

FROM CATALONIA TO CALIFORNIA: SECESSION IN CONSTITUTIONAL LAW

Tom Ginsburg & Mila Versteeg

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*Tom Ginsburg & Mila Versteeg**

From Catalonia to Kurdistan, Crimea to California, and Scotland to St. Kitts, secession has become a hotly debated political issue. While secessionist disputes appear to hinge on high power politics, they also have an important constitutional dimension. This Article offers a comprehensive exploration of how the world's constitutions treat secession, and how constitutional secession clauses can affect real-world secessionist disputes. Drawing on an original dataset that captures how the world's constitutions have dealt with secession from 1789 to 2015, we make a number of contributions.

First, we document the various ways in which constitutions have dealt with secession. While the bulk of the literature has been focused on a right to secession, such clauses are exceedingly rare in constitutions today, and most of the countries that constitutionalized such a right have broken up. Instead, where constitutions deal with secession, they tend to prohibit it, either by banning it explicitly or through an implicit prohibition that emphasizes territorial integrity. Other constitutions remain silent on the matter, even when there are live secessionist disputes. We provide a taxonomy of these various approaches and show how they have changed over time.

Second, we provide an analysis of how constitutional design choices about secession can have important real-world consequences. We develop a theory of how different constitutional design choices can affect downstream mobilization for secession. We test this theory empirically by replicating a number of existing studies, to which we add our own new data. Granting a right to secession, we find, is associated with a higher chance of a nation breaking up and makes such breakups less violent. By contrast, a clear and explicit prohibition of secession is associated with lower levels of popular support for secessionist movements, which reduces the odds of a nation's breaking up. Perhaps the worst option is for the constitution to remain silent on secession. Where the constitution is silent on secession, secessionist movements can seize on this ambiguity and garner popular support for the movement. Yet, these movements are surrounded by relatively high levels of violence, since central governments often end up opposing the claim or the country's highest court rules that it is without constitutional basis. We find similar results for implicit prohibitions: they are associated with both increased popular support and increased secessionist violence. Overall, these findings suggest that constitutional ambiguity can be harmful: it allows secessionist movements to garner support, but produces higher levels of violence without improving the chances of success. We further probe these findings by studying two recent high-profile secessionist disputes: Catalonia in Spain and Kurdistan in Iraq, which confirm our findings.

Our findings have important real-world implications for constitutional drafting. As a number of countries are debating various degrees of autonomy for regionally clustered minority groups, our findings suggest that it is important to address the question of secession head-on and that careful constitutional drafting can avoid violence and instability.

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I. INTRODUCTION

Secession is back in style.¹ In the past year alone, referenda on independence were held in Iraqi Kurdistan and Spanish Catalonia, in each case resulting in a majority vote to secede.² In both cases, however, the independence votes were rejected by the central government,³ and as of now, neither effort has been successful. Scottish voters narrowly defeated a referendum on independence in 2014; yet, the Brexit vote (itself initiating a kind of secession from the European Union) has put the issue back on the political agenda.⁴ In the same year, Ukraine suffered the secession of the Crimean Peninsula, while also enduring the de facto separation of the Donbas region in eastern Ukraine.⁵ In 2011, South Sudan became the world's newest nation after it voted to secede from Sudan;⁶ the next-newest nation is Kosovo, which had previously seceded from Serbia.⁷ Secession also continues to be a major issue of political discussion in Myanmar, as the country seeks to conclude peace agreements with ethnic armed groups that have demanded a right to secede.⁸

1. Sanford Levinson, *Introduction: Zombie (or Dinosaur) Constitutionalism? The Revival of Nullification and Secession*, in NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 1, 1 (Sanford Levinson ed., 2016) (“What is important is the grappling with the important issues of nullification (or non-nullification) and secessionism inasmuch as these have become part of discussion not only in the United States but also abroad. . . . [T]he issues have, for better or quite possibly for worse, become less purely academic; they are the continuing subjects of front-page news articles and passionate public discussion.”). For the purpose of this Article, we follow Wood in defining secession as the “formal withdrawal from a central political authority by a member unit.” See John R. Wood, *Secession: A Comparative Analytical Framework*, 14 CAN. J. POL. SCI. 107, 110 (1981).

2. Raphael Minder & Ellen Barry, *Catalonia's Independence Vote Descends into Chaos and Clashes*, N.Y. TIMES (Oct. 1, 2017), <https://www.nytimes.com/2017/10/01/world/europe/catalonia-independence-referendum.html> (“Just after midnight, the Catalan government said that the referendum had been approved by 90 percent of some 2.3 million voters.”); David Zucchino, *After the Vote, Does the Kurdish Dream of Independence Have a Chance?*, N.Y. TIMES (Sept. 30, 2017), <https://www.nytimes.com/2017/09/30/world/middleeast/kurds-iraq-independence.html>.

3. See Minder & Barry, *supra* note 2; Zucchino, *supra* note 2.

4. Steven Erlanger & Alan Cowell, *Scotland Rejects Independence from United Kingdom*, N.Y. TIMES (Sept. 18, 2014), <https://www.nytimes.com/2014/09/19/world/europe/scotland-independence-vote.html>; Elisabeth O’Leary, *Scottish Independence Case Helped by “Brexit Chaos”*: Sturgeon, REUTERS (Oct. 8, 2017), <https://www.reuters.com/article/us-britain-eu-scotland/scottish-independence-case-helped-by-brexit-chaos-sturgeon-idUSKBN1CD0B2>.

5. David M. Herszenhorn, *Crimea Votes to Secede from Ukraine as Russian Troops Keep Watch*, N.Y. TIMES (Mar. 16, 2014), <https://www.nytimes.com/2014/03/17/world/europe/crimea-ukraine-secession-vote-referendum.html>.

6. *South Sudan Referendum: 99% Vote for Independence*, BBC NEWS (Jan. 30, 2011), <http://www.bbc.com/news/world-africa-12317927>; see also Kevin L. Cope, *The Intermestic Constitution: Lessons from the World's Newest Nation*, 53 VA. J. INT’L L. 667 (2012).

7. Douglas Hamilton, *Kosovo Declares Independence from Serbia*, REUTERS (Feb. 16, 2008), <https://www.reuters.com/article/us-kosovo-serbia/kosovo-declares-independence-from-serbia-idUSHAM53437920080217>.

8. Nehginpao Kipgen, *The Continuing Challenges of Myanmar's Peace Process*, DIPLOMAT (June 6, 2017), <https://thediplomat.com/2017/06/the-continuing-challenges-of-myanmars-peace-process/> (“The second session of the 21st Century Panglong Peace Conference started on May 24 and ended on May 29 The conference brought together some 1,400 representatives from the government, the parliament, the military,

Secession is not only an international phenomenon: the issue also occasionally rears its head in the United States. Texas is perhaps most well-known for its secessionist aspirations.⁹ At a political rally in 2009, then-Governor Rick Perry seemed to threaten secession, and a petition to the White House to that effect garnered 125,000 signatures three years later.¹⁰ But Texas is not alone: in May 2014, the Wisconsin Republican Party debated whether to include in its platform a plank asserting the state's right to secede from the Union.¹¹ Longings for secession are not limited to one side of the aisle: many Californians called for leaving the Union after the election of Donald Trump in 2016.¹²

As much as these events appear to hinge on high-power politics, they have an important constitutional dimension. In Spain, the fact that the constitution rejects secession, emphasizing instead the "indissoluble unity" of the country, was an important obstacle to Catalan secessionist ambitions.¹³ The U.S. Constitution, by contrast, is silent on secession, which led seven states to

invited political parties, ethnic armed organizations, and civil society groups. . . . [Secession] has arguably been the most complicated and challenging single issue the country has faced since its independence from Britain in 1948. . . . [T]he word 'secession' has an important historical significance for the country's ethnic minorities. . . . The demand for federalism, which was construed by the Myanmar army as a secessionist movement, was also one fundamental reason why the army led by General Ne Win staged a coup in 1962, thereby dashing the hopes and aspirations of the non-Burman ethnic nationalities. That led the ethnic armed groups to demand, at least in their initial years of formation, complete independence or secession from the Union of Burma.").

9. Tom Dart, *Why Not Texas?: Texas Nationalists Look to the Brexit Vote for Inspiration*, GUARDIAN (June 19, 2016), <https://www.theguardian.com/us-news/2016/jun/19/texas-secession-movement-brexit-eu-referendum>; Amanda Holpuch, *White House Petition for Texas Independence Qualifies for Response*, GUARDIAN (Nov. 13, 2012), <https://www.theguardian.com/world/2012/nov/13/white-house-petition-texas-independence/> ("Less than a week after Barack Obama was re-elected president, a slew of petitions have appeared on the White House's We the People site, asking for states to be granted the right to peacefully withdraw from the union. On Tuesday, all but one of the 33 states listed were far from reaching the 25,000 signature mark needed to get a response from the White House. Texas, however, had gained more than 77,000 online signatures in three days. . . . The Texas petition reads: Given that the state of Texas maintains a balanced budget and is the 15th largest economy in the world, it is practically feasible for Texas to withdraw from the union, and to do so would protect its [sic] citizens' standard of living and re-secure their rights and liberties in accordance with the original ideas and beliefs of our founding fathers which are no longer being reflected by the federal government." (emphasis omitted)).

10. Manny Fernandez, *White House Rejects Petitions to Secede, but Texans Fight On*, N.Y. TIMES (Jan. 15, 2013), <http://www.nytimes.com/2013/01/16/us/politics/texas-secession-movement-unbowed-by-white-house-rejection.html?mtrref=www.google.com&gwh=6C07056122A52D4D28910846A81B00A2&gwt=pay> ("Obama administration officials were reacting to a flurry of secession petitions filed by residents of Texas and other states on a section of the White House Web site. The Texas petition, with 125,746 signatures, declared that withdrawing from the Union was 'practically feasible.'"); Erin Overbey, *Secession Follies*, NEW YORKER (Nov. 14, 2012), <https://www.newyorker.com/books/double-take/secession-follies>.

11. See David Freeland, *Wisconsin's GOP Secession Panic*, DAILY BEAST (May 2, 2014), <https://www.thedailybeast.com/wisconsins-gop-secession-panic>.

12. Olivia Solon, *Silicon Valley Investors Call for California to Secede from the US After Trump Win*, GUARDIAN (Nov. 9, 2016), <https://www.theguardian.com/technology/2016/nov/09/trump-win-california-secede-caexit-silicon-valley>.

13. CONSTITUCIÓN ESPAÑOLA, Dec. 29, 1978, art. 2 (Spain) ("The Constitution is based on the indissoluble unity of the Spanish Nation.").

hold referenda to secede from the union, provoking the Civil War.¹⁴ It was only after the war that the Supreme Court clarified that there was no right to secession under the U.S. Constitution,¹⁵ leading to a reduction in secessionist discourse for a time, although the issue continues to arise on occasion. Similar dynamics have occurred in Canada, where its Supreme Court ended the debate over Quebec's independence in the face of constitutional silence.¹⁶ Other constitutions, such as those of the Soviet Union, Yugoslavia, and Sudan, have explicitly allowed for secession; although, perhaps unsurprisingly, most of these countries have since been dissolved.¹⁷

Whether and how a constitution deals with secession, then, appears to have a real impact on the political prospects for secessionist movements. Despite the potential importance of constitutional law to secessionist disputes, we know little about how the two relate. First, there is not much theory about whether or how constitutional arrangements can dampen or embolden secessionist claims and alter the way that secessionist disputes play out. A host of studies in political science have explored the high-power politics surrounding secession¹⁸ without inquiring into the constitutional framework.¹⁹ By contrast,

14. E.B. LONG, *THE CIVIL WAR DAY BY DAY* 11, 23–25, 27, 29, 31 (2007) (“[On December 17, Monday] . . . [i]n the Baptist church of Columbia, S.C., the state capital, the Convention of the People of South Carolina gathered. . . . That evening a resolution stated ‘That it is the opinion of this Convention that the State of South Carolina should forthwith secede from the Federal Union, known as the United States of America.’ Another resolution called for a committee to draft such an ordinance. The question on secession passed 159 to nothing, and, in effect, South Carolina was out of the Union. . . . [On January 9, Wednesday] . . . [a]t Jackson, Miss., the State Convention voted 84 to 15 to secede. . . . [On January 10, Thursday] . . . [a]t Tallahassee the Florida State Convention passed an ordinance of secession 62 to 7. . . . [On January 11, Friday] . . . [a] fourth state departed from the United States. By vote of 61 to 39 the Alabama State Convention at Montgomery adopted an ordinance of secession, joining South Carolina, Mississippi, and Florida. . . . [On January 19, Saturday] . . . Georgia became the fifth state to depart from the Union as its State Convention at Milledgeville voted 208 to 89 in favor of an ordinance of secession. . . . [On January 26, Saturday] . . . [t]here had been considerable change of feeling in Louisiana after the election of Lincoln and the secession of other Southern states. Now, at Baton Rouge, the Louisiana State Convention voted for an ordinance of secession 113 to 17. . . . [On February 1, Friday] . . . The Convention of the State of Texas voted 166 to 7 in favor of secession. . . . In actual fact the seventh and last of the first group of states to secede had left the Union.”).

15. *Texas v. White*, 74 U.S. 700, 726 (1868); *see also* *Kohlhaas v. State*, 147 P.3d 714, 718 (Alaska 2006) (holding that a referendum on Alaskan secession would be unconstitutional).

16. Reference re Secession of Que., [1998] 2 S.C.R. 217 (Can.); *see also* Ran Hirschl, *Nullification: Three Comparative Notes*, in NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT, *supra* note 1, at 249, 259–64.

17. Some have attributed the breakup to the right to secession. *See* Richard F. Iglar, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, 15 B.C. INT'L & COMP. L. REV. 213 (1992).

18. These include exploration of such topics as the importance of recognition by other states and economic, cultural and political differences between center and periphery. *See, e.g.*, PHILIP G. ROEDER, *WHERE NATION-STATES COME FROM: INSTITUTIONAL CHANGE IN THE AGE OF NATIONALISM* (2007); JASON SORENS, *SECESSIONISM: IDENTITY, INTEREST, AND STRATEGY* 54 (2012); Bridget Coggins, *Friends in High Places: International Politics and the Emergence of States from Secessionism*, 65 INT'L ORG. 433 (2011).

19. One exception is Sorens's book, which looks at whether there is a right to secession and how that affects secessionist mobilization. However, Sorens's coding of the right is not based on the constitu-

legal scholars (and some philosophers) have focused on constitutional law but have been primarily concerned with the right to secession only.²⁰ As a result, there has been a dearth of theory on how different constitutional design choices affect secessionist disputes.²¹ Second, there has been little systematic analysis of whether and how the world's constitutions actually deal with secession.²² Even a cursory glance at the world's constitutions reveals that a right to secession is only one of a number of possible ways in which a constitution can deal with secession, and not a particularly common one.²³ Indeed, we show that there is a range of constitutional design choices, each of which have distinct implications for downstream mobilization. Secession is not merely about rights but also implicates questions of constitutional structure and other constitutional provisions.

This Article takes up both of these challenges. We theorize that constitutional arrangements on secession can have a great deal of impact on the prospects of secession. Constitutions that articulate a clear rule on secession send an important signal to secessionist movements. When a constitution explicitly prohibits secession, it is difficult for secessionist movements to gain support for their cause, as they have to overcome the prohibition. This, in turn, reduces the bargaining threats that can be used by subordinate units, while strengthening the central authorities, thereby making breakup less likely. By contrast, when a constitution explicitly allows for secession, by granting a right to secession, we expect the opposite to be true: it becomes easier to mobilize for secession. When local groups can invoke a right to secession, this will ease the trajectory towards independence. Moreover, when the constitution creates a legal avenue to secede, it reduces the need for violence to advance secessionist claims. When the constitution grants a right to secession, then, actual break-up may both be more likely and less violent. We theorize that constitutional silence might be the worst possible option. When a consti-

tion; rather he assumes that when secessionist movements exist, they are allowed. *See* SORENS, *supra* note 18, at 59 n.16. For a more detailed discussion, see *infra* Subpart V.B.

20. *See, e.g.*, ALLEN BUCHANAN, *SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC* (1991); KYLE SCOTT, *FEDERALISM: A NORMATIVE THEORY AND ITS PRACTICAL RELEVANCE* 134–69 (2011) (theorizing on normative and pragmatic grounds that federal systems, in some cases, should recognize a right to secession); *SECESSION, STATE AND LIBERTY* (David Gordon ed., 1998); Daniel Weinstock, *Constitutionalizing the Right to Secede*, 9 J. POL. PHIL. 182, 183–84 (2001).

21. Only few studies take a wider lens and look at the range of constitutional design choices. *See, e.g.*, Vicki C. Jackson, *Secession, Transnational Precedents, and Constitutional Silences*, in *NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT*, *supra* note 1, at 314 (analyzing constitutional silence on secession and suggesting it is the preferred constitutional design choice).

22. An important exception is Rivka Weill, *Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide*, 40 CARDOZO L. REV. 905 (2017). Another exception is Zachary Elkins, *The Logic and Design of a Low-Commitment Constitution (Or, How to Stop Worrying About the Right to Secede)*, in *NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT*, *supra* note 1, at 294. Elkins's study, however, is about the right to secede and not the broader range of constitutional design choices.

23. This is a point emphasized in Weill, *supra* note 22, at 907–08.

tution does not deal with secession head-on, secessionist groups may seize on this ambiguity to make a case for secession and might even be able to gather popular support for their cause. Yet, such movements have a rocky road ahead: where a constitution is silent on secession, it is not clear that the central government sanctions such movements, and if it turns out that it does not, secessionist disputes can burst out in violence. The same logic applies to constitutional prohibitions that are more ambiguous, such as statements of territorial integrity. The lack of constitutional clarity, then, may contribute to instability and violence.

Our main contribution is empirical. We present data that captures how the world's constitutions have dealt with secession from 1781 to the present. While the existing literature has focused almost exclusively on the question of the right to secession, we show that it is just one of four possible constitutional design choices, and a highly unusual one.²⁴ Most constitutions that deal with secession prohibit it: they either ban it explicitly²⁵ or deal with it more implicitly by reaffirming the territorial integrity of the nation.²⁶ Another option is to remain silent, and some countries with active secessionist movements have chosen to do so. In general, however, a growing number of constitutions deal with the issue of secession head-on.²⁷ Overall then, secession is growing in constitutional importance, but the most common constitutional design choice (prohibition) is relatively poorly understood, especially as compared to the right to secession, which has received the bulk of scholarly attention but is almost entirely absent from the world's constitutions today.

We also explore secession clauses' impact. Specifically, we contrast formal constitutional arrangements on secession with data on (1) instances of actual secession, (2) the level of popular support for secessionist movements, and (3) violence surrounding secessionist disputes.²⁸ We do so by replicating three well-known studies in the political science literature, to which we add our own constitutional data on secession.²⁹ While our findings merely represent cross-country correlations and do not allow us to make causal claims, they do pro-

24. See *infra* Table 1.

25. See, e.g., CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, 2009, art. 10, <http://extwprlegs1.fao.org/docs/pdf/mya132824.pdf> (“No part of the territory constituted in the Union such as Regions, States, Union Territories and Self-Administered Areas shall ever secede from the Union.”).

26. See, e.g., CONSTITUCIÓN ESPAÑOLA, Dec. 29, 1978, art. 2 (Spain) (“The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognises and guarantees the right to selfgovernment of the nationalities and regions of which it is composed and the solidarity among them all.”).

27. On the general trend for constitutions to deal with more issues directly, see Mila Versteeg & Emily Zackin, *Constitutions UnEntrenched: Towards an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657 (2016); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHIC. L. REV. 1641 (2014).

28. See *infra* Part V.

29. We replicate three different studies: (1) ROEDER, *supra* note 18; (2) SORENS, *supra* note 18; and (3) Coggins, *supra* note 18.

vide some insights into the plausibility of our theoretical expectations.

Our findings are mostly in line with our theory. Constitutional provisions that prohibit or sanction secession mostly have the intended effect. Prohibiting secession is negatively correlated with both popular support for secession and the actual likelihood of secession. That is, where the constitution prohibits secession, popular support for secession is lower and actual breakups become less likely.³⁰ By contrast, our findings point in the opposite direction when the constitution explicitly allows for secession. A right to secession is associated with increased odds of actual secession, and such breakups are less likely to be surrounded by violence. Finally, when the constitution is ambiguous on secession, we find evidence of instability and violence. More specifically, constitutional ambiguity is associated with higher levels of secessionist violence without improving the chances of actual breakups. We also find that secessionist movements enjoy higher levels of popular support where there is constitutional ambiguity as opposed to a constitutional prohibition. Our interpretation of these findings is that when a constitution is ambiguous, secessionist movements have a plausible claim that secession might be legal and are therefore able to gather popular support. Yet, this same uncertainty regarding the legal status of the claim can also produce violence, since the central government might end up opposing the movement or the country's highest court might rule that there is no legal basis for such claims. These findings lend support to our hypothesis that, as a matter of constitutional design, it is best to confront the issue of secession head-on.

We further probe these findings by studying two recent high-profile secessionist disputes: Catalonia in Spain and Kurdistan in Iraq. In the fall of 2017, referenda proposing secession produced electoral victories in both cases, but neither case led to successful secession. In one case, the constitution was silent on secession, while in the other it was implicitly prohibited. Both constitutions, then, presented some level of ambiguity, which meant that the constitutional texts had to be interpreted. Both cases showed that constitutional language *does* make a difference. The constitutional ambiguity allowed for mobilization (especially in the Kurdish case where the constitution was silent, while in Catalonia, it was a Constitutional Court decision that triggered mobilization) and was important in the adjudication of secession disputes. Ultimately, neither Kurdistan nor Catalonia were able to secede, but the lack of clear constitutional language prolonged the dispute and caused instability. In the case of Kurdistan, it also caused violence. If the constitutions of these countries had clearly banned secession, it is likely that at least some of these events could have been prevented (and if the constitutions had allowed secession, the world might now have two more independent countries). Careful

30. There is no measurable impact of an explicit prohibition on secessionist violence, presumably because such movements have trouble mobilizing in the first place.

drafting, then, may be more important than adjudication in the end.

Our findings have important real-world implications. Not only is secession a live political issue in places like Catalonia, Scotland, and Kurdistan, but it lies dormant in many more countries. While Catalonia and Scotland may have captured the bulk of media attention in recent years, similar claims have been advanced by groups in the Hijaz in Saudi Arabia,³¹ Cyrenaica in Libya,³² Kabylie in Algeria,³³ the Western Sahara,³⁴ the Katanga in the Democratic Republic of the Congo,³⁵ Bavaria in Germany,³⁶ Tibet,³⁷ Corsica,³⁸ Palestine,³⁹ Biafra in Nigeria,⁴⁰ Bougainville in Papua New Guinea,⁴¹ and Tamil Eelam in Sri Lanka,⁴² just to name a few. Knowing what kind of constitutional arrangements dampen or embolden claims for secession, then, can inform constitutional debates in these countries.

There is another reason why our findings are important for ongoing constitutional debates, which is that many of the countries that face potential secession threats are debating federal arrangements. There is a growing consensus that countries with geographically concentrated ethnic or religious groups may benefit from federal arrangements.⁴³ The core insight here is that grant-

31. MALIK DAHLAN, *THE HIJAZ: THE FIRST ISLAMIC STATE* 18–22 (2018).

32. *Violent Clashes Shake Libya City*, BBC (Mar. 16, 2012), <https://www.bbc.com/news/world-africa-17411134>; *Power Vacuum Threatens Libya*, DEUTSCHE WELLE (Mar. 13, 2014), <https://www.dw.com/en/power-vacuum-threatens-libya/a-17493245>.

33. *Government, Islamists Both Sides of Same Coin*, DEUTSCHE WELLE (July 16, 2012), <https://www.dw.com/en/government-islamists-both-sides-of-same-coin/a-16082987>.

34. Nicolas Niarchos, *Is One of Africa's Oldest Conflicts Finally Nearing Its End?*, NEW YORKER (Dec. 29, 2018), <https://www.newyorker.com/news/news-desk/is-one-of-africas-oldest-conflicts-finally-nearing-its-end>.

35. *Katangese Peoples' Congress v. Zaire*, African Comm'n on Human & Peoples' Rights, 1995 Comm. 75/92, Eighth Annual Activity Report, 1994–95, 31st Session (1995).

36. Philipp Liesenhoff, *Bavaria First: How a Provincial Party Is Tearing Germany and Europe Apart*, WASHINGTON POST (July 11, 2018), <https://www.washingtonpost.com/news/global-opinions/wp/2018/07/11/bavaria-first-how-a-provincial-party-is-tearing-germany-and-europe-apart/>.

37. *Chinese Leader Urges Fresh Push Against 'Separatist Elements' in Tibet*, GUARDIAN (Aug. 27, 2018), <https://www.theguardian.com/world/2018/aug/27/china-tibet-fresh-push-against-separatist-elements-religion>.

38. Adam Nossiter, *Is Corsica the Next Catalonia? Nationalists Are Poised for Election Win*, N.Y. TIMES (Dec. 1, 2017), <https://www.nytimes.com/2017/12/01/world/europe/corsica-catalonia-independence.html>.

39. Ahsan Butt, *Why the Palestinians Should Focus On a One-State Solution*, TRT WORLD (Feb. 27, 2018), <https://www.trtworld.com/opinion/why-the-palestinians-should-focus-on-a-one-state-solution-15528>.

40. Oluwatosin Adeshokan, *Slouching Toward Secession in Nigeria*, FOREIGN POLICY (Feb. 15, 2019), <https://foreignpolicy.com/2019/02/15/slouching-toward-secession-in-nigeria/>.

41. *Votes Loom on the Future of New Caledonia and Bougainville*, ECONOMIST (Apr. 6, 2017), <https://www.economist.com/asia/2017/04/06/votes-loom-on-the-future-of-new-caledonia-and-bougainville>.

42. *Sri Lanka Warns of Tamil Separatist Resurgence*, STRAITS TIMES (May 20, 2018, 12:22 AM), <https://www.straitstimes.com/asia/south-asia/sri-lanka-warns-of-tamil-separatist-resurgence>.

43. See Sujit Choudhry & Nathan Hume, *Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism*, in RESEARCH HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW 356, 363–64 (Rosalind Dixon & Tom Ginsburg eds., 2010).

ing some autonomy to regionally-concentrated groups will limit the central government's ability to govern these groups in a way that they find harmful.⁴⁴ When groups enjoy autonomy over key issues, such as schooling, religious matters, and the ability to speak their own language, they may be less worried about the national government. This, in turn, decreases the stakes over who holds power at the national level, which may reduce violent mobilization at the regional level. Yet, an important fear that surrounds this kind of federalism is that, once a group is granted a certain degree of regional autonomy, this will only strengthen the group's identity and will ultimately produce demands for secession.⁴⁵ This concern has impacted constitutional debates over federalism in a number of countries. For example, in Myanmar, figuring out how to design a federal system that does not exacerbate demands for secession is a key issue in resolving the decades-old conflict in the country.⁴⁶

Our analysis offers some insights into these problems: it shows that federalism and secession are conceptually distinct constitutional issues. There are federal states that explicitly allow for a right to secession, and there are federal states that prohibit it. Federalism, then, does not necessarily imply secession. Especially where secession is explicitly prohibited by the constitution, it becomes hard to advance claims that a right to secession is inherent to a federal system. Thus, when constitution-makers desire to grant some groups regional autonomy but fear that such arrangements will morph into secession, they could consider an arrangement whereby constitutional provisions on federalism are supplemented with a ban on secession.

The remainder of this Article is organized as follows. Part II surveys the existing literature by exploring whether there might be a right to secession under international law and the extent to which such a right is recognized by constitutional systems around the world. In international law, there is currently very little support for a general right to secession, although there may have been more ambiguity about this in the past. The constitutional story is slightly more complicated: a number of constitutional systems have explicitly allowed subnational units to secede. Yet, most of these systems have since been dissolved, and the right is increasingly rare. Indeed, many constitution-makers today seek to foreclose the argument that there might be an inherent right to secession by explicitly banning it.

44. *See id.* at 368.

45. *Id.*; *see also* Kristin M. Bakke & Erik Wibbels, *Diversity, Disparity, and Civil Conflict in Federal States*, 59 *WORLD POL.* 1, 2 (2006) (“[F]ederal institutions reduce the likelihood of armed conflict by providing subnational challengers with institutional channels for voicing their demands.”); Dawn Brancati, *Decentralization: Fueling the Fire or Dampening the Flames of Ethnic Conflict and Secessionism?*, 60 *INT’L ORG.* 651, 651–52 (2006); Ian S. Lustick et al., *Secessionism in Multicultural States: Does Sharing Power Prevent or Encourage It?*, 98 *AM. POL. SCI. REV.* 209, 209–10 (2004).

46. Joe Kumbun, *Secession, Federalism and Decentralization*, *MIZZIMA* (Aug. 1, 2017), <http://www.mizzima.com/news-opinion/secession-federalism-and-decentralization>.

Part III presents global data on how the world's constitutions actually deal with secession and how this has changed over time. It shows that a growing number of constitutions deal with the issue of secession head-on. It further shows that the most common way of dealing with secession is by prohibiting it. Part IV develops our theory on the purpose and effect of constitutional secession clauses. It develops a simple bargaining model to explain why prohibitions are more likely to receive constitutional status than is a right to secession. It uses insights from this model to develop hypotheses on whether and how constitutional secession clauses might further mobilization for secession. Part V presents our empirical findings from our quantitative analysis, while Part VI illustrates the theory through the study of two high-profile secessionist disputes: in Catalonia and Kurdistan. Part VII concludes.

II. IS THERE A RIGHT TO SECESSION?

Whether or not substate entities should have a “right” to secede from a larger entity is an old question in constitutional theory. It is this idea that has emboldened some groups to stake their claims for independence and has contributed to the increasing number of states over time.⁴⁷ It has further made some central governments particularly wary of federal arrangements and has led a growing number of constitution-makers to explicitly ban secession. It is also the reason why the bulk of scholarship has focused on the right to secession rather than on the broader set of possible constitutional arrangements that can impact secession. In this Part, we will summarize the key insights on whether there exists a right to secession in international law and constitutional law.

A. International Law

In international law, discussions of the legality of secession draw on the right of “peoples” to exercise self-determination, as found in the very first articles of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR).⁴⁸ This right is also mentioned in the United Nations Charter, which states that “[t]he [p]urposes of the United Nations are . . . [t]o de-

47. *Cf.* ALBERTO ALESINA & ENRICO SPOLAORE, *THE SIZE OF NATIONS 175–201* (2003) (explaining how improved security and lower trade barriers have led to an increase in the number of states over time).

48. International Covenant on Civil and Political Rights, art. 1, Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3 (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

velop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”⁴⁹

At the time these documents were adopted, there was substantial confusion over what the clauses would entail.⁵⁰ While the concept of self-determination dates back at least to the French Revolution, it was clear that in the twentieth century it was a response to colonialism and meant that countries had a right to be free from their colonial powers.⁵¹ This approach was confirmed in the 1960 Declaration on Colonial Countries of the UN General Assembly.⁵² But it was less clear whether self-determination also entailed a right of peoples within those countries to become independent. With time, it became apparent that existing states had no appetite to extend the right in such a manner.⁵³ Subsequent international declarations narrowed the scope of the broad statements in the ICCPR, ICESCR, and the United Nations Charter. In particular, the 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations* made clear that the right to self-determination meant a right to be free from external interference by foreign states, but not a right of all peoples to secede.⁵⁴ Thus, the right to self-determination became a right to “upgrade[] former . . . delimitations, established during the colonial period, to international frontiers,”⁵⁵ but not a right of people within these frontiers to declare independence. The idea that settled borders were not to be reorganized is a principle known as *uti possedetis*.⁵⁶ Self-determination was held to be an “internal” right, exercised within a country’s borders, rather than a right to external independence.⁵⁷

While it is now well-accepted that there is no right to external self-determination under international law, and thus no general right to secession, some have suggested that there might be a narrow exception to this rule, re-

49. U.N. Charter art. 1, ¶ 2.

50. Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT’L L. 1, 39–41 (1998).

51. Tanisha Fazal & Ryan Griffiths, *A State of One’s Own: The Rise in Secession Since World War II*, 15 BROWN J. INT’L AFF. 199, 201 (2008) (documenting increase in secession).

52. G.A. Res. 1541 (XV), at 29 (Dec. 15, 1960).

53. Orentlicher, *supra* note 50, at 42.

54. G.A. Res. 2625 (XXV), at 123 (Oct. 24, 1970) (“By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.” (emphasis omitted)).

55. Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, ¶ 23 (Dec. 22); *see also* Orentlicher, *supra* note 50, at 42.

56. Orentlicher, *supra* note 50, at 42.

57. *See generally* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 5–7 (1995) (summarizing the history and doctrine of self-determination).

served for the most extreme circumstances of severe oppression.⁵⁸ In 2008, Kosovo unilaterally declared independence from Serbia.⁵⁹ Serbia ultimately accepted Kosovo's independence, but only after significant international pressure. The Kosovo case is exceptional because its ethnic Albanian population—when it was still within Serbia—had been systematically persecuted and denied representation in the central government. This culminated in a violent conflict for which secession was the only resolution. The Kosovo case raises the possibility, however, that the right to self-determination may include unilateral secession in cases in which racial or religious minorities are systematically mistreated or denied representation in the national government and for which there is no peaceful solution available.⁶⁰ The Canadian Supreme Court, when dealing with the question as to whether Quebec had a right to secede from Canada, hinted at the same possibility without definitively finding that severe oppression generates a right to secession.⁶¹ It found that it did not need to reach the question because it found that the Quebecois did not meet the threshold of oppression in any case.⁶²

The argument that there might be a unilateral right to self-determination in exceptional cases was considered by the International Court of Justice after Kosovo's Declaration of Independence in 2008. The General Assembly requested an Advisory Opinion of the Court, which was delivered in 2010.⁶³ In an opinion that was not particularly bold, the Court found that international law did not prohibit unilateral secession, yet it declined to hold on whether or not there was a norm of "remedial secession" for oppressed peoples outside the colonial context.⁶⁴

The oppression exception was later invoked by Russian President Vladimir Putin, who cited the Kosovo case in the Crimea conflict.⁶⁵ Few countries, however, have been willing to accept Putin's claim, as there was very little evidence of the kind of systematic oppression that had been found in Kosovo. For now, the possible exception to the principle of the territorial integrity of

58. MICHAEL W. DOYLE, *THE QUESTION OF INTERVENTION: JOHN STUART MILL AND THE RESPONSIBILITY TO PROTECT* 86–90 (2016) (reviewing international legal rules).

59. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 1 (July 22) [hereinafter Kosovo Opinion].

60. CASSESSE, *supra* note 57, at 114–15.

61. *See* Reference re Secession of Que., [1998] 2 S.C.R. 217, ¶¶ 131–39 (Can.); *see also* Katangese Peoples' Congress v. Zaire, Communication 75/92, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 6 (Oct. 1995).

62. *Reference re Secession of Que.*, 2 S.C.R. 217, ¶¶ 135–36.

63. *See* Kosovo Opinion, *supra* note 59.

64. *Id.* ¶¶ 83–85.

65. Paul Linden-Retek & Evan Brewer, *Why Crimea Is Not Kosovo, and Why It Matters*, OPEN DEMOCRACY (Mar. 18, 2014), <https://www.opendemocracy.net/od-russia/paul-linden-retek-evan-brewer/crimea-justified-kosovo-ruling-icj-2008-russia-putin> ("In his 18 March speech, Vladimir Putin cited the International Court of Justice 2010 opinion allowing Kosovo to declare independence as justification for Crimean separation.")

states is narrow, and international law generally leaves little room for territorial units to secede unilaterally. The implication is that whether or not secession is allowed for territorial subunits is generally a question of constitutional law, not international law.

B. *Constitutional Law*

In international law, the conceptual link with self-determination has sometimes led secession to be framed in terms of a “right.” In constitutional terms, however, although secession is often framed in terms of a “right,” it is not a right in the conventional sense. It belongs not to individuals but is instead conferred on a group or people that must have an internal structure for collective action in order to exercise the right. In addition, secession is frequently tied to certain conditions, such as failure of the central government to hold up its end of the bargain. In this sense, it shares something in common with the right to resist unjust authority, which is a kind of metaright that is invoked when there have been violations of other obligations.⁶⁶

The right to secession was a major issue for the founders of the U.S. Constitution, who grounded their own break from England in the ancient right of resistance against unjust authority.⁶⁷ While they did not provide a right to secession in the U.S. Constitution, neither did they explicitly prohibit it, and this ambiguity ultimately led to the nullification crisis and the Civil War.⁶⁸ As early as 1798, states were asserting that the Constitution was a compact among independent sovereigns, in which states could judge the constitutionality of federal law and nullify it if in violation.⁶⁹ This “compact theory” was later invoked by John C. Calhoun to be a resource for Southern concerns⁷⁰ and led to a crisis in 1832 when South Carolina mobilized forces to resist en-

66. Tom Ginsburg, Daniel Lansberg-Rodriguez & Mila Versteeg, *When to Overthrow Your Government: The Right to Resist in the World's Constitutions*, 60 UCLA L. REV. 1184, 1193 (2013).

67. THOMAS PAINE, COMMON SENSE 115 (1776).

68. For detailed historical account, see CYNTHIA NICOLETTI, SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS (2017). See also Cynthia Nicoletti, *Did Secession Really Die at Appomattox?: The Strange Case of U.S. v. Jefferson Davis*, 41 U. TOL. L. REV. 587 (2009).

69. *Virginia and Kentucky Resolutions (1798)*, BILL OF RIGHTS INST., <https://billofrightsinstitute.org/founding-documents/primary-source-documents/virginia-and-kentucky-resolutions/> (last visited Mar. 25, 2019) (“The Virginia Resolution, authored by Madison, said that by enacting the Alien and Sedition Acts, Congress was exercising ‘a power not delegated by the Constitution, but on the contrary, expressly and positively forbidden by one of the amendments thereto; a power, which more than any other, ought to produce universal alarm, because it is leveled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right.’ Madison hoped that other states would register their opposition to the Alien and Sedition Acts as beyond the powers given to Congress. The Kentucky Resolutions, authored by Jefferson, went further than Madison’s Virginia Resolution and asserted that states had the power to nullify unconstitutional federal laws. . . . The ideas in the Virginia and Kentucky Resolutions became a precursor to John C. Calhoun’s arguments about the power of states to nullify federal laws.”).

70. *Id.*

forcement of a federal tariff. Opponents of the compact view, such as Daniel Webster, argued that the Constitution was made by a single people of the United States, and that states had to comply with federal law. Compact theory, with its emphasis on state sovereignty, was used by advocates of secession leading up to the Civil War.

Southern states were not the only ones to claim a right to secession: an 1814 meeting of New England elites at Hartford also considered the issue but decided against it.⁷¹ Although the federal courts rejected a unilateral state right to secession in the case of *Texas v. White*,⁷² it occasionally appears in popular discourse, particularly in Texas. Many Americans misunderstand the terms of Texas's accession to the Union (which allow the breakup into four discrete states) as preserving a right of secession.⁷³ Indeed, at a political rally in 2009, then-Governor Rick Perry seemed to threaten secession, and a petition to the White House to that effect garnered 125,000 signatures three years later.⁷⁴ In 2012, a survey showed that 24% of Americans believed that states currently have a right to secede from the Union.⁷⁵

Outside the United States, several countries have included a right to secession in their constitutions. Self-determination and the right to secession were central features of Bolshevik policy after the Russian Revolution and were included in the Declaration of the Rights of the Peoples of Russia.⁷⁶ Indeed, the right was part of Leninist ideology, which emerged around the same time as the idea of self-determination in the early 20th century. The Soviet Union thus included rights to secede for its component republics, and other communist federalist systems, such as Yugoslavia, followed suit. Interestingly, both the Soviet Union and Yugoslavia actually did break up. While the right to secession did not directly contribute to either breakup, it arguably played an important role in making the process peaceful in the case of the Soviet Union.

71. Alison L. LaCroix, *A Singular and Awkward War: The Transatlantic Context of the Hartford Convention*, 6 AM. NINETEENTH CENTURY HIST. 3, 23 (2005).

72. *Texas v. White*, 74 U.S. 700, 732–34 (1869); *see also* Kohlhaas v. State, 147 P.3d 714, 718–20 (Alaska 2006) (holding that a referendum on Alaskan secession would be unconstitutional).

73. *In Texas, 31% Say State Has Right to Secede from U.S., but 75% Opt to Stay*, RASMUSSEN REPORTS (Apr. 17, 2009), http://www.rasmussenreports.com/public_content/politics/general_state_surveys/texas/in_texas_as_31_say_state_has_right_to_secede_from_u_s_but_75_opt_to_stay.

74. *See* Josh Marshall, *Go Rick!*, TALKING POINTS MEMO (Apr. 16, 2009), <http://talkingpointsmemo.com/edblogger/go-rick> (stating that Governor Perry of Texas hinted “that the Stimulus Bill may be such a blow to the constitution that Texas may have to secede from the Union”). *But see* Nate Blakeslee, *Revolutionary Kind*, TEX. MONTHLY (Sept. 2009), <https://www.texasmonthly.com/the-culture/revolutionary-kind/> (explaining that Governor Perry did not show up at the “Secession or Sovereignty” rally at the state capitol); Overbey, *supra* note 10 (“We’ve got a great Union. There’s absolutely no reason to dissolve it. But if Washington continues to thumb their nose at the American people, who knows what might come out of that.”).

75. *24% Say States Have Right to Secede*, RASMUSSEN REPORTS (June 3, 2012), http://www.rasmussenreports.com/public_content/politics/general_politics/may_2012/24_say_states_have_right_to_secede.

76. DEKLARACIJA PRAV NARODOV ROSSII [Declaration of Rights of the People of Russia] (Nov. 15, 1917), <http://base.garant.ru/57791720/>.

Issues such as the boundaries of the new states were less controversial because of the prior federal structure, and the existence of the secession clause may have helped the country to dismember quickly and peacefully. In the case of Yugoslavia, however, the breakup was long and extremely violent.⁷⁷

The Weimar Constitution allowed for secession by public referendum.⁷⁸ Other multiethnic nations, such as Myanmar and Ethiopia, have included rights to secession as ways to induce territorially concentrated minorities to remain loyal to the state. For instance, at the conclusion of Ethiopia's civil war in 1991, the ruling Tigray People's Liberation Front (possibly influenced by Leninist ideology) believed that the Oromo, the largest ethnic group in Ethiopia, would not join the transitional government if not granted a right to secede.⁷⁹ The 1994 Constitution gave every nationality in Ethiopia the right not only to self-determination but to secession by providing for the right of "any Nation, Nationality or People to form its own state."⁸⁰ Yet other elements of Ethiopia's authoritarian system have been sufficient to prevent this from actually occurring and materializing. As in the Soviet Union, national integration has been maintained by political force, rather than law. Myanmar's 1947 Constitution allowed secession after a ten-year period for all the units except for Kachin and Karen states.⁸¹ Maintaining a right to secession became a major demand for minority groups during many decades of civil war thereafter.

In general, however, the right to secession is rare. In addition to the countries mentioned above, the constitutions of France (until 1995), Uzbekistan, Sudan, and St. Kitts and Nevis are the only ones that have included the right. Each of these has a particular local story as to why it was included. The complete list of constitutions with provisions allowing secession is given below.

77. See *Balkans War: A Brief Guide*, BBC NEWS (Mar. 18, 2016), <http://www.bbc.com/news/world-europe-17632399>.

78. DIE VERFASSUNG DES DEUTSCHEN REICHS [CONSTITUTION] Aug. 11, 1919, art. 18 (Ger.).

79. See Alem Habtu, *Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution*, 35 PUBLIUS 313, 322 (2005).

80. BA'ITTYOP'YA FĒDĒRALAWĪ DĪMOKIRASĪYAWĪ RĪPEBİLĪKĪ HĪGE MENIGĪŠITI [CONSTITUTION] Dec. 8, 1994, art. 47(3) (Eth.).

81. THE CONSTITUTION OF THE UNION OF BURMA, Sept. 24, 1947, ch. IX, pt. II, art. 178 (Myan.); *id.* ch. IX, pt. III, art. 181(10); *id.* ch. X, arts. 201–03.

Table 1. *Rights to Secession in National Constitutions*

Country	Year of Constitution	Notes
Ethiopia	1991; 1994	
France	1958 (repealed 1995)	Allowed states to exit the French community ⁸²
Liechtenstein	1921	Communes can secede ⁸³
Myanmar	1947	For all except two states ⁸⁴
St. Kitts & Nevis	1983	Nevis is allowed to secede with supermajority in legislature and referendum ⁸⁵
Sudan	2005	Allowed for secession of South Sudan ⁸⁶
Serbia & Montenegro	2003	Either state, after three years ⁸⁷
USSR	1918; 1924; 1946; 1977	
Uzbekistan	1992	Republic of Karakalpakstan only ⁸⁸
Yugoslavia	1946; 1963; 1974	

Instead of granting a right to secede, it is far more common for constitutions to explicitly ban secession, proclaim the indivisibility of the nation, or provide that the country's territorial integrity may not be compromised.⁸⁹ Such statements might be seen as foreclosing the argument by potential secessionist groups that there might be an inherent right to secession, as proposed under the compact theory. We will discuss these clauses in the next Part.

82. See 1958 CONST. art. 76 (Fr.) (repealed 1995).

83. VERFASSUNG DES FÜRSTENTUMS LIECHTENSTEIN [CONSTITUTION] Oct. 5, 1921, art. 4.

84. THE CONSTITUTION OF THE UNION OF BURMA, Sept. 24, 1947, ch. IX, pt. II, art. 178 (Myan.); *id.* ch. IX, pt. III, art. 181(10); *id.* ch. X, arts. 201–03.

85. CONSTITUTION OF SAINT CHRISTOPHER AND NEVIS, June 23, 1983, art. 113 (St. Kitts & Nevis).

86. ALDUSTUR ALMUAQAT LJUMHURIAT ALSUWDAN [CONSTITUTION] July 6, 2005, art. 219 (Sudan).

87. USTAVNA Povelja Državne Zajednice Srbije i Crne Gore [CONSTITUTIONAL CHARTER OF THE STATE UNION OF SERBIA AND MONTENEGRO] Feb. 4, 2003, art. 60.

88. O'ZBEKISTON RESPUBLIKASI KONSTITUCIJASI [CONSTITUTION] Dec. 8, 1992, art. 74 (Uzb.).

89. See, e.g., CONSTITUTION IMPERIALE D'HAÏTI, May 20, 1805, art. 15 (Haiti) (“indivisible”); see also Weill, *supra* note 22, at 949–52.

III. SECESSION IN THE WORLD'S CONSTITUTIONS: A GLOBAL OVERVIEW

Our Article seeks to provide a comprehensive analysis of whether and how constitutions actually deal with secession.⁹⁰ We undertake this analysis with the help of data from the Comparative Constitutions Project (CCP), which is a major effort to capture the characteristics of all constitutions written since 1781.⁹¹

A. *Constitutional Secession Clauses*

For each constitution, we code a number of different possible approaches to dealing with secession. First, a small number of constitutions explicitly allow for secession. We code this either when secession is unconditionally allowed or when secession is allowed under some circumstances. Conditional secession clauses in almost all cases require the subnational unit to consult the local population through a referendum. For example, the 2003 Constitution of Serbia and Montenegro stated that

[u]pon the expiry of a 3-year period, member states shall have the right to initiate the [procedure] for the change in its state status . . . [i.e., withdrawal] from the state union of Serbia and Montenegro.

The decision on breaking away from the state union of Serbia and Montenegro shall be taken following a referendum.⁹²

We treat both types of provisions as allowing for secession. We also treat the constitution as allowing for secession if this right is granted to a single subnational unit only.

Second, a growing number of constitutions prohibit secession. Here, too, there are some further distinctions to be made. Some constitutions ban secession explicitly, such as the 2008 Constitution of Myanmar, which states that “[n]o part of the territory constituted in the Union such as Regions, States, Union Territories and Self-Administered Areas shall ever secede from the Union.”⁹³ Another example is that, in setting out a system of decentralized autonomous governments, Ecuador’s constitution states quite clearly that “[u]nder no circumstances shall the exercise of autonomy allow for secession

90. This Article is not the first to do this. Zachary Elkins used the same data to look at the prevalence of the right to secession but not the other possible ways in which constitutions deal with secession. See Elkins, *supra* note 22. Rivka Weill presents a global exploration and reaches conclusions complementary to this Article. See Weill, *supra* note 22, at 976–84.

91. *About the CCP*, COMPARATIVE CONSTITUTIONS PROJECT, <http://comparativeconstitutionsproject.org/about-ccp/> (last visited Feb. 21, 2019).

92. USTAVNA POVELJA DRŽAVNE ZAJEDNICE SRBIJE I CRNE GORE [CONSTITUTIONAL CHARTER OF THE STATE UNION OF SERBIA AND MONTENEGRO] Feb. 4, 2003, art. 60.

93. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, art. 10.

from the national territory.”⁹⁴ This is an explicit prohibition.

There are also prohibitions that are less explicit and that leave some ambiguity over whether secession is allowed.⁹⁵ Implicit prohibitions come in different forms. Some constitutions provide for the indivisibility of the nation, such as the 2006 Constitution of Serbia, which states that “[t]he territory of the Republic of Serbia is inseparable and indivisible.”⁹⁶ Likewise, Spain’s prohibition of secession, which we will analyze in the case study in Part VI, is implicit and states that “[t]he Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognises and guarantees the right to selfgovernment of the nationalities and regions of which it is composed and the solidarity among them all.”⁹⁷ In Bolivia, subnational autonomy of indigenous peoples is guaranteed “within the . . . unity of the [s]tate,” a softer way of prohibiting secession.⁹⁸ Another type of implicit prohibition is a provision that requires the national legislature to approve changes to the national territory. One example is the 2008 Constitution of the Maldives, which states that

[a]ny changes to the territory of the Maldives may only be made pursuant to a law [passed] by at least a two-third majority of the total membership of the People’s Majlis. . . . No foreign party, shall own or be given ownership of any part of the territory of the Maldives.⁹⁹

This kind of provision can be used to restrict unilateral territorial changes by a subunit. A third broad design choice is for a constitution to remain silent on the matter. Thus, when a constitution does not take any of the aforementioned approaches, we code it as being silent on secession. Both implicit prohibitions and silence are ambiguous and leave the constitutional status of secessionist claims undecided.

In sum, we code the following categories, which can be ordered from least restrictive towards secession (a right to secession) to most restrictive (an explicit prohibition).

- (1) Constitution allows secession (either conditionally or unconditionally).
- (2) Constitution is silent on secession.
- (3) Constitution bans secession implicitly.

94. CONSTITUCIÓN DE LA REPUBLICA DEL ECUADOR [CONSTITUTION] Oct. 20, 2008, tít. V, ch. 1, art. 238.

95. See Weill, *supra* note 22, 956–58.

96. УСТАВ РЕПУБЛИКЕ СРБИЈЕ [CONSTITUTION] Oct. 29, 2006, art. 8 (Serb.). This Article also includes the cases in which the constitution states that the territory is inalienable, such as the Romanian Constitution of 1991, which states that “[t]he territory of Romania is inalienable.” CONSTITUTIA ROMANIEI [CONSTITUTION] Dec. 8, 1991, art. 3(1) (Rom.).

97. CONSTITUCIÓN ESPAÑOLA, Dec. 29, 1978, art. 2 (Spain).

98. CONSTITUCIÓN POLÍTICA DEL ESTADO, Feb. 7, 2009, art. 2 (Bol.).

99. CONSTITUTION OF THE REPUBLIC OF MALDIVES, Aug. 7, 2008, arts. 3, 251(a).

(4) Constitution bans secession explicitly.

Our data reveals that the most constitutions do not address secession at all. Of course, this reflects the fact that not all countries have potential break-away regions or secessionist movements. When something is not a live issue, it is unlikely to come up in constitutional negotiations. Of the 190 countries in our data in 2014, 127 (or 67%) are silent on secession.¹⁰⁰ To the extent constitutions deal with secession, the most common approach is to ban secession. Today, fifty-seven constitutions (or 30% of all constitutions in force today) ban secession, either implicitly or explicitly (twenty-five include an explicit prohibition and thirty-two an implicit one). As noted above in Table 1, only five constitutions currently in force include a right to secession, which are Ethiopia,¹⁰¹ Liechtenstein,¹⁰² Saint Kitts and Nevis,¹⁰³ Sudan,¹⁰⁴ and Uzbekistan.¹⁰⁵

Figure 1 depicts the prevalence of these different constitutional design choices over time. The dark grey area represents the number of constitutions in force in each year that explicitly allow secession, the light grey area represents the number of constitutions in force in each year that either explicitly or implicitly prohibit secession, and the solid line indicates the total number of constitutions in force in each year. This Figure reveals that the right to secession has always been extremely rare. Instead, it is much more common for constitutions to ban secession or to remain silent. If anything, Figure 1 reveals that there is a trend towards confronting secession head-on with a prohibition. Thus, while the bulk of research and debate has focused on a right to secession, the most common design choice is the opposite: to ban secession.

100. The CCP dataset on this question includes a total of 204 countries, current and past. We lose some countries when the constitution has been suspended or because some constitutions have not yet been coded. For example, Central African Republic is only in our data until 2010 because the CCP database does not yet include coding of the 2010 interim constitution.

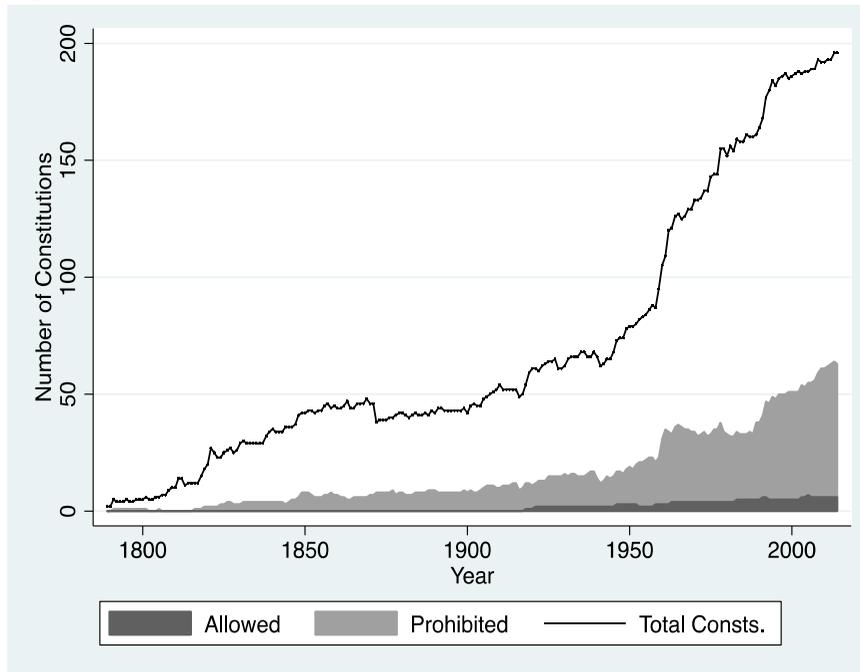
101. BA'ĪTIYOP'ĪYA FĒDĒRALAWĪ DĪMOKIRASĪYAWĪ RĪPEBĪLĪKI HIGE MENIGĪŠITI [CONSTITUTION] Dec. 8, 1994, art. 47(3) (Eth.); *see also* Peter Radan, *Secession in Constitutional Law*, in ASHGATE RESEARCH COMPANION TO SECESSION 333, 333 (Aleksandar Pavković & Peter Radan eds., 2011).

102. VERFASSUNG DES FÜRSTENTUMS LIECHTENSTEIN [CONSTITUTION] Oct. 5, 1921, art. 4.

103. CONSTITUTION OF SAINT CHRISTOPHER AND NEVIS, June 23, 1983, art. 113 (St. Kitts & Nevis).

104. ALDUSTUR ALMUAQAT LJUMHURIAT ALSUWDAN [CONSTITUTION], July 6, 2005, art. 219 (Sudan).

105. O'ZBEKISTON RESPUBLIKASI KONSTITUCIJASI [CONSTITUTION] Dec. 8, 1992, art. 74 (Uzb.).

Figure 1. *Treatment of Secession in Constitutions over Time*

B. *Related Constitutional Design Choices*

Even if drafters decide to include a secession clause, there are subsidiary design decisions that must be made. First, should the right be granted to all or just some subunits?¹⁰⁶ Second, what are the procedures for demanding secession? Relatedly, who must approve the secession decision? Is it only the subunit seeking to secede, or must the entire country vote on a change to the territorial integrity of the state? Typically, secession decision-making will involve, at a minimum, the consent of the population in the subunit, as expressed through a referendum. Once this step is taken, the decision might require approval by the national parliament or some other step. And finally, who resolves disputes about secession? These and other issues can become critical in seeing how secession movements actually play out, whether they enjoy success or failure, and whether the process is peaceful or violent. Because some of these questions are hard to answer from the text of the constitution alone, we will explore them in further depth through our qualitative case studies presented in Part VI.

Besides explicitly prohibiting secession, a constitution can reduce the in-

106. *Id.* (“The Republic of Karakalpakstan shall have the right to secede . . .”).

centives to mobilize around it. One particular variation is to place upon citizens a duty to uphold the unity and territorial integrity of the state. For example, Afghanistan's Constitution states that no individual can "act against independence, territorial integrity, sovereignty as well as national unity."¹⁰⁷ Bhutan's Constitution provides citizens with a duty to "preserve, protect and defend the sovereignty, territorial integrity, security and unity of Bhutan."¹⁰⁸ Requiring citizens to commit to the territorial integrity of the country can mean that anyone who advocates secession might be violating the constitution. This may be in tension with rights to freedom of expression or association. For example, the Bulgarian Constitution of 1991 grants freedom of association, so long as the activities are not "contrary to the country's sovereignty and national integrity, or the unity of the nation."¹⁰⁹ In 2000, Bulgaria's Constitutional Court banned the United Macedonian Organization Linden-Pirin, which advocated that Bulgaria's Pirin region should belong to Macedonia.¹¹⁰

As Professor Weill notes, many constitutions prohibit political parties organized on ethnic or religious lines or that seek to undermine the basic democratic order or existence of the state, and these prohibitions can extend to potential secessionists.¹¹¹ According to data from the Comparative Constitutions Project, fifty-six countries, including Brazil, Bulgaria, France, Germany, and India, have an explicit ban on political parties that threaten the territorial integrity of the state or national unity and sovereignty.¹¹² For example, Bhutan's constitution includes mentions of territorial integrity in the conditions for registering political parties.¹¹³ Presumably this means that a party that was organized around a secessionist platform could not be formed. In many democracies, the ultimate decision about the legality of political parties is made by the constitutional court. Ukraine, for example, has twice banned parties since 1991 on the grounds of advocating secession, among other things.¹¹⁴ While we want to note the importance of such related constitutional design features, we do not study them here. In this Article, we focus on documenting and understanding the constitutional design features most directly relevant to secession: rights to secession and prohibitions of secession.

107. CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, Jan. 26, 2004, art. 59.

108. CONSTITUTION OF THE KINGDOM OF BHUTAN, July 18, 2008, art. 8(1).

109. КОНСТИТУЦИЯ НА РЕПУБЛИКА БЪЛАГАРИЯ [CONSTITUTION] July 13, 1991, art. 44(2) (Bulg.).

110. United Macedonian Organisation Ilinden – Pirin v. Bulgaria, App. No. 59489/00 Eur. Ct. H.R. ¶¶ 21–28 (2005), <http://hudoc.echr.coe.int/eng?i=001-70731> (relating the Bulgarian case).

111. See Weill, *supra* note 22, at 933 (making the point that this is an alternative way for constitutions to prohibit secession).

112. *Id.* at 934–35.

113. CONSTITUTION OF THE KINGDOM OF BHUTAN, July 18, 2008, art. 15.

114. *Ukraine Bans Communist Party for "Promoting Separatism"*, GUARDIAN (Dec. 17, 2015), <https://www.theguardian.com/world/2015/dec/17/ukraine-bans-communist-party-separatism>; see also Weill, *supra* note 22, at 942–43.

IV. THE PURPOSES AND EFFECTS OF CONSTITUTIONAL SECESSION CLAUSES

A. *Negotiating Secession Clauses and Prohibitions*

In order to understand why countries might differ in their constitutional treatment of secession, it is useful to conceive of the constitution as a political bargain concluded by a small set of decision-makers.¹¹⁵ While constitutional theorists have long thought of a constitution as a social contract between the people and their government, recent studies have argued that this perspective does not do justice to the realities of constitution-making.¹¹⁶ Constitutions, in most cases, result from a bargaining process among a small number of elites.¹¹⁷

In our particular context, the bargaining occurs across a territorial “cleavage” of some kind, such as a subnational unit that seeks more autonomy from the central government.¹¹⁸ Relevant decision-makers, then, represent a central government (which we will simply refer to as “the center”) and a periphery, that is, a geographic region within the country with relatively little access to power at the center.¹¹⁹ Sometimes, constitution-making might involve several units coming together to form a new nation (as was the case in the United States); in other cases, it might involve a center trying to keep a nation together by granting some regional autonomy to appease groups that threaten with violence and secession.¹²⁰ In both cases, bargaining among peripheral units might be important.

115. ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 66 (2009) (“Our theory of bargaining begins with a specification of the parties seated at the table. In the real world, constitutions are political bargains that vary widely in their level of inclusion of members of the political community. Many constitutions, particularly those in authoritarian regimes, are crafted by a small set of leaders in the proverbial back room without popular involvement.”); see also Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 247–52 (1997).

116. See, e.g., Tom Ginsburg, *Constitutions as Contract, Constitutions as Charters*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 182, 182 (Denis Galligan & Mila Versteeg eds., 2013); Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364 (1995); Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT’L L. 663 (2006); CONST. WRITING & CONFLICT RESOL., <http://pcwr.princeton.edu> (last visited Mar. 25, 2019).

117. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 97–99 (2004).

118. Ugo M. Amoretti, *Introduction: Federalism and Territorial Cleavages*, in FEDERALISM AND TERRITORIAL CLEAVAGES 1, 1–8 (Ugo M. Amoretti & Nancy Gina Bermeo eds., 2004) (developing concept of territorial cleavage).

119. George Anderson & Sujit Choudhry, *Constitutional Transitions and Territorial Cleavages*, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE 5, 22–24 (2015).

120. Alfred Stepan, *Federalism and Democracy: Beyond the U.S. Model*, 10 J. DEMOCRACY 19, 23 (1999) (“[O]ne may see the formation of democratic federal systems as fitting into a sort of continuum. On one end, closest to the pure model of a largely voluntary bargain, are the relatively autonomous units that ‘come together’ to pool their sovereignty while retaining their individual identities. The United States, Switzerland, and Australia are examples of such states. At the other end of the democratic continuum, we have

We should note that, in many instances, disputes between a center and periphery are not merely territorial but also have an ethnic or religious dimension. That is, regions that demand regional autonomy or secession are often populated by distinct ethnic or religious groups that are a majority within the region but are a minority in the country as a whole. To illustrate, South Sudan is predominantly Christian, while Sudan is predominantly Muslim.¹²¹ As another example, people in Catalonia have a distinct language (Catalan) and cultural traditions that set them apart from Spain.¹²² Such religious and ethnic differences tend to compound territorial cleavages. Of course, territorial cleavages do not always have an ethnic or religious dimension: Californians may have ideological differences with the central government, but there is no major ethnic or religious divide. For ease of exposition, the analysis below simply focuses on the bargaining between a center and periphery and sets aside the added complications of race and religion.

When different groups bargain over a new set of constitutional arrangements, a key issue for negotiation is the degree of autonomy for the periphery, which raises such questions as whether subnational units have autonomy over their own fiscal affairs, can establish their own schooling, or can use their own language and how they will be represented within the central government. At one extreme, the subnational unit may have nearly complete legal and fiscal autonomy over many policy areas. At the other extreme lies a strong unitary state without any autonomy for regions. In between these two extremes lie many possible configurations of territorially distributed power, over which the parties may bargain.¹²³ The bargain is, by definition, multidimensional; that is, it involves multiple issues which are all open for negotiation at the same time.¹²⁴

To conclude a constitutional bargain, all the players must believe they are likely to be better off within the prospective arrangement than outside of it.

India, Belgium, and Spain as examples of ‘holding-together’ federalism. And then there is what I call ‘putting-together’ federalism, a heavily coercive effort by a nondemocratic centralizing power to put together a multinational state, some of the components of which had previously been independent states. The USSR was an example of this type of federalism. Since federal systems have been formed for different reasons and to achieve different goals, it is no surprise that their founders created fundamentally different structures.”)

121. *See Sudan: A Country Divided*, BBC NEWS (Dec. 19, 2013), <http://www.bbc.com/news/world-af-rica-12115013>.

122. Nafees Hamid & Clara Pretus, *How Spain Misunderstood the Catalan Independence Movement*, ATLANTIC (Oct. 1, 2017), <https://www.theatlantic.com/international/archive/2017/10/catalan-referendum-spain-independence/541656/>.

123. ELKINS ET AL., *supra* note 115, at 66–67; *see also* Tom Ginsburg, *Constitutional Design Options for Problems of Enduring Territorial Cleavages*, in CONSTITUTIONAL TRANSITIONS AND TERRITORIAL CLEAVAGES (George Anderson & Sujit Choudhry eds., forthcoming 2019).

124. Arijit Sen, *Multidimensional Bargaining Under Asymmetric Information*, 41 INT’L ECON. REV. 425, 425 (2000).

Furthermore, the arrangement they produce must be “self-enforcing.”¹²⁵ This idea refers to the fact that, in most cases, there are no external enforcers of constitutional bargains,¹²⁶ so compliance must be incentivized within the system. Constitutional arrangements can become self-enforcing when deviating from those arrangements is politically costly, which is the case when other actors who benefit from these arrangements have the ability to resist and punish significant deviations.¹²⁷

During constitutional bargaining over the degree of regional autonomy, one side or the other may raise the issue of secession. Specifically, the negotiations may address whether the constitution should (1) include a right to secession, or alternatively, (2) prohibit secession. Both of these are potentially important rules that might advantage one side of the constitutional bargain. The periphery may wish to demand a right to secession to ease exit in the event that the center encroaches on its power. The center, by contrast, is likely to demand a prohibition of secession to ensure that the powers granted to the region will *not* be used to invoke secession. If neither party can get what it wants, the constitution may end up being silent on the matter of secession, which is a third constitutional design option. A lack of agreement on clear terms might also produce an implicit prohibition—such as a provision on territorial integrity or national unity—that does not address the issue head on. Each of these four options are possible outcomes within the multidimensional bargain over regional cleavages. And each is likely to have different effects on downstream mobilization.

B. *Effects of Secession Clauses and Prohibitions*

To understand how these design options may affect downstream secessionist mobilization, it is useful to recount existing explanations for why social

125. For a discussion of self-enforcing constitutions, see ADAM CHILTON & MILA VERSTEEG, DO CONSTITUTIONAL RIGHTS MATTER? THE ORGANIZATIONAL BASIS OF CONSTITUTIONAL RIGHTS 50–71 (forthcoming 2019).

126. Russell Hardin, *Why a Constitution?*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS, *supra* note 116, at 51, 53 (observing that constitutions are not enforced by a third party); Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1791, 1794 (2009) (observing that constitutional law lacks an “enforcement authority capable of coercing powerful political actors to comply with unpopular decisions” and conceptualizing both international law and constitutional law as “law for states”); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 662 (2011) (noting that constitutions lack “any external constitutional enforcer”).

127. THE FEDERALIST NO. 51 (James Madison) (“In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own”); Rui J.P. de Figueiredo, Jr. & Barry R. Weingast, *Self-Enforcing Federalism*, 21 J. L. ECON. & ORG. 103, 103–04 (2005) (arguing that federal constitutional arrangements can become self-enforcing because subnational units can use constitutional rules to coordinate their action in policing central governments that encroach upon state powers).

movements are able to mobilize for some causes but not others.¹²⁸ The literature has pointed to a number of factors and forces that facilitate mobilization. A first is the existence of a group identity.¹²⁹ When a group is characterized by a distinct identity—for example, ethnic, religious, or linguistic—the ability to appeal to that shared identity makes it easier to mobilize. A second consideration is whether the group has actual grievances.¹³⁰ When there are grievances, especially when held by a group as a whole, members are more willing to incur costs associated with mobilization. Relatedly, a number of studies have drawn attention to the importance of a “rights consciousness,” that is, whether certain claims and entitlements are framed in the language of rights.¹³¹ Where a rights consciousness exists, groups are more likely to mobilize, as people feel they are entitled to certain rights and are willing to incur costs to enforce them. Another factor highlighted by the social mobilization literature is the existence of political opportunity structures; that is, “consistent . . . dimensions of the political environment which either encourage or discourage people from using collective action.”¹³² Examples include economic collapse, sanctions, international pressure, oil booms and busts, or opportunities to raise funding for a cause.

Our key takeaway from the existing literature is that secessionist movements are likely to be highly mobilized. Secessionist movements tend to comprise regionally concentrated ethnic or religious minorities, which tend to share a distinct identity. They are often marginalized by the central government, meaning that they share the kind of grievances that facilitate mobilization. They may further possess a rights consciousness and frame their demands as rights. Considering these characteristics, shared by many secessionist movements, it is perhaps surprising that the constitution would play any role at all in shaping mobilization.

Our view, in contrast, is that constitutions can make a difference by changing the incentives to mobilize. To understand how constitutional ar-

128. See, e.g., JEFF GOODWIN & JAMES M. JASPER, *RETHINKING SOCIAL MOVEMENTS* (2004); MARCO GUIGNI, DOUG McADAM & CHARLES TILLY, *HOW SOCIAL MOVEMENTS MATTER* (1999).

129. JOE FOWERAKER & TODD LANDSMAN, *CITIZENSHIP RIGHTS AND SOCIAL MOVEMENTS: A COMPARATIVE AND STATISTICAL ANALYSIS* 38 (1997) (noting that the social movement literature is characterized by an “obsessive enquiry into the identity of social movements”); see also William N. Eskridge, Jr., *Channeling Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001).

130. See, e.g., David A. Snow, *Grievances, Individual and Mobilizing*, in *THE WILEY-BLACKWELL ENCYCLOPEDIA OF SOCIAL AND POLITICAL MOVEMENTS* (2013).

131. W. McCANN, *RIGHTS AT WORK* 5 (1994); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 131 (2d ed. 1974); Sally Engle Merry, *Rights Talk and the Experience of Law: Implementing Women’s Human Rights to Protection from Violence*, 25 HUM. RTS. Q. 343, 345 (2003); Neal Milner, *The Right to Refuse Treatment: Four Case Studies of Legal Mobilization*, 21 LAW & SOC’Y REV. 447 (1987).

132. SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS, COLLECTIVE ACTION AND POLITICS* 18 (1994); see also Doug McAdam, *Political Opportunities: Conceptual Origins, Current Problems, Future Directions*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS* 23, 24 (McAdam et al. eds., 1996).

rangements might affect mobilization, it is useful to think of constitutional provisions as “focal points” that allow actors to coordinate their actions. This idea draws on the work of scholars such as Professor Ordeshook and Professor Weingast, who have argued that constitutional rules serve as focal points, which allow citizens to coordinate their actions when a government violates the rules.¹³³ Without clear rules, citizens might not agree on whether a government has overstepped its powers and what can be done about it. By defining what is a transgression and providing certain avenues of recourse, constitutions help people to coordinate their behavior and to punish their government for such transgressions.¹³⁴

Focal points work not only for citizens but for government bodies as well. In the context of a federal system, a constitution not only provides focal points that help define transgressions of power by the central government but also by subnational units. When subnational units have been granted an enumerated set of powers (as is the case in most countries) and then engage in activities outside of these powers, it is easy for the central government to retaliate, as it is clear that the subnational unit overstepped its powers.

In the next Subpart, we elaborate on each of the various different approaches to secession: an explicit right, an explicit or implicit prohibition, or silence. For each of these we examine the motives to adopt the clause, as well as the likely downstream effects on mobilization, recognizing of course that the two are related.

C. Design Options of Secession Clauses and Prohibitions

1. Right to Secession

Let us first examine the considerations in bargaining over a right to secession. It is easy to understand why a territorial subunit would demand such a right from the center. From its perspective, secession provisions can make the constitution self-enforcing, in that deviations can be punished through exit. If the center violates the terms of the bargain, such as encroaching on powers granted to the subunit, the subunit will leave. The right to secession, then, is a “remedial right” that can be invoked by subunits to remedy transgressions on the part of the central government.¹³⁵ Knowing that the subunit can leave, the center is more likely to keep its promises to the subunit. A right to secession

133. See, e.g., Peter Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137 (1992); Weingast, *supra* note 115, at 246; Yan Chen & Peter Ordeshook, *Constitutional Secession Clauses*, 5 CONST. POL. ECON. 45 (1995).

134. Barry Weingast & Sonia Mittal, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century*, 29 J.L. ECON. & ORG. 278, 280, 283 (2013).

135. See BUCHANAN, *supra* note 20, at 154.

thus facilitates “precommitment” on the part of the center, meaning that it ensures that the center will uphold its promises.¹³⁶

While it is easy to see why the periphery would demand a right to secession, it is harder to see why the center would grant it. As Professor Sunstein observed nearly three decades ago, a right to secession might trigger strategic behavior on the part of the subunit.¹³⁷ Armed with the ability to threaten to leave, a subunit might invoke the right frequently in order to renegotiate the bargain to its own advantage.¹³⁸ Even if the center is precommitted to upholding the bargain, the subunit might not be. Politicians in the center who anticipate this possibility will be unlikely to grant a right to secession.

These same considerations may also shape the perspective of politicians within the periphery, who are competing with each other for power. We should say at the outset that secession may or may not be the best outcome for the local population, depending on its economic prospects and the external security environment. For example, a secessionist claim makes more sense for wealthy Catalonia located within the (relatively safe) European Union than it does for Chin state in Myanmar, which has no natural resources and is one of the poorest regions in the world.¹³⁹ The calculation on whether secession is beneficial, then, depends on context.

Regardless of such economic calculations, rights to secession change the internal incentives for political mobilization within the subunit. Consider two different types of politicians in the subunit: those in favor of secession and those who are against it. Those against it may recognize that secession, if included in the constitution, will shape subsequent political mobilization in negative ways.¹⁴⁰ The presence of a right to secession will encourage future politicians to use it to mobilize support for secessionist claims, which may distract from other goals. Some local leaders may thus wish to take this option off the table during constitutional bargaining, thereby making a precommitment of their own.

136. See, e.g., JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 37–38 (1998); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 208–09 (Jon Elster & Rune Slagstad eds., 1988).

137. Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 648–49 (1991) (“A right to secede will encourage strategic behavior, that is, efforts to seek benefits or diminish burdens by making threats that are strategically useful and based on power over matters technically unrelated to the particular question at issue. Subunits with economic power might well be able to extract large gains in every decision involving the geographic distribution of benefits and burdens. A constitutional system that recognizes and is prepared to respect the right to secede will find its very existence at issue in every case in which a subunit’s interests are seriously at stake. In practice, that threat could operate as a prohibition on any national decision adverse to the subunit’s interests.”). *But see* SCOTT, *supra* note 20, at 137–41 (arguing for constitutional inclusion of secession as promoting greater deliberation).

138. Sunstein, *supra* note 137, at 648–49.

139. *Chin Groups See No Need for Secession Clause*, KHONUMTHUNG NEWS (Mar. 5, 2017), <https://www.bnionline.net/en/news/chin-state/item/2788-chin-groups-see-no-need-for-secession-clause.html>.

140. See Elster, *supra* note 116, at 373–74.

Local leaders in favor of secession, on the other hand, might wish to seek independence at the time of the constitutional negotiation. But if the subunit is strong enough to secure independence, it may not need to bargain with the center at all. This suggests that a right to secession will only be demanded by politicians in a unit that is too weak to stand on its own at the moment and who think that it will be stronger in the future. Since the center will demand a steep price for including the right, there will be other, more immediate benefits that must be sacrificed in the multidimensional negotiation over the constitution. Securing a right to secede sometime in the future will mean foregoing certain benefits today. Politicians in favor of a right to secession must convince their people that it is worth giving up on other benefits and also convince the center to grant the right. In the end, then, it is not clear that politicians within the subunit will spend a lot of their political capital on demanding a right to secession, especially since the bargain is multidimensional in nature. These considerations help us understand why rights to secession are rare.¹⁴¹

Of course, once the constitution explicitly grants a right to secession, it might become easier for secessionists to mobilize, gain support for their cause, and accomplish actual secession. The right to secession provides a focal point that allows local leaders to agree that the movement's goal is to strive for actual secession (rather than a larger degree of internal autonomy, for example).

What is more, when a right to secession is constitutionalized, secessionist disputes are less likely to be violent. When a center and periphery have laid out procedures for secession, they do not need to resort to violence to get their way, as long as both parties play by the rules. Indeed, it may become difficult for the central government to crack down on secessionist movements, as doing so is clearly unconstitutional. The likely peaceful nature of the potential separation might further increase popular support for the movement.¹⁴² One might thus hypothesize that a constitutional right to secession will increase the likelihood of actual secessions, and that such secessions will be more peaceful ones.

Anecdotal evidence supports these claims. In 1991, Estonia, Lithuania, and Latvia each held referenda asking their populations whether they would like to secede from the Soviet Union shortly before President Mikhail Gorba-

141. One can imagine institutional solutions to this problem. While these are beyond the scope of our present inquiry, it is worth mentioning them in brief. Perhaps the subunit ought to be able to invoke the right of secession but at a high, predesignated price. For example, the subunit might have to pay back the center for its share of accumulated debts. Raising the cost of secession will deter it from "bluffing" in order to extract more from the center. Another mechanism might be a vote on a specific date. If the secession does not gain support, it might disappear from the option set for the future.

142. ERICA CHENOWETH & MARIA J. STEPHAN, *WHY CIVIL RESISTANCE WORKS: THE STRATEGIC LOGIC OF NONVIOLENT CONFLICT* 32–33 (2011).

chev's referendum on whether the USSR should be renewed.¹⁴³ President Gorbachev tried to prevent these secessions by initiating economic sanctions. And while his defiance of the constitution could have erupted into violence, he was soon out of office, and President Boris Yeltsin created the Commonwealth of Independent States to replace the USSR.¹⁴⁴ Arguably, the long-dormant provision allowing secession created an opening for the Baltic states to become independent, leading to the unraveling of the Soviet Union. Within Ukraine, even Crimea voted for independence from the USSR in December 1991.¹⁴⁵ These are examples of how secession clauses might have made breakups both easier and more peaceful.

2. *Prohibition of Secession*

Let us next examine motives in bargaining over a prohibition of secession. If the central government believes that a subunit may be strong enough in the future to make a credible secessionist claim, it might want to foreclose this option by writing a ban into the constitution. Such considerations may be particularly salient when the (multidimensional) constitutional bargain also includes the granting of regional autonomy. Regional autonomy is often believed to strengthen regional identity and embolden secessionist claims.¹⁴⁶ An explicit prohibition of secession can act as a focal point for the central government in resisting such claims.¹⁴⁷ Where there is clarity on the illegality of the secessionist claims, it is easy for the central government to justify cracking down on secessionist movements, which, in turn, makes such mobilization less likely, as local politicians contemplating a push for secession will realize that the odds of succeeding are small. For the central government, then, a prohibition of secession ensures that it has a means to punish regions in which politics takes a secessionist turn. The prohibition allows it to challenge the legality of any secessionist claim and take steps to suppress such movements in the name of the constitution. It is thus easy to see why central governments want to constitutionally ban secession.

143. Francis X. Clines, *Latvia and Estonia Vote for Sovereignty*, N.Y. TIMES (Mar. 4, 1991), <http://www.nytimes.com/1991/03/04/world/latvia-and-estonia-vote-for-sovereignty.html>.

144. Serge Schmemmann, *Soviet Turmoil; Soviets Recognize Baltic Independence, Ending 51-Year Occupation of 3 Nations*, N.Y. TIMES (Sept. 7, 1991), <http://www.nytimes.com/1991/09/07/world/soviet-turmoil-soviets-recognize-baltic-independence-ending-51-year-occupation-3.html?pagewanted=all>; Norman Kempster, *Yeltsin Expects Commonwealth of 10 Republic*, L.A. TIMES (Dec. 17, 1991), http://articles.latimes.com/1991-12-17/news/mn-445_1_soviet-union.

145. SCOTT, *supra* note 20, at 150.

146. Yash Ghai, *Ethnicity and Autonomy: A Framework for Analysis*, in AUTONOMY AND ETHNICITY: NEGOTIATING COMPETING CLAIMS IN MULTI-ETHNIC STATES 1, 14 (Yash Ghai ed., 2000).

147. See generally Tiberiu Dragu & Yonatan Lupu, *Collective Action and Constraints on Repression at the Endgame*, 51 COMP. POL. STUD. 1042 (2018) (describing how government agents use rights as focal points).

From the perspective of the subunit, there are competing considerations. On the one hand, the ban on secession deprives the unit of a potentially powerful tool to render the constitutional bargain self-enforcing. With a ban on secession, it is particularly difficult to threaten to exit in case the center encroaches upon the subunit's powers. On the other hand, in a multidimensional bargaining game there are other issues to consider, and a prohibition of secession may be an acceptable concession to make if it means increased regional autonomy. Bargaining may thus focus on different elements of regional autonomy—such as fiscal powers, areas of legislative competence, or natural resource management—rather than on the secession provision. Considering that the prohibition of secession is likely to be rather important to a central government granting regional autonomy but less important to any subnational units that do not currently have secessionist aspirations, it is perhaps unsurprising that prohibitions are the most common way in which constitutions deal with secession.

If the outcome of the bargain is a prohibition of secession, it becomes more difficult for local politicians to mobilize for secession, especially when the prohibition is explicit. What is more, where movements do mobilize in the face of a prohibition, they are likely to encounter resistance from the government, and the conflict may burst into violence.¹⁴⁸ As Professor Roeder observes, more than half of all the civil wars between 1946 and 2001 were associated with independence movements—that is, movements that were trying to secede.¹⁴⁹ Such prospects for violence might deter potential supporters from joining a secessionist movement in the first place, thus making it harder for such movements to gain broad popular support. Indeed, a recent study by Professors Chenoweth and Stephan on civil resistance shows that where resistance movements resort to violence, they tend to receive less popular support and, ultimately, are less successful in reaching their goals.¹⁵⁰ The same logic may apply to secessionist movements.

3. *Constitutional Ambiguity*

Many constitutions remain silent on secession. One obvious reason why some constitutions do not address secession is that there is no regional cleavage in the first place. While most countries in the world have territory that might possibly form an independent state, some do not—it depends on the

148. Christian Tomuschat, *Secession and Self-Determination*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 23, 26 (Marcelo G. Kohen ed., 2006).

149. ROEDER, *supra* note 18, at 5. He further notes that 82% of the suicide bomb attacks between 1980 and 2001 were associated with independence movements. *Id.*

150. CHENOWETH & STEPHAN, *supra* note 142, at 32–33. However, Professors Chenoweth and Stephan do suggest that secessionist movements are less likely to be successful than other civil resistance movements. *Id.* at 222.

particular geography and the distribution of population groups across it.¹⁵¹ Alternatively, the regional groups may be so weak that they are simply not represented within the constitutional bargaining process, which is another reason why the constitution does not clarify the rules on secession.

In other cases, regional cleavages do exist, and bargaining over federal arrangements does occur; yet, no agreement is reached, and the matter is simply left undecided. Professor Lerner has argued that the deeper the ethnic and religious divides within a society are, the harder it becomes to negotiate specific constitutional arrangements.¹⁵² Instead, the divides result in a “strategic ambiguity,” whereby the different bargaining groups can all imagine their preferred arrangement to be reflected in the constitution.¹⁵³ Constitutional ambiguity over secession in a society with regional cleavages may be an example of such strategic ambiguity. For our purposes, such ambiguity can take the form of silence or an implicit prohibition. From the perspective of constitution makers deadlocked over secession, kicking this decision down the road may be an attractive option, especially when both sides believe that they have a chance at winning the argument in the future. These considerations explain why constitutional ambiguity is relatively common even in countries with live secessionist disputes.

Some have argued that it is best not to bring up secession in a constitution precisely because it might lead to political mobilization.¹⁵⁴ In part, this argument is driven by the fact that the literature has concerned itself almost exclusively with a right to secession. Relative to an explicit right to secede, silence might be attractive, especially when breakup seems undesirable. Our theory, however, points in a different direction, which is that constitutional ambiguity (including constitutional silence) actually produces instability.

When a constitution is silent on secession, local politicians may seize on this ambiguity to make a case for secession. For example, they may set forth a version of compact theory and argue that the right to secede is inherent in the federalist system, as secessionists did in the United States.¹⁵⁵ As long as such an argument has not been foreclosed by a court, regional politicians may believe such a claim to be plausible and dedicate time and resources towards the secessionist movement. Our case study on Kurdistan illustrates this dynamic: as the Iraqi constitution was silent on secession, Kurdish lawyers made the

151. ROEDER, *supra* note 18, at 10 (“From 1901 to 2000, 177 new nation-states were created, and 153 of these new nation-states had been segment-states immediately prior to independence. . .”).

152. HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 39–40 (2011).

153. *Id.* at 44; see also Clark B. Lombardi, *The Constitution as Agreement to Agree: The Social and Political Foundations (and Effects) of the 1971 Egyptian Constitution*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS, *supra* note 116, at 398, 409.

154. Jackson, *supra* note 21, at 326–27.

155. See *supra* notes 69–72 and accompanying text.

case that the possibility of secession was inherent in the constitution.¹⁵⁶ It is for this same reason that movements that seek popular support in the face of constitutional ambiguity might be successful, at least as compared to an explicit prohibition that makes clear that secession will not be tolerated by the central government. Thus, when the constitution is ambiguous, we expect that secessionist movements may be able to mobilize.

Yet, while constitutional ambiguity may not be an obstacle to mobilization, it is likely to make the process of secession more difficult. In particular, while the option of secession is not precluded, the reaction of the central government cannot be easily anticipated. Should the central government decide to suppress the movement, such ambiguity may lead to violence. As already noted, in the United States, the lack of a clear clause about secession generated constitutional confusion and political crises for many decades, eventually leading to the Civil War in the nineteenth century.¹⁵⁷ Most central governments tend to oppose secession, once confronted with the demand. Constitutional silence, then, might be the worst design choice: it allows movements to mobilize and grow strong, only to encounter strong government opposition down the road.

D. The Role of Constitutional Courts

The fact that some constitutions do not themselves resolve the question of whether secession is allowed (either because they remain silent on the issue or because the prohibition is implicit) means that constitutional courts will often be called upon to judge the constitutionality of secessionist claims and to determine the meaning of constitutional silence or an implicit prohibition. Courts, then, are crucial arbiters in secessionist disputes.

It is our (admittedly casual) observation that national courts that are called upon to interpret the constitution on the question of secession typically turn the constitutional silence or ambiguity into an explicit prohibition. This is what the U.S. Supreme Court did in *Texas v. White*, for example.¹⁵⁸ In Canada, the Supreme Court likewise held that Quebec could not unilaterally secede, although it hinted at the possibility that if there were grave violations of rights it might be legal to do so.¹⁵⁹ In Spain, the Constitutional Court has rejected Catalonia's attempt to hold an independence referendum outright, holding that the right to self-determination and mentions of Catalan sovereignty do *not* allow for unilateral secession.¹⁶⁰ Similarly, Iraq's Supreme Court both enjoined

156. See *infra* Subpart VI.B.

157. See *supra* notes 69–72 and accompanying text.

158. 74 U.S. (7 Wall.) 700 (1868).

159. See Reference re Secession of Que., [1998] 2 S.C.R. 217, 221 (Can.).

160. S.T.C., Oct. 27, 2017 (S.T.C. No. 114, p.1) (Spain); Hannah Strange, *Spanish Constitutional Court Suspends Catalan Referendum Law*, TELEGRAPH (Sept. 7, 2017, 6:48 PM), <https://www.telegraph.co.uk/>

and held illegal the Kurdistan independence referendum after the fact.¹⁶¹ The German Constitutional Court, too, ruled out the possibility of secession for Bavaria.¹⁶²

If constitutional courts typically turn constitutional ambiguities into prohibitions, then there is a question as to why ambiguities are ultimately different from an explicit prohibition. The answer is that timing matters. Courts will only be called upon to resolve secessionist claims when there is a live secessionist dispute. This means that at the time that courts resolve the claim, there is already an active and highly mobilized secessionist movement. When the court turns constitutional ambiguity into a prohibition, such movements are unlikely to simply dissolve themselves; instead, they might resort to more radical means to press their claims. We see this logic in action in Catalonia, where the Constitutional Court's decision that turned an implicit prohibition into an explicit prohibition only energized and radicalized the secessionists.¹⁶³ At the same time, a court decision ruling secession unconstitutional allows the government to retaliate against the secessionist movement, possibly further exacerbating the violence of the conflict and alienation felt in the subunit. Had there been a clear constitutional prohibition from the beginning, secessionist movements might have been unable to mobilize in the first place.

The role of constitutional courts in resolving secessionist disputes is not limited to clarifying the meaning of unclear constitutional texts. If a secession process is being undertaken in accordance with an explicit constitutional provision, someone must ensure that the predicate conditions have been met and the process is conducted properly. Supervising a referendum might also require the support of a national electoral commission, and courts can underpin such support.

What is more, in both federal and unitary systems, courts are frequently involved in resolving territorial cleavages. In the course of these disputes, courts may, sometimes inadvertently, affect the incentives of secessionist movements. For example, in the Philippines, the Supreme Court ruled unconstitutional an initial agreement to establish an independent judicial authority in

news/2017/09/07/catalonias-independence-referendum-intolerable-act-disobedience/; see also Angus Berwick, *Catalonia to Pursue Split from Spain Despite Court Block, Mas Says*, REUTERS (Dec. 3, 2015, 5:27 AM), <https://www.reuters.com/article/us-spain-catalonia/catalonia-to-pursue-split-from-spain-despite-court-block-mas-says-idUSKBN0TM19U20151203>.

161. See *infra* notes 262–66 and surrounding text.

162. BVerfG, 2 BvR 349/16, Dec. 16, 2016, http://www.bverfg.de/e/rk20161216_2bvr034916.html; see also Asier Garrido-Munoz, *International Decisions*, 112 AM. J. INT'L L. 80, 85 (2018) (“There is no room for secessionist aspirations of individual states . . . under the Basic Law.” (quoting BVerfG, 2 BvR 349/16, Dec. 16, 2016, http://www.bverfg.de/e/rk20161216_2bvr031416.html)); Adam Taylor, *German Court Shuts Down Hopes for a Breakaway Bavaria*, WASH. POST (Jan. 4, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/01/04/a-german-court-has-shut-down-hopes-for-a-breakaway-bavaria/>.

163. See *infra* Subpart VI.A.

the putative Bangsamoro region.¹⁶⁴ This was viewed by some as hindering an attempt to keep a restive region in the country. Although this proved to be only a minor hiccup in the process of coming to a comprehensive agreement, it suggests that courts can sometimes exacerbate rather than resolve cleavages.

V. MEASURING THE IMPACT OF CONSTITUTIONAL SECESSION CLAUSES

Our various hypotheses suggest that secession clauses can impact secessionist disputes in meaningful ways. In this Part, we will explore whether there is empirical support for these hypotheses. Doing so is not easy. One particular difficulty that we have to face is that secession clauses are not randomly distributed. Certain countries—presumably those subject to viable secessionist threats—will be more likely to address the topic in their constitutions. Such selection issues are tricky for analysts. Just like criminologists have found that cities with more police have more crime, we might find that constitutions that deal with secession are more likely to experience secession.

The key to solving such selection problems is to compare countries that are similar in their secessionist threats but have different constitutional design features. Singling out which countries have secessionist threats is not easy, however, and for the most part, beyond our expertise as legal scholars. Fortunately for us, there is a substantial political science literature that has addressed secession empirically. As a result, it is unnecessary for us to develop brand new empirical strategies. Rather, we replicate existing studies and add our own data to their empirical models.

We should note, however, that the existing studies also have their limitations and that, ultimately, the empirical analyses presented in this Part do not allow us to make causal claims. At best, these analyses allow us to probe the plausibility of our theoretical expectations. Ultimately, it is the combination of theory, statistical analysis, and case studies that informs our claims. But we acknowledge that a large amount of uncertainty surrounds any type of cross-national analysis like ours.

We replicate and expand three separate existing studies. We (1) build on work by Professor Roeder to predict actual secession among countries with segment-states—that is, pre-existing subnational jurisdictions that are at an increased risk of secession.¹⁶⁵ We (2) build on work by Professor Sorens to explore the strength of secessionist movements among countries that have regionally concentrated secessionist movements.¹⁶⁶ Finally, we (3) build on

164. Province of North Cotabato v. Gov't of the Republic of the Phil. Peace Panel on Ancestral Domain, G.R. No. 183591 (S.C., Oct. 14, 2008) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2008/october2008/183591.htm>. See generally Bryony Lau, *The Philippines: Peace Talks and Autonomy in Mindanao*, in CONSTITUTIONAL TRANSITIONS AND TERRITORIAL CLEAVAGES, *supra* note 123, at 189.

165. ROEDER, *supra* note 18.

166. SORENS, *supra* note 18.

work by Professor Coggins to predict levels of violence surrounding secessionist movements in countries that have active secessionist conflict.¹⁶⁷ Each of these empirical projects explore a distinct set of secessionist groups: Professor Roeder studies secessionist movements in segment-states,¹⁶⁸ Professor Sorens looks at ethnopolitical groups that have a regional base,¹⁶⁹ and Professor Coggins looks at those groups that are engaged in an active secessionist conflict.¹⁷⁰ While there may be some overlap in the groups that they study, they use different criteria for which groups they include in their analysis. We build on these three distinct studies to explore (1) how constitutional secession clauses impact the probability of secession in countries with segment-states (replicating Professor Roeder's work); (2) how secession clauses impact the strength of secessionist movements in countries with regionally concentrated secessionist groups (replicating Professor Sorens's work); and (3) how secession clauses impact the level of violence in countries with active secessionist conflicts (relying on Professor Coggins's work). While the following Subparts elaborate the data, methods, and our findings in some detail, we briefly summarize our core findings here so that the nontechnical reader can skip these details.

Let us first discuss the right to secession. We find that countries that constitutionalize a right to secession are more likely to actually experience secession (compared to those who do not allow it). What is more, we find that such breakups are less violent. This finding is in line with our expectation that a right to secession both eases exit and makes such exit more likely. We do not find that a right to secession increases the level of popular support for a secessionist movement. (The effect is positive but not statistically significant.)

By contrast, a prohibition of secession reduces the odds of actual secession (compared to having a right to secession). Additionally, in line with our expectation that it is hard to mobilize in the face of an explicit prohibition, we find that secessionist movements garner less popular support for their cause when the constitution prohibits secession. We also find that movements that *do* proceed in the face of a constitutional prohibition are characterized by more violence. But interestingly, the impact on violence is driven by the implicit prohibitions, not the explicit ones. This suggests that violence is mainly present when there is ambiguity that secessionist movements can seize onto. (We do not find, however, that there is a difference between explicit and implicit prohibitions in terms of level of popular support for the movement.)

Where a constitution is silent on secession, actual secession becomes less likely (compared to having a right to secession). Perhaps more interestingly,

167. Coggins, *supra* note 18.

168. ROEDER, *supra* note 18, at 9–12.

169. SORENS, *supra* note 18, at 5–6.

170. Coggins, *supra* note 18, at 446.

constitutional silence is associated with higher levels of popular support for a secessionist movement than is a prohibition. This is in line with our expectation that, compared with an explicit prohibition, a secessionist claim seems more plausible. Finally, we find that, where constitutions are silent, the level of violence surrounding secessionist disputes increases. This finding suggests that secessionist movements that mobilize in the face of constitutional silence may face repression should the government decide it opposes secession (or should courts turn the constitutional silence into a prohibition).

Table 2. *Summary of Core Findings*

Constitutional Provision	Actual Secession	Effect on Popular Support for Secession	Level of Violence Surrounding Secessionist Movement
Right to Secession	More likely	No effect	Less violence
Explicit Prohibition	Less likely	Less support	No effect
Implicit Prohibition	Less likely	Less support	More violence
Silence	Less likely	More support	More violence

A. *Effect of Secession Clauses on Actual Secession*

To explore whether constitutional secession clauses affect the ultimate success of secessionist movements and affect the likelihood of actual secession, we build on work by Professor Roeder.¹⁷¹ Professor Roeder's prize-winning book *Where Nation-States Come From* explores the conditions under which new nations emerge.¹⁷²

1. *General Rules for the Effect of Secession Clauses on Actual Secession*

Professor Roeder's core thesis is that nation-state projects are far more likely to succeed when they are associated with a "segment-state" that is an existing jurisdiction.¹⁷³ Independence tends to entail the upgrade of an existing jurisdiction to a new country. Such existing jurisdictions are often subnational units in a federation or confederation (which he refers to as "the common-state"), such as Kazakhstan and Ukraine, which used to be segment states within the Soviet Union.¹⁷⁴ Roeder's segmental state thesis explains why

171. See generally ROEDER, *supra* note 18.

172. *Id.* at 5; *Past Winners of the Davis Center Book Prize*, ASEES, <https://www.asees.org/programs/asees-prizes/davis-center-book-prize-political-and-social-studies/past-winners> (last visited Feb. 20, 2019).

173. ROEDER, *supra* note 18, at 10.

174. *Id.*

Kazakhstan and Ukraine were successful (they were segment states), while the project for independence of Turkestan was not (it was not a segment-state).¹⁷⁵ In fact, Professor Roeder observes that 86% of all new nation-states that formed in the twentieth century used to be segment-states and that the rule “no segment-state, no nation-state” is the best predictor of the formation of nation-states.¹⁷⁶

Of course, not all segment-states become nation-states. Professor Roeder explores the conditions under which segment-states are most likely to become nation-states. To that end, he compiles a dataset that captures all segment-states that existed between 1900 and 2001, as well of which of those became independent.¹⁷⁷ Countries without segment-states are not included, and countries with multiple segment-states are included multiple times. (Each observation in the data captures a dyadic relationship between a segment-state and a common-state, and these dyadic relationships are included for all years that they existed.¹⁷⁸)

Professor Roeder’s data and analysis offers us an opportunity to explore whether constitutional secession clauses affect actual secession. Because the dataset only includes countries that have segment-states (and are therefore at risk of secession), this mitigates some concerns about selection problems.

Simply contrasting our constitutional secession data with incidents of actual secession reveals some illuminating patterns. Perhaps most striking, in none of the years where a constitution explicitly banned secession did secession take place in that country. By contrast, Table 3 reveals that the incidence of secession is highest among countries that allow secession. The numbers indicate all the possible dyad-years in which a secession could occur in the Roeder data.

Table 3. *Constitutional Secession Clauses Versus Secession*

	Secession Allowed	Silent	Implicit Prohibition	Explicit Prohibition
No Secession	1602	3916	1897	114
Actual Secession	38	26	14	0
<i>Secession Rate</i>	<i>2.37%</i>	<i>0.66%</i>	<i>0.74%</i>	<i>0.00%</i>

175. *Id.*

176. *Id.*

177. *Id.*

178. In total, his analysis includes 336 dyads. *Id.* at 324. And since each dyad tends to exist for multiple years, his dataset has a total of 13,644 observations. *See id.* Roeder uses two different dependent variables. The first dependent variable captures all secessions of segment-states from the common-state, where by the segment-state itself became an independent nation. *Id.* A secondary dependent variable captures all secessions including those that did not result in independence. *Id.* In our primary analysis, we use the variable that captures the secession that results in the segment becoming an independent nation. However, our results are similar when we use the other dependent variable.

Of course, such a simple comparison does not account for the different factors that affect secession. To more systematically explore how secession clauses might affect the risk of secession, we replicate Professor Roeder's model that explores which segment-states actually secede from the common-state.¹⁷⁹ More specifically, Professor Roeder uses a Cox proportional hazard model that estimates the expected duration until secession takes place.¹⁸⁰

Professor Roeder includes a number of variables in his model, which he justifies at length in his book.¹⁸¹ We only briefly summarize these variables here. First, the model includes two variables that capture regime change or constitutional turmoil in common-state governments. There are two versions of this variable:

- (1) one that captures turmoil in common-states with self-governing segment-states; and
- (2) one that captures turmoil in common-states without self-governing segment-states.¹⁸²

Professor Roeder's hypothesis is that self-governing segment-states might be able to seize on such turmoil to claim independence. The model further includes five variables that capture democratic differences between the common-state government and the segment-state government:

- (3) whether the common-state is anocratic (meaning somewhere between democracy and autocracy), while the segment-state is self-governing;
- (4) whether the common-state is anocratic, but the segment-state is not self-governing;
- (5) whether the common-state is democratic within the metropolitan core but not within the segment-state, and the segment-state is self-governing;
- (6) whether there is democracy within the metropolitan core only, but the segment-state is not self-governing; and
- (7) whether the common-state as a whole is autocratic.¹⁸³

These variables are contrasted with fully inclusive democracy, which is the reference category for comparison.¹⁸⁴ The idea here is that if there is a difference in democracy between the common-state and segment-state, and the

179. Specifically, we replicate his analysis reported in Table 10.3. *See id.* at 329.

180. *Id.* at 324.

181. *Id.* at 324–27.

182. *Id.* at 326.

183. *Id.* Roeder conceptualizes these as an interaction between three institutional factors: the inclusiveness of the common-state; the role of the segment-state population in its government; and empowered leadership within the segment-states. *See id.*

184. *Id.*

segment-state is self-governing, it might be more likely to seek independence. The model further includes two variables on prior statehood:

- (8) prior statehood of the segment-state whereby the segment-state leadership was co-opted by the common-state; and
- (9) prior statehood whereby the former leadership of the segment-state was abolished.¹⁸⁵

Professor Roeder's hypothesis here is that prior statehood will embolden secessionist claims. The model also includes (10) the population balance—that is, the ratio between the populations of the segment-state and metropolitan core¹⁸⁶—and three variables on cultural differences between the segment-state and common-states:

- (11) linguistic and religious difference;
- (12) religious difference only; and
- (13) linguistic difference only.¹⁸⁷

Cultural differences are believed to make secession more likely.

Professor Roeder finds that almost all of these variables increase the likelihood of secession, thus finding support for each of his hypotheses (with a few exceptions, as can be seen in Appendix A). Arguably his most important finding is that exclusion of the subnational entity from democratic politics dramatically increases the risks of secession.¹⁸⁸ He further found that weakness within the common-state government also increased the risk of secession, suggesting that secessionist movements are often able to seize onto opportunities as they arise.¹⁸⁹

In column 1 of the table in Appendix A, we replicate Roeder's analysis.¹⁹⁰ We next add our own variables to Professor Roeder's model. Since we coded secession on an ordinal scale, we first include it as a four-point ordinal variable ranging from zero (secession allowed) to three (secession explicitly prohibited). When adding this variable to Roeder's model, the variable is negative

185. *Id.* at 326–27.

186. *Id.* at 327.

187. *Id.*

188. *Id.* at 328–29 (“A democracy that gave separate political status to segment-state populations[] by excluding them from politics ran roughly triple the risk of secession that led to a new nation-state as a fully inclusive democracy. When this separate political status was further reinforced by separate locally constituted political authority in the segment-state, the risk was about 17 times greater than in a fully inclusive democracy. Anocracies, in the absence of segmental self-governance, were no more likely than exclusionary democracies to experience secession that led to a new nation-state, but the introduction of self-government in the segment-state raised the likelihood over 39 times compared to a fully inclusive democracy.”).

189. *Id.* at 329.

190. There are a few small differences between our replication of Roeder and the results presented in Table 10.3 (p. 329) of his book. Even before adding our own data, the replication data has a slightly smaller number of cases (333 instead of 336). We are not sure what explains these differences. Overall, however, the findings are very similar in terms of significance and size.

and statistically significant, suggesting that a more restrictive approach to secession makes secession less likely.¹⁹¹ More specifically, a one-point increase on our ordinal scale increases the risk of secession by a factor of 2.3. The full results from this exercise are reported in Appendix A (column 2).

We next include our data as a set of binary variables. This approach allows us to better evaluate the impact of each category. (What is more, including an ordinal variable as a predictor variable in our model assumes that the variable is linear, meaning that the differences between the categories are the same, which is not the case.) When we use the right to secession as the reference category to evaluate the impact of the other binary variables, we find that both constitutional silence and the prohibition of secession are negative and statistically significant. More specifically, compared to having a right to secession, countries whose constitutions that are silent are eleven times less likely to experience secession. Compared to a right to secession, countries whose constitutions implicitly prohibit secession are just over eight times less likely to experience secession. We have no estimates for the explicit prohibition because it perfectly predicts secession—that is, none of the countries with an explicit prohibition in our data experienced secession. These results are reported in Appendix A (column 3).¹⁹²

We next combine the implicit and explicit prohibitions into a single variable that captures all types of prohibitions and add this to our model, along with the constitutional-silence variable. The results, reported in column 4 of Appendix A, show that, compared to having a right to secession, constitutions that are silent or prohibit secession are less likely to experience secession.¹⁹³

One potential issue with Professor Roeder's data is that it includes both internal and external segment-states. That is, it both includes regions within a country (such as Crimea in Ukraine, which is an internal segment-state) and overseas territories (such as Algeria and France, where Algeria was an external segment-state). Our theory mainly applies to internal segment-states, as the logic of former colonies is a unique one. We therefore repeat the same analysis as before, but we limit our sample to internal segment-states only. When doing so, we find that our ordinal secession variable is again negative and statistically significant, even though our sample is substantially smaller. The full results can again be found in Appendix A (column 5).

191. We report hazard ratios. A hazard ratio smaller than one means that the effect is negative; a hazard ratio larger than one means that the effect is positive.

192. If we include a binary variable that captures the right to secession and uses all other types of secession clauses as a reference category, the right-to-secession variable is positive and statistically significant. We do not report this specification in Appendix A, but it is available from the authors upon request. Compared to any other constitutional design choices (prohibition or silence), countries that include a right to secede are slightly over seven times more likely to experience actual secession.

193. Constitutions that are silent are eleven times less likely to experience secession; constitutions that prohibit secession are just over eight times less likely to experience secession.

2. *Note: The Ukrainian Exception*

According to our analysis, countries that ban secession explicitly do not experience secession. In recent years, we have seen one high-profile exception to this rule (that is not included in our dataset): Ukraine, which lost Crimea after a unilateral referendum in that part of the country in March 2015, followed by absorption into Russia. The Ukrainian Constitution has two provisions relevant to secession. The first is general and states that “[a]ltering the territory of Ukraine [is] resolved exclusively by an All-Ukrainian referendum.”¹⁹⁴ The second explicitly declares Crimea “an inseparable constituent part of Ukraine,” thus seemingly prohibiting the secession of Crimea.¹⁹⁵ Both provisions seem to indicate that Crimea had no right to unilateral secession but instead would have to seek approval from a national referendum. This implies that the March 2015 local referendum in Crimea was unconstitutional or, at least, had no legal effect. Indeed, it is no coincidence that the (presumably unconstitutional) secession of Crimea happened under the shadow of the gun: it was the force of the Russian army and the threat of an all-out international war that caused Ukraine to stand by while Crimea seceded. Without Russian involvement, however, it is unlikely that the Crimean secession would even have been a viable political option. We therefore believe that Ukraine is an unusual case, with limited relevance to the choice faced by most constitutional designers.

B. Effect of Secession Clauses on Mobilization

We next explore whether constitutional secession clauses affect popular support for secessionist movements. Recall that our hypothesis is that a constitutional ban in particular suppresses support for secessionist movements, as people will be wary to join and support movements that are clearly banned. By contrast, mobilization is unlikely to suppress to the same extent when the constitution is silent.

One prior study documented the extent to which secessionist movements enjoy popular support and explored the predictors of support. This study, by Professor Sorens, creates a new measure of “secessionism,” that is, “a simple ordinal variable that measures quite roughly the support of organizations advocating extensive self-government among a territorially concentrated minority population,”¹⁹⁶ whereby secessionist organizations can be “rebel armies, extrapolitical pressure groups, or, in advanced democracies, political par-

194. KONSTYTUTSIIA UKRAÏNY [CONSTITUTION] June 28, 1996, art. 73 (Ukr.) (emphasis omitted).

195. *Id.* art. 134.

196. SORENS, *supra* note 18, at 54.

ties.”¹⁹⁷ To create this measure, Professor Sorens identifies all of the world’s ethnopolitical groups that have a regional base, and are thus potentially able to make secessionist claims.¹⁹⁸ He identifies 283 groups in the year 2003, 107 of which actually had secessionist organizations. The resulting variable takes the following values:

“4” for groups for which a majority of members appear to support (not necessarily participate in) secessionist organizations, “3” for groups[] for which roughly 25 to 50 percent of members support secessionist organizations, “2” for groups for which roughly 5 to 25 percent of members support secessionist organizations, “1” for groups that have had any secessionist mobilization on the fringes, representing less than 5 percent of the group, and “0” for groups that have not had any evidence of secessionist mobilization at all.¹⁹⁹

Since there is little variation in the level of support for secessionist movements over time, Professor Sorens estimates a simple cross-sectional model suited for an ordinal-dependent variable (known as an ordered-probit model) that has a number of predictors. To test the importance of economic differences between the center and periphery, the model includes

- (1) a variable that captures a group’s economic disadvantage on a variety of dimensions (“economic differentials”),²⁰⁰ both by itself and
- (2) interacted with democracy.²⁰¹

The model also includes the following factors:

- (3) the mineral resource production by the subnational region (logged)²⁰² and
- (4) the population size of the group (also logged).²⁰³

The general idea behind these variables is that where regions are wealthier and more populous, they are more likely to seek secession. Another set of variables concern geography:

197. *Id.*

198. *Id.* at 54–56. Sorens took ethnopolitical groups coded by the Minorities at Risk Project dataset as a starting point but eliminated the groups without a regional base, as they would not be able to mobilize for secession. *Id.* at 55–56. He further removed groups that are regionally concentrated but not in their historic homeland, such as African-Americans in the United States. *Id.* at 56. Also, minority groups that control their states (“dominant minorities”) were removed from the data. *Id.*

199. *Id.* at 55.

200. *Id.* at 57. The variable “takes positive values for worse-off groups, with ‘2’ the maximum and ‘-2’ the minimum, while ‘0’ represents groups roughly equally affluent to other groups in society.” *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

- (5) geographic separation from the mainland (lack of road access to the rest of the country); and
- (6) sea access.²⁰⁴

Both of these are believed to increase secessionism. The model further captures whether groups have

- (7) irredentist potential (meaning that groups want to join a territory that they formerly belonged to); and
- (8) the opportunity of seizing power in the center (as captured by a measure of whether it is the largest ethnic group or the second largest group whereby no group comprises 60% or more of the population).²⁰⁵

Both these variables are hypothesized to decrease secessionism. Finally, the model includes a set of variables that capture grievances by secessionist groups:

- (9) a measure of discrimination of the group;²⁰⁶
- (10) a measure that captures whether the group has lost autonomy in the past;²⁰⁷ and
- (11) whether a group has secessionist kin in another country.²⁰⁸

We should note that Sorens's analysis includes a measure of whether secession is permitted, but one that is very different from our own. Specifically, Professor Sorens codes a country as permitting secession (1) when secessionist movements actually exist in a country or (2) if the country obtains "a perfect score on competitiveness and openness of executive recruitment and on competitiveness and regulation of political participation, variables from the Polity IV dataset."²⁰⁹ We believe that this measure is somewhat problematic. First, we know that in some countries, secessionist movements exist in the face of an explicit constitutional prohibition (for example in Myanmar), and Sorens's approach would assume that secession is allowed in these countries. Second, being democratic does not mean that secession is permitted, as the events surrounding Catalonia's attempted secession demonstrate. Indeed, it turns out that his measure is largely unrelated to our own (the pairwise correlation is 0.03). We therefore do not include Sorens's measure of secession rights in our analysis but add our own constitutional secession variables instead.

204. *Id.* at 58.

205. *Id.*

206. *Id.*

207. *Id.* at 59.

208. *Id.* at 59–60.

209. *Id.* at 190 n.16.

We first replicate Professor Sorens's model and report it in Appendix B (column 1). We next add our own data to Sorens's model and find that constitutional secession clauses do correlate with the level of support for secessionist movements. First, when we add our ordinary-secession variable, it is negative and statistically significant (albeit only at the 10% level), suggesting that a more restrictive approach to secession reduces popular support for a secessionist movement. These findings are reported in Appendix B (column 2).

Next, we add the binary secession variables. Whether these are statistically significant depends on the reference category for interpretation. When we compare prohibitions of all kinds to constitutions that are either silent or allow for secession, the constitutional prohibition variable is negative and statistically significant at the 5% level. Thus, prohibiting secession appears to decrease support for secessionist movements. These results are reported in Appendix B (column 3). Interpreting effect sizes in models with ordinal-dependent variables is not straightforward, as the size of the effect depends on the values of the other variables in the model and differs across different values of the dependent variable. Nonetheless, it appears that the effect of the prohibition is quite substantial. Without a prohibition, and setting all the other variables in the model at their mean values, the probability of the secessionism variable taking the value 0 (meaning there is no secessionist activity at all, even though there are regionally concentrated minority groups) is 48%. Where the constitution adds the prohibition of secession, this probability increases to 70%, an increase of twenty-two percentage points. The probability of the secessionism variable taking the value 1 decreases from 18% to 13%, the probability of it taking the value 2 decreases from 14% to 8%, the probability of it taking the value 3 decreases from 11% to 5%, and the probability of it taking the value 4 decreases from 8% to 2%.

By contrast, when we use constitutional prohibitions as a reference category for interpretation, we find that constitutional silence increases support for secessionist movements. The right to secession is not statistically significant, most likely because the legal avenue for secession reduces the need to build a movement and seek popular support. These results are reported in Appendix B (column 4). The effect of constitutional silence is again quite substantial. Compared to a prohibition (and again setting all the other variables in the model at their mean values), not addressing secession in the constitution decreases the probability of the secessionism variable taking the value 0 (meaning there is no secessionist activity at all, even though there are regionally concentrated minority groups) from 69% to 48%, a change of twenty-one percentage points. Similarly the probability of the secessionism variable taking the value 1 increases from 14% to 18%, the probability of it taking the value 2 increases from 9% to 14%, the probability of it taking the value 3 increases from 5% to 11%, and the probability of it taking the value 4 increases from 3% to 8%.

We should highlight one aspect of our finding that contradicts our theoretical expectation. Specifically, in our analysis, we do not find that there is a statistically significant difference between implicit and explicit prohibitions when it comes to mobilization. This finding hints at the possibility that implicit prohibitions provide greater clarity about the legality of secession than constitutional silence. That is, secessionist movements might interpret the implicit prohibition as a prohibition, while they use constitutional silence to make the case that secession is permitted. On the other hand, we should note that the sample size in this cross-sectional dataset is small, which could also explain this finding.

C. *Effect of Secession Clauses on Secessionist Violence*

A final question is whether constitutional secession clauses affect violence surrounding secessionist conflicts. Our hypothesis is that a right to secession might reduce violence, while constitutional silence or a prohibition might increase it.

We can explore this hypothesis by building on work by Professor Coggins, who has explored state emergence among countries with active secessionist conflicts.²¹⁰ Specifically, Professor Coggins tracks 256 secessionist conflicts, in which “a nationalist group attempt[s] to separate from one state in order to create a newly independent state for its people.”²¹¹ In her data, secessionist movements have the following characteristics:

- (1) it formally declares independence from its home state; (2) it has a national flag (signaling national consciousness); (3) it claims an identifiable territory and population; and (4) its campaign lasts at least one calendar week, has greater than 100 active individuals, and claims greater than 100 square kilometers of territory.²¹²

Professor Coggins tracks movements from the “year that the secessionists formally demand independence,” “the first year of violent conflict over independence,” or “the first year of the data set where either the first or second item above occurred prior.”²¹³ The conflict ends in the year that the movements “formally concede,” “go five years without publicly pursuing independence,” or “reach some resolution, short of or including independence, with their home state.”²¹⁴ In total, Coggins identifies 3,725 conflict years.²¹⁵

One of the variables in Professor Coggins’s dataset captures the level of

210. Coggins, *supra* note 18, at 433.

211. *Id.* at 454.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

violence relating to the secessionist conflict. Coggins creates this variable by pairing her own data with armed-conflict data from Uppsala Conflict Data Program. The variable takes the value 0 when there is no armed conflict, the value 1 when there are “between 25 and 999 battle-related deaths,” and the value 2 when there are “at least 1,000 battle-related deaths . . . in a given year.”²¹⁶

Professor Coggins’s analysis uses secessionist violence data as an explanatory variable and not the dependent variable. As a result, unlike for the Roeder and Sorens models, there is no exact model for us to replicate. Yet, a number of variables in Coggins’s analysis are plausible controls that can explain the level of violence. A first such control captures the linguistic and religious difference between the home-state majority and the secessionist group.²¹⁷ A second control captures whether the secessionist movement comprises a “large, oppressed, and mobilized” minority, which is the case when a secessionist group is found within the Minority at Risk dataset.²¹⁸ It is plausible that both these variables are associated with increased levels of violence surrounding secessionist conflicts, as the stakes of secession are higher for the secessionist groups. A third control captures whether the secessionist group is a colony of the home state.²¹⁹ A fourth variable captures whether the secessionist group is part of an ethnic federation.²²⁰ These are all the country-level controls in Coggins’s analysis. We also include a lagged dependent variable, because the level of violence in one year is likely to predict the level of violence in the next, as well as a linear time trend. We further cluster standard errors at the secessionist conflict level, thus allowing observations relating to the same conflict to be correlated over time.

We first estimate this model with our ordinal secession variable. The variable is positive, suggesting that more restrictive approaches to secession produce more violence. However, its significance falls just outside of conventional levels for statistical significance. These results are reported in Appendix C (column 1).

We next include a set of binary variables, omitting the right to secession as the reference category. The results (reported in Appendix C, column 2)

216. *Id.* at 456.

217. *Id.* at 455 (“If the groups share a language family, the indicator is coded 0; if different, then 1. Religious dissimilarity compares the majority’s religion to the secessionists’. If the two shared a religion, the indicator is coded 0; if different, then 1. The indicators were then summed to create [the variable]. Thus a group coded 2 is linguistically and religiously dissimilar from its home state, a group coded 1 is distinct on one dimension and a group coded 0 shares both language and religion with the majority.” (footnotes omitted)).

218. *Id.* (“These secessionist groups must come from minority communities that number at least 100,000 or constitute 1 percent of their home state’s total population, suffer discrimination due to their minority status, and be politically mobilized to advance or defend the group’s interests.”).

219. *Id.*

220. *Id.* at 456. The coding of ethnic federations relies on Professor Roeder’s coding of segment-states. *See id.*

reveal that, compared to a right to secession, both constitutional silence and the prohibition of secession are statistically significantly associated with more violence surrounding secessionist movements. (By contrast, if we include a binary variable that captures the right to secession and use the other categories as a reference category, it is negative and statistically significant, suggesting that the right to secession decreases the level of violence surrounding secession.²²¹) Let us first explore the size of these effects for constitutional silence. Compared to either a right to secession or a prohibition, being silent on secession decreases the probability of the violence variable taking the value 0 (meaning that there is no secessionist violence) from 78% to 56%, a decrease of twenty-two percentage points. By contrast, the probability of the violence variable taking the value 1 (between twenty-five and 999 battle-related deaths) increases from 21% to 41%. The probability of the violence variable taking the value 2 (at least 1000 battle-related deaths) increases from 0.007 to 0.03. These findings are in line with our theoretical expectations that secessionist claims in the face of constitutional silence may erupt in violence, since movements can seize upon the lack of constitutional clarity to gather popular support for their cause, but it is unclear that the government will allow for these claims to proceed. If the government ends up opposing secessionist claims, there is a large potential for violence.

One question is whether the positive relationship between the prohibition and violence is driven by the implicit or the explicit prohibition. At first glance, the relationship between prohibitions and violence seems somewhat puzzling: if prohibitions reduce mobilization (as we found in the previous Subpart), one would expect that they would also reduce violence, since there is no movement to fight to begin with. Yet, it is possible that the effect is different for the implicit and explicit prohibition. One possibility is that the explicit prohibition drives the effect: when faced with a clear prohibition, movements might not seek to obtain popular support but rather resort to more extreme and violent means to advance their cause, meaning that they might be associated with higher levels of violence. Another possibility is that the implicit prohibition drives the effect: when there is uncertainty over the legality of the movement, the government might want to show a stronger display of force to signal that it will not tolerate the secessionist claims.

To explore how each type of prohibition relates to violence, we add the implicit and the explicit prohibitions as separate variables (along with constitutional silence) and thus use the right to secession as a reference category. The results, reported in Appendix C (column 3), show that the implicit prohibitions are driving the effect on violence. That is, the implicit prohibition variable is associated with a statistically significant increase in secessionist violence,

221. We do not report this specification in the Appendix, but it is available from the authors upon request.

whereas an explicit prohibition is not (although the effect is positive, it is not statistically significant). The size of this effect is, again, quite substantial. Compared to any of the other design options, an implicit prohibition decreases the probability of the violence variable taking the value 0 (meaning that there is no secessionist violence) from 69% to 47%, a decrease of twenty-two percentage points. By contrast, the probability of the violence variable taking the value 1 (between twenty-five and 999 battle-related deaths) increases from 29% to 48%, while the probability of the violence variable taking the value 2 (at least 1000 battle-related deaths) increases from 0.01 to 0.05.

Our best interpretation of these findings is that the potential uncertainty over the status of secessionist claims in the face of implicit prohibition might cause the government to send a strong signal that the movement will not be tolerated. While we acknowledge that cross-sectional analyses of this kind do not allow us to develop a causal story over the mechanisms through which constitutional provisions affect violence, this finding is consistent with both with our theoretical expectations and our overall finding that constitutional ambiguity is associated with violence and instability.

VI. CASE STUDIES: CATALONIA AND KURDISTAN

Our quantitative analysis reveals that constitutional language on secession can, in important ways, affect the level of support for secessionist movements, the level of violence surrounding secessionist movements, and even the odds of actual secession. However, quantitative analyses of this kind leave open important questions on whether real-world cases are consistent with the broad patterns we have uncovered in the data. We therefore supplement our quantitative analysis with case studies. Studying real-world cases allows us to delve deeper into the mechanisms through which constitutional language may affect downstream mobilization.

In this Part, we examine two recent high-profile secessionist disputes: Catalonia in Spain and Kurdistan in Iraq. In the fall of 2017, referenda on secession produced electoral victories in both cases, but neither case led to successful secession. In one case, the constitution was silent on secession, while in the other, secession was implicitly prohibited. We use these cases to explore whether and how the text of the constitution mattered. We ask, for each, whether the constitutional approach affected mobilization for secession, and whether there was secessionist violence as a result.

A. Implicit Prohibition: Catalonia

Catalan nationalism has deep roots, and regional decentralization was one of the forces that gave rise to the Spanish Civil War of 1936–1939. After the victory of General Franco, Catalan identity was repressed during his long dic-

tatorship (1939–1975), during which the state was highly centralized.²²² A clandestine *Assemblea de Catalunya* was organized in 1971 and demanded a statute of autonomy and return to democracy; notably, it did not use the violent and separatist tactics of the Basque group ETA.²²³

With Franco's death in 1975, a new political pact was memorialized in the Spanish Constitution of 1978.²²⁴ This provided a structure that recognized the regional differences in the country, providing for statutes of autonomy for the constituent parts of the country.²²⁵ It did so while emphasizing the “indissoluble unity” of the Spanish nation, which we characterize as an implied prohibition on secession.²²⁶ These Autonomous Communities (*Comunidades Autónomas*) had power over a large and flexible set of competences laid out in the Constitution, representation in the national senate, and the right to establish government organs within the framework of “[s]tatutes of [a]utonomy.”²²⁷ The governments were to be overseen by the Constitutional Court and the central government.²²⁸

The statutes of autonomy were to be drafted by the representatives of the region in the national parliament, approved by popular referendum in the territory concerned, and then passed by the Spanish parliament for the King's signature.²²⁹ Since each statute had to be passed separately by the national government, there was the possibility of asymmetric arrangements, meaning that some regions might have a larger degree of autonomy than others. Catalonia was one of the first regional communities to be recognized in 1979, at which time it adopted its statute of autonomy, which established many institutions of government (including its own police force), broad public policies, and symbols of government (such as a Catalan flag).²³⁰ At the time of drafting, there was relatively little appetite for secession.²³¹

In 2006, the regional government of Catalonia sought to revise its statute

222. See Michael Keating, *Rival Nationalisms in a Plurinational State: Spain, Catalonia, and the Basque Country*, in CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 316, 318–19 (Sujit Choudhry ed., 2008).

223. The ETA (*Euskadi Ta Askatasuna*, “Basque Homeland and Freedom”) advocated creation of an independent state crossing the French–Spanish border. See Keating, *supra* note 222, at 318. It gave up violence in 2011.

224. ANDREA BONIME-BLANC, SPAIN'S TRANSITION TO DEMOCRACY: THE POLITICS OF CONSTITUTION-MAKING 46 (1987).

225. *Id.* at 86–88 (detailing division of powers).

226. CONSTITUCIÓN ESPAÑOLA, Dec. 29, 1978, art. 2 (Spain).

227. *Id.* arts. 143–58.

228. *Id.* art. 153 (a)–(b).

229. *Id.* art. 151 (outlining a fast-track procedure for creating autonomous communities).

230. See Carlos Flores Juberias, *Catalonia's Search for a Place Within Pluralist Spain*, in PRACTICING SELF-GOVERNMENT 235 (Yash Ghai & Sophia Woodman eds., 2013).

231. *Id.*

of autonomy to gain more power.²³² These changes were part of a set of reforms initiated from the regions themselves and drew criticism from some analysts on the ground that they were unilateral.²³³ In Catalonia, specifically, the ruling coalition contained three parties, one of which was a pro-independence faction known as the *Esquerra Republicana de Catalunya* (ERC) that engaged in maximalist demands. Throughout the process, many of its positions were considered to be unconstitutional by the central government as well as by many constitutional lawyers.²³⁴ A complicated negotiation process ensued and led to an extremely complex and detailed Statute of Autonomy, with 223 total articles, up from the previous fifty-eight.²³⁵ Among other things, the preamble of the new statute referred to Catalonia as a “nation” for the first time.

In 2010, a Constitutional Court decision struck down some aspects of the 2006 statute of autonomy.²³⁶ Specifically, it found that the language referring to Catalonia as a “nation” had no legal effect and also struck provisions on language and regional powers over judges.²³⁷ The Court reasoned that the Constitution did not explicitly prohibit the use of the term nation by subnational groups, but it did use the term for Spain as a whole, which meant that Catalonia could not be a nation.²³⁸ The Court further pointed out that the Spanish Constitution protected the “indissoluble unity” of the nation. Thus, the constitution was ambiguous on whether Catalonia could be seen as a nation; it was the Court that clarified that it was not. Interestingly, the Court decision led to mass protests and renewed mobilization for independence.²³⁹ Mobilization was thus encouraged by the ambiguity of the implied prohibition against secession. Specifically, when it became clear that the Court interpreted the ambiguous provision as a prohibition, this triggered widespread mobilization.

In 2014, the Catalan regional government announced that it would hold a referendum on independence.²⁴⁰ The central government asked the Constitu-

232. See generally César Colino, *The Spanish Model of Devolution and Regional Governance: Evolution, Motivations and Effects on Policy Making*, 36 POL'Y & POLITICS 573 (2008); César Colino, *Constitutional Change Without Constitutional Reform: Spanish Federalism and the Revision of Catalonia's Statute of Autonomy*, 39 PUBLIUS 262–88 (2009) [hereinafter Colino, *Constitutional Change*].

233. Colino, *Constitutional Change*, *supra* note 232, at 265 (noting that demands will produce instability by hollowing out central level of government).

234. *Id.* at 270.

235. *Id.* at 274.

236. Margarita Batallas, *El Tribunal Constitucional Dicta Sentencia Sobre el Estatut*, EL PERIÓDICO (June 28, 2010), <https://www.elperiodico.com/es/politica/20100628/el-tribunal-constitucional-dicta-sentencia-sobre-el-estatut-354031>.

237. Krishnadev Calamur, *The Spanish Court Decision That Sparked the Modern Catalan Independence Movement*, ATLANTIC (Oct. 1, 2017), <https://www.theatlantic.com/international/archive/2017/10/catalonia-referendum/541611/>.

238. *Id.*

239. *Id.*

240. *Id.*

tional Court to review the constitutionality, and the Court held that it would be unconstitutional to conduct such a referendum.²⁴¹ The regional government then recharacterized the referendum as a nonbinding consultation and went ahead anyway, asking the public whether Catalonia should seek independence.²⁴² On the date of the vote, the Constitutional Court held that a nonbinding referendum would also be illegal, at which point the regional government rebranded it a “participation exercise.”²⁴³ Turnout was low, but the vote was overwhelmingly in favor of independence.²⁴⁴ Again, the Constitutional Court decisions appeared to have encouraged further secessionist mobilization.

In 2017, the head of the regional government, Carles Puigdemont, announced that he would call a real referendum on Catalan independence. When the regional parliament passed a law to facilitate this, the Spanish Constitutional Court declared it to be unconstitutional.²⁴⁵ The regional government went ahead anyway, and the referendum was held on October 1, 2017, despite efforts of the Spanish police to shut it down. Turnout was low—under 50%—but the voters again overwhelmingly supported independence. On October 27, 2017, the regional parliament then declared independence from Spain.²⁴⁶ This provoked a fierce reaction from Madrid, where the Prime Minister, Mariano Rajoy, invoked Article 155 of the Spanish Constitution, which allows the central government to compel communities to uphold their constitutional obligations, to disband the regional government in late October.²⁴⁷ Puigdemont fled to Belgium to escape a warrant for his arrest.²⁴⁸ Oriol Jun-

241. *See id.*

242. *Non-referendum popular consultation on the political future of Catalonia 2014*, GENERALITAT DE CATALUNYA (Sept. 30, 2014), https://web.archive.org/web/20141006085117/http://www20.gencat.cat/portal/site/consulta/?newLang=en_GB.

243. *Id.*

244. *Catalonia’s Independence Vote: Yes and No*, ECONOMIST (Nov. 10, 2016), <https://www.economist.com/blogs/charlemagne/2014/11/catalonias-independence-vote>.

245. S.T.C., Oct. 17, 2017 (S.T.C. No. 114, p.1) (Spain); Judgement of Constitutionality (Oct. 17, 2017), <https://boe.es/boe/dias/2010/07/16/pdfs/BOE-A-2010-11409.pdf>; *Catalonia: Spain Just Declared Catalan Referendum Law Void*, INDEPENDENT (Oct. 17, 2017), <http://www.independent.co.uk/news/world/europe/catalonia-catalan-independence-referendum-spain-constitutional-court-void-a8004941.html>.

246. *See* Raphael Minder & Patrick Kingsley, *Spain Dismisses Catalonia Government After Region Declares Independence*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/world/europe/spain-catalonia-puigdemont.html>.

247. CONSTITUCIÓN ESPAÑOLA, Dec. 29, 1978, art. 155 (Spain) (“If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, take the measures necessary in order to compel the [Autonomous Community] forcibly to meet said obligations, or in order to protect the above-mentioned general interests.”).

248. Sam Jones, *Catalan Leaders Facing Rebellion Charges Flee to Belgium*, GUARDIAN (Oct. 31, 2017), <https://www.theguardian.com/world/2017/oct/30/spanish-prosecutor-calls-for-rebellion-charges-against-catalan-leaders>.

queras, the former Vice President of the regional government, was jailed for rebellion, along with several other MPs and ministers.²⁴⁹ (Some remain in jail at this writing, and Puigdemont has yet to return.²⁵⁰)

The crisis did not disappear, however. In the December 2017 election, secessionist parties again won a majority of seats. In January, the Catalan regional government tried to reinstate Puigdemont as the regional head of government even though he remained in exile in Belgium.²⁵¹ Meanwhile, in January, the Constitutional Court announced it would consider the constitutionality of Prime Minister Rajoy's actions under Article 155.²⁵²

While this saga is still ongoing, it illustrates the risks of constitutional ambiguity. While we coded this as a case of an implicit prohibition, the provision is quite ambiguous, especially as compared to that of other countries.²⁵³ What is more, in this case, other features of the constitutional scheme provide for a kind of one-way ratchet dynamic in terms of pushing for regional autonomy. Regional leaders exploited ambiguity to push for independence; the Constitutional Court's various decisions shutting down these attempts seemed to encourage rather than discourage mobilization. It has not, however, been a violent movement. As regional leaders outbid each other, they provoked a major constitutional crisis in Spain that has hardened feelings and will not go away anytime soon. A clear prohibition on secession might have limited the most extreme steps taken by these actors. On the other hand, true silence might have led to even more ambiguity and, perhaps, more violent mobilization.

B. *Constitutional Silence: Iraqi Kurdistan*

The Kurds have been described as the world's largest nation without a state.²⁵⁴ After World War I and the collapse of the Ottoman empire, the Kurds were not given their own country, so the Kurdish population spans four different countries: Turkey, Iran, Iraq, and Syria. After the first Gulf War, the U.S.-led coalition established a no-fly zone over northern Iraq, effectively protecting the Kurds in that country from military action by Saddam Hus-

249. Raphael Minder, *Catalonia's Ex-Leaders, Behind Bars, Remain Committed to the Separatist Cause*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/world/europe/catalonia-oriol-junqueras-jail.html>.

250. Stephen Burgen, *Former Catalan Vice-President Tells Trial He Is Political Prisoner*, GUARDIAN (Feb. 14, 2019), <https://www.theguardian.com/world/2019/feb/14/former-catalan-vice-president-oriol-junqueras-tells-trial-he-is-political-prisoner>.

251. *Pro-Independence Parties Agree to Reinstate Puigdemont as President*, CATALAN NEWS (Jan. 10, 2018), <http://www.catalannews.com/politics/item/pro-independence-parties-agree-to-reinstate-puigdemont-as-president>.

252. *Rajoy's Measures Imposed in Catalonia Illegal, Claims Parliament*, CATALAN NEWS (Jan. 9, 2018), <http://www.catalannews.com/politics/item/rajoy-s-measures-imposed-in-catalonia-illegal-claims-parliament>.

253. See *supra* Subpart IV.A.

254. Sarah Leduc, *The Kurds: The World's Largest Stateless Nation*, FRANCE 24 (July 15, 2015), <http://www.france24.com/en/20150730-who-are-kurds-turkey-syria-iraq-pkk-divided>.

sein.²⁵⁵ When Hussein fell, the Kurds played an important and effective role in negotiations over Iraq's constitution and soon thereafter set up the Kurdish Regional Government (KRG).²⁵⁶ With its own militia, it had de facto autonomy on many dimensions.

The constitution of Iraq is silent on secession. Although Article 1 states that “[t]he Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq,”²⁵⁷ there is no reference to the inability of a region to leave, nor is the territory declared to be indivisible. The silence is not accidental: during constitutional negotiations, there was little doubt that Kurds harbored dreams of secession but also little chance that they would be allowed to obtain a clause permitting it explicitly.²⁵⁸ Silence, thus, can be characterized as a result of parties being unable to reach agreement on secession.²⁵⁹

Within Iraq, the KRG never held an official referendum on independence, but a 2005 advisory referendum organized by civil society groups led to a 98% vote in favor.²⁶⁰ The government, led by the President of the KRG, Masoud Barzani, had long threatened to hold an official referendum, and the KRG finally did so after the regional parliament approved it on September 15, 2017.²⁶¹ Observers note that Barzani was motivated to take this bold step by his weakening of local political support against other Kurdish factions.²⁶²

Two days later, the Federal Supreme Court of Iraq ordered that the referendum be suspended until it could rule on complaints it had received about the constitutionality of the plebiscite.²⁶³ The KRG ignored this decision and

255. Gregory Ball, *1991 – Operation Provide Comfort and Northern Watch*, AIR FORCE HISTORICAL SUPPORT DIV. (Sept. 18, 2012), <https://www.afhistory.af.mil/FAQs/Fact-Sheets/Article/458953/operation-provide-comfort-and-northern-watch/>; see S.C. Res. 688, ¶ 8 (Apr. 5, 1991).

256. Jonathan Morrow, *Deconstituting Mesopotamia: Cutting a Deal on the Regionalization of Iraq*, in FRAMING THE STATE IN TIMES OF TRANSITION 563, 578 (Laurel Miller ed., 2010).

257. Article 1, *Dustūr Jumhūriyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005. Article 109 directs the federal authorities to “preserve the unity, integrity, independence, and sovereignty of Iraq and its federal democratic system.” *Id.* art. 109.

258. LARRY DIAMOND, *SQUANDERED VICTORY* 22, 162–64 (2007).

259. See *supra* Subparts III.A & III.B.

260. *98 Percent of the People of South Kurdistan Vote for Independence*, INDYBAY (Feb. 9, 2005), <https://www.indybay.org/newsitems/2005/02/09/17205061.php> (last visited Mar. 7, 2018); Galip Dalay, *Iraqi Kurdish Independence Referendum: The Road Ahead*, AL JAZEERA CENTRE FOR STUDIES (Oct. 24, 2017), <http://studies.aljazeera.net/en/reports/2017/10/iraqi-kurdish-independence-referendum-road-171024102636556.html>.

261. Raya Jalabi, *Iraq's Kurdish Parliament Backs Sept 25 Independence Referendum*, REUTERS (Sept. 15, 2017), <https://www.reuters.com/article/us-mideast-crisis-iraq-kurds/iraqi-kurd-parliament-reconvenes-to-vote-on-independence-referendum-idUSKCN1BQ2AV>.

262. Aslı Bâli, *Independence Referenda Through the Prism of Kurdistan*, BLOG INT'L J. CONST. L. (Dec. 27, 2017) <http://www.icconnectblog.com/2017/12/independence-referenda-through-the-prism-of-kurdistan-icconnect-column/>.

263. Ali Sangar, *Iraq Supreme Court Orders Scheduled Kurdistan Referendum Be Suspended*, KURDISTAN 24 (Sept. 18, 2017), <http://www.kurdistan24.net/en/news/1c31be27-0188-4bfd-8027-13fc6731ee06>.

went ahead anyway.²⁶⁴ As expected, the referendum revealed overwhelming support, over 90%, for independence.²⁶⁵ The reaction on the part of the central government was swift. It immediately banned flights to the region, and in mid-October launched a military operation to retake the contested city of Kirkuk.²⁶⁶ As the government turned to crack down on the Kurds' secessionist ambitions, the dispute took a violent turn, with many deaths reported.²⁶⁷ The conflict also led to the resignation of Barzani, in embarrassment at this failed gambit.²⁶⁸

The Kurdish story is almost a textbook illustration of the strategic problems associated with constitutional silence. As in the “Hawk-Dove” game,²⁶⁹ one side took silence as an opportunity to pursue an aggressive strategy, without fully anticipating the reaction of the other side. Once the KRG announced its referendum, the Iraqi national government had two options: to accept the results and lose a valuable piece of territory, or to respond. It reacted violently—the “Hawk-Hawk” outcome—and because of the national government's superior military strength, it was able to force the Kurds to back down. Not only did the KRG lose face, the Kurds have now squandered any viable chance for secession in the future.

It is worth considering why the KRG thought it could get away with this move, and why it miscalculated the response from the other side. One clue comes from a court case. In November 2017, the Federal Supreme Court of Iraq ruled on the referendum and held it to be unconstitutional and void. The case provides insights into the various arguments and claims.²⁷⁰ The Court had jurisdiction, it said, under Article 93 of the Iraqi constitution, which gives the Court the power to settle disputes between the federal government and the governments of the regions.²⁷¹ The KRG argument relied heavily on in-

264. *Id.*

265. Bethan McKernan, *Kurdistan Referendum Results: 93% of Iraqi Kurds Vote for Independence*, *Say Reports*, INDEPENDENT (Sept. 27, 2017), <https://www.independent.co.uk/news/world/middleeast/kurdistan-referendum-results-vote-yes-iraqi-kurds-independence-iran-syria-a7970241.html>.

266. Martin Chulov, *Kurds Defeated, Displaced and Divided After Iraq Reclaims Oil-Rich Kirkuk*, *GUARDIAN* (Oct. 21, 2017), <https://www.theguardian.com/world/2017/oct/22/kurds-bitter-defeat-iraq-reclaims-kirk-uk>.

267. *See, e.g., Violence as Iraq Tries to Block Kurdish Independence Vote*, *CBS NEWS* (Sept. 19, 2017), <https://www.cbsnews.com/news/iraq-kurdish-independence-referendum-plan-kirkuk-baghdad-legal-challenge/>.

268. Raya Jalabi & Maher Chmaytelli, *Kurdish Leader Barzani Resigns After Independence Vote Backfires*, *REUTERS* (Oct. 29, 2017), <https://www.reuters.com/article/us-mideast-crisis-iraq-kurds-barzani/kurdish-leader-barzani-resigns-after-independence-vote-backfires-idUSKBN1CY0KR>.

269. *See generally* Essam EL-Seidy, *On the Behavior of Strategies in Hawk-Dove Game*, 5 *J. GAME THEORY* 9 (2016).

270. *Kurdish Independence Referendum: Iraq Court Rejects Results*, *DW* (Nov. 6, 2017), <http://www.dw.com/en/kurdish-independence-referendum-iraq-court-rejects-result/a-41256723>.

271. Article 93, *Dustūr Jumhūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005.

ternational law in support of the referendum.²⁷² It argued that Kurdistan met the criteria for statehood laid out in the Montevideo Convention.²⁷³ It already had its own institutions of government, with legislative power, and its own separate military that controlled its external borders. Indeed, it argued that it had been de facto independent, in large part, since 2001, and it invoked the inherent right to self-determination under the United Nations Charter and other international legal instruments.²⁷⁴ The KRG further pointed at the failure of Iraq's central government to live up to its commitments. It cited repeated violations of the constitution by the central government, noting that the center had not accepted the creation of other federal regions, as contemplated by the constitution.²⁷⁵ The KRG characterized the constitution as a compact among separate entities, giving it the right to dissolve the Union in the event of violations.²⁷⁶ In this sense, it read an implicit right to secession into the constitutional bargain. In other words, the KRG read the constitution's silence as including an inherent right to secession. The KRG further noted that regional law was, under Articles 115 and 121(2) of the Iraqi constitution, superior to federal law except in a limited set of areas.²⁷⁷ Because there was no exclusive right of the federal government to hold a referendum, the regional government asserted it had the right to hold one under its own regional legislation.²⁷⁸ Overall, then, the KRG believed that, notwithstanding the constitution's silence, it had a strong legal argument for secession, which appears to be why it decided to push the claim.

All the different arguments put forth by the KRG failed, and it ended up being worse off than it had been before the referendum: the central government reasserted control over external borders and customs.²⁷⁹ The Kurdish story, much like that of Catalonia, was one of failed gambit in the face of unclear constitutional language—in this case, silence. No doubt the particular negotiations of the 2005 Iraqi constitution could not realistically have included a right to secession; the fact that there was no prohibition was likely a result of Kurdish negotiating positions. But this strategic vagueness came with a cost,

272. KURDISTAN REG'L GOV'T, THE CONSTITUTIONAL CASE FOR KURDISTAN'S INDEPENDENCE & A RECORD OF THE VIOLATION OF IRAQ'S CONSTITUTION BY SUCCESSIVE IRAQI PRIME MINISTERS AND MINISTERS, THE COUNCIL OF REPRESENTATIVES, THE SHURA COUNCIL, THE JUDICIARY AND THE ARMY (2017) [hereinafter THE CONSTITUTIONAL CASE FOR KURDISTAN'S INDEPENDENCE], http://cabinet.gov.krd/uploads/documents/2017/Constitutional_violations_Sept_24_2017.pdf.

273. The Montevideo Convention on Rights and Duties of States, art. 1, *opened for signature* Dec. 26, 1933, 165 L.N.T.S. 19 (entered into force Dec. 26, 1934).

274. U.N. Charter art. 1, ¶ 2.

275. THE CONSTITUTIONAL CASE FOR KURDISTAN'S INDEPENDENCE, *supra* note 272, ch. 3.

276. *Id.* ch. 1.

277. *Id.* ch. 2.

278. Article 141, Dustūr Jumhūrīyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005.

279. Mohamed Mostafa, *Iraqi PM Adviser: Dialogue Planned as Kurdistan Yields to Constitution*, IRAQI NEWS (Jan. 2, 2018), <https://www.iraqinews.com/baghdad-politics/iraqi-pm-adviser-dialogue-planned-kurdistan-yields-constitution/>.

namely, that a poorly timed call for secession would dash the hopes for an independent Kurdistan for a good time to come.

C. Concluding Thoughts

These two recent prominent cases of unilateral secessionist gambits illustrate the dangers of constitutional silence or vagueness in the prohibition of secession. In both cases, longstanding grievances provided the underpinnings of the secessionist movements, but it was the constitutional text that provided the political opportunities for leaders to claim that they could get away with breaking away from the larger state. Of the two constitutional texts, the Spanish text contains what we have characterized as an implicit prohibition; the Iraqi text is wholly silent. Given the longstanding Kurdish desire for a homeland and the strong position of the Kurds during the negotiations for the 2005 constitution of Iraq, it is hard to imagine that either a clear prohibition or right to secede would have been approved. The result was constitutional silence that provided the Kurds with an opportunity to mobilize for secession.

It is quite easy to imagine that clearer language would have led to different incentives in both cases. Our thesis that silence and ambiguity encourage mobilization is supported in both cases. In the Catalan case, secessionist sentiment, too, seems to have increased in response to the mobilization. However, it has never been as large as some of the proponents of Catalonia's secession have asserted.²⁸⁰ The two cases also support our conjectures about violence. The Kurdish separatist movement had a massive military force behind it and culminated in Iraqi government deployments after the referendum. The Catalan movement, with arguably a clearer prohibition and less public support, has not led to the same level of militarization, at least to date.

It is worth noting that neither of these two cases would meet the test of oppression that was considered, if not endorsed, by the International Court in the Kosovo case.²⁸¹ Like the Quebecois in Canada, both the Kurds and Catalans are well represented in national institutions. While the Kurds had suffered horrific violence at the hands of Saddam Hussein, the current Iraqi regime has not interfered with their cultural or political rights. A detailed examination of their particular claims is beyond the scope of this Article, but on the face of it, they do not appear to rise to the level of oppression suffered by the Kosovars at the hands of the Milosevic regime. Without serious repression, and without any constitutional language in favor of secession, it seems that unilateral se-

280. Eric Guntermann, *The Myth of Massive Support for Catalan Independence*, WASH. POST (Oct. 11, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/11/the-myth-of-massive-support-for-independence-in-catalonia/>.

281. See *supra* notes 59–60 and accompanying text.

cession remains off the table, with the only exception being a powerful neighbor that is willing to dismember a country, as in the Crimea.

VII. CONCLUSION

This Article has provided a comprehensive empirical analysis of constitutional secession clauses. It has documented how different constitutions deal with secession and how secession clauses can impact downstream mobilization for secession.

We have refrained from making normative claims about whether secession is desirable; much, no doubt, depends on the particular claims and history of the groups seeking it. We do, however, argue that constitutional drafters ought to be as explicit as possible about their intentions regarding secession. Either a prohibition or an explicit clause allowing secession may be superior to the common approach of creating ambiguity, since the lattermost option is associated with violence and instability.

Our analysis also contributes to the debate on whether and how constitutions matter.²⁸² A small literature has arisen examining the conditions under which written constitutions are actually effective. In general, the literature on constitutional rights has found that there is little relationship between parchment and practice: only a small number of rights provisions are, on average, effective.²⁸³ In contrast, some literature on structural provisions of the constitutions, such as executive term limits, finds them to be generally more effective.²⁸⁴ Other constitutional provisions, such as those on judicial independence, have a more mixed impact.²⁸⁵ By focusing on an issue area that straddles the line between the rights and structure, our analysis provides insight into an important condition under which constitutional provisions are likely to be effective: when they change the incentives for political mobilization.

282. See Tom Ginsburg & Aziz Huq, *Assessing Constitutional Performance*, in *ASSESSING CONSTITUTIONAL PERFORMANCE* 3, 3–4 (Tom Ginsburg & Aziz Huq eds., 2016).

283. Adam Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 *AM. J. POL. SCI.* 575, 581 (2016); see also Adam Chilton & Mila Versteeg, *The Failure of Constitutional Torture Prohibitions*, 44 *J. LEGAL STUD.* 417 (2015); Adam Chilton & Mila Versteeg, *Rights Without Resources: The Impact of Constitutional Social Rights on Social Spending*, 60 *J.L. & ECON.* 713 (2017); Adam Chilton & Mila Versteeg, *Courts' Limited Ability to Protect Constitutional Rights*, 85 *U. CHI. L. REV.* 293 (2018); Mila Versteeg, *The Politics of Takings Clauses*, 109 *NW. U. L. REV.* 695 (2015); Lucas Kowalczyk & Mila Versteeg, *The Political Economy of the Constitutional Right to Asylum*, 102 *CORNELL L. REV.* 1219 (2017).

284. Tom Ginsburg et al., *On the Evasion of Executive Term Limits*, 52 *WM. & MARY L. REV.* 1807, 1821 (2011) (showing that term limits are generally effective in democracies); Mila Versteeg et al., *The Law and Politics of Presidential Term Limit Evasion*, 120 *COLUM. L. REV.* (forthcoming 2020).

285. Bernd Hayo & Stefan Voigt, *Explaining De Facto Judicial Independence*, 27 *INT'L REV. L. & ECON.* 271 (2007).

APPENDIX A: EFFECT OF CONSTITUTIONAL SECESSION
CLAUSES ON ACTUAL SECESSION

	(1)	(2)	(3)	(4)	(5)
	base model	ordinal secession	secession dummies	secession dummies	internal segments only
Constitutional Secession Clauses (ordinal)		0.42** (0.15)			0.08** (0.10)
Constitutional Silence			0.09*** (0.06)	0.09*** (0.06)	
Constitutional Prohibition (Implicit)			0.12*** (0.08)		
Secession Pro- hibited (Explicit)			-		
Secession Pro- hibited (Implicit or Explicit)				0.12*** (0.08)	
Common-State Anocracy with Self-governing Segment	40.93*** (20.34)	14.88*** (8.99)	10.09*** (6.48)	10.09*** (6.48)	3.77 (4.28)
Common-State Anocracy with Non-Self- Governing Segment	0.72 (0.81)	0.55 (0.63)	0.92 (1.06)	0.92 (1.06)	0.00 (0.00)
Democratic Metropole with Exclusion of Self-Governing Segment	10.88*** (5.18) (0.65)	11.92*** (6.51) (0.64)	22.59*** (14.04) (0.92)	22.59*** (14.04) (0.92)	

<i>Cont'd</i>	(1)	(2)	(3)	(4)	(5)
	base model	ordinal secession	secession dummies	secession dummies	internal segments only
Transition in Common-State- Self-Governing Segment	31.41*** (20.08)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
Transition in Common-State- Non-Self- Governing Segment	5.76** (4.33)	6.62** (6.19)	8.92** (8.18)	8.92** (8.18)	166.85** (354.35)
Autocracy	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
Prior Statehood with Coopta- tion of Local Leadership	0.31*** (0.10)	0.28* (0.19)	0.14*** (0.10)	0.14*** (0.10)	
Prior Statehood with Abolishing of Local Lead- ership	2.21** (0.87)	1.93 (1.04)	1.48 (0.80)	1.48 (0.80)	0.31 (0.29)
Population Ra- tio	1.23** (0.11)	1.16 (0.18)	1.18 (0.18)	1.18 (0.18)	10.21* (12.77)
Linguistic and Religious Di- versity	2.21*** (0.65)	3.30** (1.84)	2.85* (1.61)	2.85* (1.61)	9.50 (13.46)
Religious Di- versity Only	0.41 (0.27)	0.37 (0.33)	0.31 (0.28)	0.31 (0.28)	5.31 (7.42)
Linguistic Di- versity Only	0.60 (0.25)	0.91 (0.58)	1.24 (0.79)	1.24 (0.79)	3.58 (5.10)
Observations	13,475	7,562	7,562	7,562	3,331

Cox Proportional Hazard Model with hazard ratios reported

$N=333$, Failures= 127, time at risk= 13,506

APPENDIX B: EFFECT OF CONSTITUTIONAL SECESSION CLAUSES
ON SUPPORT FOR SECESSIONIST MOVEMENTS

	(1) base model	(2) ordinal secession	(3) dummy variables	(4) dummy variables
Constitutional Secession Clauses (ordinal)		-0.24* (0.14)		
Secession Prohibited (Implicit or Explicit)			-0.57** (0.22)	
Constitutional Silence				0.57** (0.22)
Secession Allowed				0.55 (0.50)
Economic Differentials	0.12 (0.10)	0.09 (0.10)	0.09 (0.10)	0.09 (0.10)
Economic Differentials * Democracy	0.00 (0.01)	0.00 (0.01)	0.01 (0.01)	0.01 (0.01)
Population Group Size	0.02 (0.07)	0.01 (0.07)	0.01 (0.07)	0.01 (0.07)
Sea Access	0.53*** (0.20)	0.59*** (0.20)	0.62*** (0.20)	0.62*** (0.20)
Resource Production by Region	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
Irredentist Potential	-0.12 (0.23)	-0.10 (0.23)	-0.06 (0.23)	-0.06 (0.23)
Democracy	-0.04* (0.02)	-0.04** (0.02)	-0.05** (0.02)	-0.05** (0.02)

<i>Cont'd</i>	(1) base model	(2) ordinal secession	(3) dummy variables	(4) dummy variables
Discrimination	-0.02 (0.08)	-0.02 (0.08)	-0.03 (0.08)	-0.03 (0.08)
Lost Autonomy	0.55*** (0.16)	0.56*** (0.16)	0.56*** (0.16)	0.56*** (0.16)
Secessionist Kin	1.04*** (0.24)	1.08*** (0.25)	1.10*** (0.25)	1.10*** (0.25)
Regional Minority	-0.28 (0.23)	-0.22 (0.24)	-0.25 (0.24)	-0.25 (0.24)
(Pseudo) r-squared	0.1397	0.1451	0.1532	0.1532
Observations	168	166	166	166

Cross-sectional ordered probit model for 2003, with robust standard errors

APPENDIX C: EFFECT OF CONSTITUTIONAL SECESSION
CLAUSES ON SECESSIONIST VIOLENCE

	(1) ordinal se- cession	(2) secession dummies	(3) secession dummies
Violence Level t-1	1.74*** (0.14)	1.71*** (0.13)	1.72*** (0.13)
Constitutional Secession Clauses (ordi- nal)	0.10 (0.10)		
Constitutional Silence		0.61*** (0.21)	0.60*** (0.21)
Constitutional Prohibition (Implicit or Explicit)		0.52** (0.25)	
Constitutional Prohibition (Implicit Only)			0.59** (0.26)
Constitutional Prohibition (Explicit Only)			0.25 (0.45)
Distinct Language or Religion	-0.02 (0.08)	-0.01 (0.08)	-0.03 (0.09)
Oppressed Minority	0.69** (0.34)	0.68** (0.34)	0.70** (0.35)
Colony	-0.04 (0.34)	0.00 (0.33)	-0.00 (0.34)
Ethnic Federalism	0.27* (0.17)	0.21 (0.16)	0.21 (0.16)
Year	-0.00 (0.00)	-0.01 (0.00)	-0.00 (0.00)
(Pseudo) r-squared	0.6855	0.6893	0.6898
Observations	2,244	2,244	2,244