements.

As demonstrated in Switzerland with the creation of Canton Jura in the 1970s, a workable procedure exists for changing jurisdictional boundaries through a series of

¹⁶³ Hans-Hermann Hoppe explains the tendency of state to maintain or expand their territory in the following way:

A state is a territorial monopolist of compulsion – an agency which may engage in continual, institutionalized property rights violations and the exploitation – in the form of expropriation, taxation and regulation – of private property owners. Assuming no more than self-interest on the part of government agents, all states (governments) can be expected to make use of this monopoly and thus exhibit a tendency toward *increased* exploitation (and internal taxation). On the other hand...it means territorial expansionism. States will always try to enlarge their exploitation and tax base. (Hoppe, *Democracy: The God That Failed*, p. 107).

plebiscites at local, district levels. This procedure worked for the secession of districts from Canton Berne and their subsequent amalgamation into a new Jura Canton. All of this activity occurred within the frontiers of the Swiss state, as an example of internal secession.¹⁶⁴

However, a true innovation would be to extend via constitutional amendment the Jura procedure of sequential plebiscites to the realm of external secession, or secession per se; that is, the secession of political subunits from existing central states for the purpose of becoming newly independent sovereign states.

Such a legal procedure would work to solve the problem of “trapped” minorities within newly seceded states that most scholars of secession never cease to point out. With a Jura procedure at hand, minorities trapped within seceded states would have the means to vote in a series of plebiscites on whether to remain with the predecessor state, or to join the seceded state, or even to form their own independent political entity. Thus, the Jura procedure can also avoid the potential problem of enclaves by allowing for the creation of new sovereign political entities whose territory is contiguous.¹⁶⁵

iii. Solutions: De Facto Secession

a) Unilateral Declaration of Independence: The Effectivity Principle

Although the previous solutions mentioned to rectify the inherent flaws of current constitutional provisions for secession are certainly ideal from a legal standpoint, it seems highly unlikely that they would be voluntarily implemented by political actors with no interest in providing the constitutional means for what they would perceive to be the

¹⁶⁴ For a more detailed discussion of secession within existing state frontiers, see Robert W. McGee, “Secession as a Tool for Limiting the Growth of State and Municipal Government and Making it More Responsive: A Constitutional Proposal.” *Western State University Law Review* 21 (Spring 1994). Pp. 499-513.

¹⁶⁵ Monahan and Bryant, p. 14.

potential disintegration of the prevailing democratic state. This would certainly be the position of Hans-Hermann Hoppe, who favors de facto secession at the level of districts or cities, rather than at the level of provinces or states that have constitutional status within the larger state.¹⁶⁶

But, what if it is demonstrated over time that existing constitutional provisions for secession, encumbered as they are by numerous procedural and substantive barriers, are ineffective in allowing seceding majority or minority groups to peacefully withdraw from the state, regardless of how justified the cause for secession might be? What then would be the alternative solutions for groups who truly desire secession and no longer wish to remain within the existing state?

In its 1998 Reference on Quebec Secession, the Supreme Court of Canada did account for one possible scenario arising from the possibility of Quebec unilaterally declaring its independence from Canada. The Court was responding to an argument based on the principle of “effectivity,” which suggested “that the National Assembly, legislature or government of Quebec could unilaterally effect the secession of that province from Canada, but it was not suggested that they might do so as a matter of law; rather, it was contended that they simply could do so as a matter of fact.”¹⁶⁷

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

Although under the Constitution there is no right to pursue secession unilaterally, that is secession without principled negotiation, this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community.¹⁶⁸

¹⁶⁶ Hoppe, *Democracy: The God That Failed*, pp.289-292.

¹⁶⁷ “Reference re Secession of Quebec.” Supreme Court Reports at [1998] 2 S.C. 217., paras. 148-154.

¹⁶⁸ *Ibid.*, para. 164.

Thus, the Court found it conceivable that a political sub-unit can unilaterally declare independence from the existing central state, albeit unlawfully, while ultimately achieving international recognition of its borders, assuming it can effectively assume control of its territory.

Whether a province actually succeeds in becoming an independent state through extra-legal means is, of course, a separate issue. Historically, the success rate for unilateral declarations of independence has been extremely low.¹⁶⁹ This is largely because secessionists that unilaterally withdraw from the larger state have little choice but to engage in warfare with the larger state to determine which side wins control of the contested, seceding territory.

b) Unilateral Declaration of Independence: Private Guerilla Warfare

In addressing the problem of potential war resulting from an unlawful, unilateral declaration of independence by secessionist forces, Austro-libertarian scholar Jorg Guido Hulsmann has offered a theory of secession by means of private guerilla warfare as a way for secessionists to overcome the larger military strength of the central state.¹⁷⁰ Hulsmann argues that the maintenance of decentralized militia leadership and strictly contractual relations with the local population in order to gain the population's support, gives secessionist warriors the best chance of freeing themselves from the hegemonic bonds of the larger state.¹⁷¹ He concludes that victory by secessionist forces would depend on how economically efficient they become in mobilizing themselves by using "the three forms

¹⁶⁹ See James Crawford, "State Practice and International Law in Relation to Unilateral Secession." Expert report filed by the Attorney General of Canada, supplement to the case on appeal in the *Quebec Secession Reference* (1997). According to Crawford, only one country since 1945, Bangladesh, has successfully seceded on a unilateral basis.

¹⁷⁰ Jorg Guido Hulsmann. (forthcoming). "Secession and the Production of Defense." In *The Myth of National Defense*, edited by Hans-Hermann Hoppe. Auburn AL: Ludwig von Mises Institute.

¹⁷¹ *Ibid.*, p. 395.

of concentration known from civil business: (1) growth, (2) merger, and (3) joint venture.”¹⁷²

Conclusion

We notice from history and the present day that in most cases where secession is treated as a constitutional right, it is most often subordinated to the immediate political interests of those who are faced with secessionist movements or threats of secession. In rare cases is the constitutional right of secession both recognized and respected by states. From seventeenth century Europe starting with the Dutch secession from Spain until the defeat in 1865 of the Confederacy by Union forces in the American War Between the States, there was widespread recognition and acceptance of the idea of Althusian federative political order, which allowed for a multiplicity and hierarchy of social orders co-existing within the same territorial area. The existence of a coercive, monopolistic state to protect individual liberty was both considered unnecessary and potentially tyrannous. As such, secession as a constitutional right was implied de jure, at least in the United States prior to 1861.

With the lingering centralizing influence left from the French Revolution and the decisive Union victory over the Southern states in 1865, the ideology of political order shifted from Althusian federalism to Hobbesian unitary and centralized Leviathan. Today, the issue of whether the right of secession should be constitutional is determined largely by a Hobbesian conception of political order that requires the existence of nation-states characterized as coercive territorial monopolies. Liberal democracy, as the dominant political paradigm, depends on the structure of the centralized state as the

¹⁷² Ibid., p. 412.

necessary means to carry out its values of egalitarianism and distributive justice. The claim made by liberal democrats is that constitutional democracy is the best method of guarantee universal and equal human rights of individuals and groups, as well as free entry for all in the arena of democratic politics. Since democracy constrained by constitutional constraints is the best available system by which to protect human rights, any individuals within a democratic state that wish to secede from such a state have no moral cause to do so because they already find themselves living in a perfectly or reasonably just society.

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

However, facing this challenge on a theoretical level is a moot point because the political reality today is that secessionist movements do exist, even in liberal democratic states that theoretically should not be spawning such movements. Liberal democrats are forced to deal with the secession in spite of the existence of the “perfectly just” democratic state. They have come down both for and against making a right of secession constitutional, while maintaining their common goal of suppressing or preventing secession. Many of the constitutional rights and procedures for secession that exist in nation-states today are so heavily qualified and limited that the actual implementation of constitutional secession of people and territory is almost certain to fail.

As the ideological competitor to liberal democracy, Austro-libertarianism offers an interpretation of Hobbesian political order that demonstrates the harmful politico-economic consequences of the centralized and coercive democratic state monopoly. This alternative perspective reopens the door for relegitimizing the morality and legality of secession. Secession in the Austro-libertarian conception works to undo the centralized structure of democratic states and reintroduce a more Althusian conception of pluralistic federal governance.¹⁷³

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

¹⁷³ For a full discussion of the various economic, monetary, political and cultural benefits of secession, see Hoppe, *Democracy: The God that Failed*, esp. the chapter on Centralization and Secession, pp. 107-120.

constitutional secession is that de jure secession may not necessarily be a superior strategy to de facto secession.