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Mind the Gap Between Federalism and Secession: The Relationship Between Two (In)compatible Concepts

by

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Abstract

Scholars have often either framed federalism as an alternative to secession (Buchanan 1995) or suggested that secession is incompatible with the federal principle (Jellinek 1905). As Jellinek (ibid: 768) put it, 'political suicide is not a legal category.' And yet secession within today's globalised world can be also seen as just 'another form of subsidiarity – a claim about the right level for governance within a complex, multi-layered system that extends from the personal through the local, regional, state, transnational and international.' (Waters 2020:227). Taking the cue from that, the paper provides for a nuanced account of the relationship between the two concepts by developing its argument in three steps. First, it defines the two concepts and highlights that secession may occur at various tiers within a federal system. Second, it reviews how federal constitutional orders deal with secession in the different levels. Third, although it accepts that constitutional orders are markedly more reluctant to recognise a right to external secession, it puts forward an understanding of federalism that may accommodate it.

Keywords

Federalism, internal secession, external secession, withdrawal, comparative constitutional law

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1. Introduction

On 4th March 1861, President Lincoln (1861) in his inaugural speech declared that '[p]erpetuity is implied, if not expressed, in the fundamental law of all national governments.' Just a month before the start of the American civil war, he declared secession as 'legally void' given that 'no government proper ever had a provision in its organic law for its own termination' (ibid). In a similar spirit of constitutional self-preservation, most federal orders adopt 'provisions that prevent the defeat of the basic enterprise' (Sunstein 1991: 633). As Jellinek (1905: 768) put it, 'political suicide is not a legal category.'[I] This is why scholars such as Sunstein (2001) have questioned the prudence of constitutionally enshrining a right to secession. For them, codification would make it more likely to fuel than quell secessionist sentiment.

And yet, since the time of Lincoln's speech, legal developments challenge the idea that secession is a legal taboo. In its *Advisory Opinion on Kosovo*, the International Court of Justice (ICJ) reaffirmed that international law does not ban secessionism.[II] The Supreme Court of Canada provided for a procedural framework that makes Quebec's secession possible if it complies with certain fundamental principles including federalism.[III] Some constitutional orders exhibiting federal characteristics such as Ethiopia provide in black and white for 'an unconditional right to self-determination including the right to secession.'[IV] In 2014, a lawful referendum was organised in Scotland to decide its constitutional future while Northern Ireland is one of the few substate entities that enjoy a constitutionally enshrined right to secession.[V]

Precisely because the actual legal landscape provides for a much more complicated picture of the relationship between federalism and the right to secession than what conventional wisdom suggests, the aim of this article is to revisit this age-old debate. Overall, the article does not question the fact that a number of federal constitutional orders are reluctant to recognise the possibility of consensual external secession. However, it argues that it is possible to understand federalism in a way that allows for the accommodation of secessionist processes that take place at every level of a federal order (substate; state; supranational). The remainder is organised as follows. Part 2 defines the two concepts and points to how secession may apply at every level of a federal order. Part 3 provides for a bird's-eye view of how constitutional orders that exhibit federalism treat secession that takes

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place at the substate; state and; supranational levels. By referring to the concept of territorial integrity, Part 4 explains why federal constitutional orders are reluctant to accept the possibility of external secession and suggests an alternative understanding of federalism that aims to smooth its perceived incompatibilities with secession.

2. A Federal Understanding of Secession

In order to understand the relationship between federalism and secession, it is necessary first to define those polysemous concepts. Starting from the former, we note that clear definitions about the federal principle are difficult to achieve for such 'a chameleon-like concept' (Post 1990: 227). The reason for that might be the fact that federalism can be a normative idea, a political aspiration, and a descriptive category of political institutions, sometimes almost simultaneously.

'To begin with what might seem only a matter of semantics, it is worth recalling that the word "federal" (*Föderativ, federaal*) is derived from a Latin root (*foedus*) which in Roman Law referred to an international treaty, and in wider usage extended to concepts of "covenant", "compact" and "agreement"' (Aroney 2009: 16–17). It comes as no surprise that when modern federalism emerges with the rise of the European states system, it is associated with the political relations between independent/sovereign States (Schütze 2009: 14).

It is the American experiment with federalism, however, which has largely shaped our contemporary understanding of it as a constitutional system of governance. United States Supreme Court Justice Kennedy, has once proudly proclaimed that modern 'federalism was [the American] Nation's own discovery'.[VI] The gradual evolution of the American constitutional order from confederation to federation and from a dual federal model to a more cooperative one has greatly influenced the academic and political debate on federalism (Elazar 1987: 144–46; Schütze 2009: 75–127). This is why 'today "federal" and "federalism" are understood primarily in terms of the American hybrid form of governance as opposed to the older idea of federalism as confederation' (Halberstam 2012: 579).

In his pioneering *Federal Government*, Wheare defines the federal principle as 'the method of dividing powers so that the general and regional governments are each, within a sphere,

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coordinate and independent' (Wheare 1964: 10). In that context, he noted the importance of the existence of a written constitution

> expressly conferring powers on the central and regional governments, a system of direct elections for both levels of government, the power of each level of government to act (or not act) independently of the other, and the existence of an independent high court to serve as the "umpire" of federalism (Choudry and Hume 2011: 357).

This definition which stresses on the one hand the legislative autonomy of the different levels of government in a federal order and on the other the combination of self-rule and shared-rule over the same territory has informed a number of other analyses such as the one provided by Riker. His understanding of federalism echoes the one of Wheare by suggesting the following rule of identification:

> [a] Constitution is federal if (1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee (even though merely a statement in the constitution of the autonomy of each government in its own sphere) (Riker 1964: 11).

The influence of Wheare's definition can be also seen in the work of Watts, who elaborated further the aforementioned constitutional model. In his very detailed federal 'checklist', Watts added the formal distribution of legislative and executive authority, the allocation of sufficient revenues to ensure the autonomy of each order of government, the representation of regional views in the central legislature (eg through an upper chamber), a constitutional amendment procedure requiring a substantial degree of regional consent, and an enforcement mechanism that included courts, referendums or a special role for the upper chamber (Watts 1966). More recently, he redefined federalism as a normative term that 'refers to the advocacy of multi-tiered government combining elements of shared rule and regional self rule' (Watts 2008: 8). Despite the elaborate nature of Watts' model of federalism, his more recent definition echoes the one of Elazar who referred to 'shared rule plus self rule' (Elazar 1987: 12).

Overall, despite their differences, in all those classical writings, federalism is associated with polities where:

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(i) shared rule is combined with territorially based self rule (Annett 2010: 109); and
(ii) every level of the government—whether central or sub-state—enjoys a constitutionally guaranteed claim to some degree of organisational and jurisdictional authority (Halberstam 2008: 142).

This rather broad definition encapsulates the different species of federal political systems circumventing the rather sterile debate on the precise category of federal arrangements (Watts 2008) to which different entities belong. In that sense, it equally applies to federal States such as the United States, Germany and Switzerland; regionalised States such as Italy, Spain and the UK and; even supranational organisations such as the EU. Such multi-level constitutional systems—irrespectively of their political and historical origins—may sometimes be faced with secessionist challenges at any tier of legislative autonomy.

Much like in the case of federalism, there are different perceptions in legal and political theory about secession as well.[VII] The strict/narrow perception entails 'the creation of a new independent entity through the separation of part of the territory and population of an existing State without the consent of the latter' (Cohen 2006: 3). It is the parent state's lack of consent that turns such 'separation, if it occurs, into secession' (Thürrer and Burri, 2009) effectively excluding the possibility of a consensual and democratic secession. In that (strict/narrow) sense, secessions rarely occur. 'Since 1945 there has not been a single separation of a constituent part from a State to which the latter has not, sooner or later, given its consent' (ibid). 'In fact, no new State formed since 1945 outside the colonial context has been admitted to the United Nations over the opposition of the predecessor State' (Crawford 2007: 415).

Other authors follow 'a broad notion of secession, including in their analyses all cases of separation of States in which the predecessor State continues to exist in a diminished territorial and demographic form' (Cohen 2006: 2). For them, secession includes 'every action that leads to a part of a State being separated off, regardless of whether or not this happens with the consent of the existing State' (Thürrer and Burri, 2009). By not focusing on the potential opposition of the metropolitan State as a *conditio sine qua non* for secession, this wider definition includes events that have been characterised as consensual and democratic secessions such as Norway's secession from Sweden or more recently Montenegro's independence from the State Union of Serbia and Montenegro. Thus, it is able to encapsulate the political developments in the post-WWII period, during which 142 new

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States managed to become members of the UN General Assembly. Out of those States, almost three quarters owe their birth to secession. This is why authors such as Buchanan (1997: 301) and Griffiths (2017) speak about the 'Age of Secession'.

Having said that, both those conceptions are 'mostly level-specific because they apply only to independent states' (Bauböck 2019: 228). And yet secession may also occur at the sub-state (internal secession) and the supranational levels (withdrawal) as well. In fact, a closer look at how international law treats the right to self-determination which is the basis of the right to secession points to this direction. According to international law, the right to external self-determination (ie. secession and independence) for peoples under colonial domination is undisputed.[VIII] Given that the period of classical colonialism has largely passed, this principle applies to a rather limited number of peoples, such as those of Gibraltar and New Caledonia.[IX] In 1995, however, the ICJ proclaimed that the right to self-determination 'has an *erga omnes* character.'[X] This does not mean, though, that all peoples have the right to external secession and independence. In metropolitan territories such as Flanders, Scotland, Basque Country and Catalonia, 'peoples are expected to achieve self-determination within the framework of their existing state.' (Crawford and Boyle, 2012: para 175) As the Canadian Supreme Court in *Reference re Secession of Quebec* held, outside the colonial context, the right is 'normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state.'[XI] At its most extreme, this right to internal self-determination includes a right to internal secession—the possibility to create a new autonomous sub-state unit within the borders of the same metropolitan State. Having said that, the ICJ famously held in its *Advisory Opinion on Kosovo* that there is no prohibition on unilateral declarations of independence in international law,[XII] let alone independence that has been reached via a consensual and democratic process (external secession). At the same time, the people's pursuit to 'freely determine their political status and freely pursue their economic, social and cultural development'[XIII] clearly encompasses the sovereign choice of a nation to withdraw from an international organisation (withdrawal).

This means that secession i.e. the 'formal withdrawal from a central political authority by a member unit' (Wood 1981: 110; Ginsburg and Versteeg 2019: 925) may occur at any tier of a polity that exhibits federal characteristics. For instance, part of a legislative region (e.g., Jura) may be carved out of an existing one (e.g. Berne) and given distinctive substate status

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within a federal or quasi-federal state (internal secession) (Requejo and Nagel 2017: 9). A 'subunit of a state [may also break off], usually to form a new state, but sometimes to join an existing neighbour' (external secession) (Ginsburg 2018: 1). Finally, a State as a whole may withdraw from a supranational organisation such as the European Union. In fact, the UK's 'unilateral decision[] to separate territory and citizenry from the Union,' (Pohjankoski 2018: 849) has been aptly characterised as 'functionally akin to secession'(Vidmar 2019: 371).

So, in a federal legal order, secession i.e. 'the voluntary breakaway of a polity from a territory of which it had previously been a part' (Bauböck 2019: 228) may be experienced at the substate; the state and; the supranational levels. This is why it is important to assess how constitutional orders which exhibit federal characteristics regulate secessionist processes.

3. Secession in federal constitutional orders

A comparative analysis of how federal constitutional orders actually regulate secession points to two directions. First, it is clear that while federal orders are willing to recognise, accommodate and include processes of consensual and democratic secession at the subnational (internal secession) and the supranational (withdrawal) levels, they are markedly more reluctant to do so at the State level (external secession). Having said that, even when it comes to the most controversial form of secession (i.e., regions' right to external secession), a close look at the relevant federal arrangements reveals a picture that is much more nuanced than what conventional wisdom suggests. A number of federal orders do not prohibit it.

3.1 Internal Secession

Internal secession is a procedure available in some federal systems 'where new States are carved out of the existing ones and given member state status' (Requejo and Nagel 2017: 9). And while with regard to external secession, federal constitutional orders tend to be reluctant if not opposing, as we shall see, there is a number of federal constitutions that allow internal secession. In fact, a cursory look at those procedures reveals that most of the constitutions that permit the redrawing of internal borders do so on the condition that the institutions of the affected entity/ies and of the central political authority approve such initiative.

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For instance, Article IV, Section 3 of the US Constitution requires the approval by both legislatures of the affected States and by Congress in order part of an existing State to merge with a neighbouring one. Similarly, Article 3 of the Austrian Constitution requires the passing of 'harmonizing constitutional laws of the Federation (*Bund*) and the *Land*, whose territory experiences change.' In the case of Germany 'revisions of the existing division into Länder shall be effected by a federal law which must be confirmed by referendum.'[XIV] In fact, according to Article 29(3) of the German Basic Law, a referendum on a bill allowing the internal secession of part of a Land would have to be held in the territory of the whole Land. The secession would be approved if 1/4 of the electorate of the Land participates and there are either simple majorities in favour in both the seceding territory and the whole Land or a 2/3 majority for secession in the seceding territory and no 2/3 majority against it in the affected Land.

The most famous example of a process of internal secession is the one related to the creation of the Swiss canton of Jura. After a partly militant campaign of Jurassian separatists, a series of cascading plebiscites were organised. The seven districts that comprised of the *Ancien Jura* were asked to vote whether a new canton was to be created and what should be the delimitation of its borders. Given that the Swiss constitution enumerates the cantons[XV] and specifies their participation rights within the consociational arrangement,[XVI] a federal constitutional amendment was necessary.[XVII] 'This requires a double majority among all enfranchised federal citizens as well as in a majority of cantons' (Bauböck 2019: 241). Moreover, the new cantonal constitution required the consent of the federation.[XVIII]

The aforementioned Swiss procedure is considerably more entrenched than what is required in other constitutional orders that allow for internal secession. In the case of Canada, the self-governing territory of Nunavut was carved out of the Northwest Territories following two local plebiscites that approved the secession and the delineation of the border and an Act of the Canadian Parliament that ratified the decision. In the case of India, Article 3 of the Constitution allows the federal parliament to approve a process of internal secession after consulting the legislature(s) of the affected State(s). The states of Chhattisgarh, Uttaranchal (renamed Uttarakhand), Jharkhand, and Telangana were all established through such procedure.

To sum up, internal secession is not prohibited in a number of federal constitutional orders. Having said that, in all cases, the approval of the realignment of internal boundaries

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requires some form of consent from the central political authority. This ensures that those processes that may often be politically divisive and controversial take place in a more inclusive, democratic and less conflictual manner that does not threaten the stability of the overall federal arrangement.

3.2 External Secession

From an international law point of view, 'no one is very clear as to what [the right to external secession and independence] means, at least outside the colonial context' (Crawford 2001: 10). Indeed, the right to external secession for peoples under colonial domination was enshrined in the UN Charter,[XIX] further crystalised in UN General Assembly Resolutions[XX] and endorsed by the ICJ in a number of Advisory Opinions.[XXI] Outside the colonial context, a right to unilateral secession may be recognised to people 'subject to alien subjugation, domination or exploitation.'[XXII] Still, the status of remedial secession in international law remains unclear. In its *Advisory Opinion on Kosovo*, the ICJ highlighted the different opinions expressed on 'whether international law provides for a right of "remedial secession" and, if so, in what circumstances.'[XXIII]

More importantly for the purposes of the article, it should be noted that Joint Article 1 of the two covenants in the International Bill of Rights provides that '[a]ll peoples have the right of self-determination.'[XXIV] This does not mean, however, that all peoples have the right to external secession and independence. In fact, a state that respects the principles of self-determination in its internal arrangements 'is entitled to maintain its territorial integrity under international law.'[XXV] As the Canadian Supreme Court held, 'international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state.'[XXVI]

At the same time, from a comparative constitutional law point of view, it is true that the vast majority of Constitutions are generally hostile to external secession by affirming either explicitly or implicitly the primacy of the state's territorial integrity (Monahan et al. 1996: 7-8). Even when they are silent on the matter, they often adopt tools and strategies to prevent secession for 'existential – and not so existential – needs, rather than democratic reasons alone' (Weill 2018: 913). These strategies include the use of 'eternity clauses' and bans on either partition/secession or secessionist political parties (Ibid.). For instance, the indivisibility of the Republics of France and Romania is enshrined in Article 1 of their

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respective constitutions, while Article 2 of the Spanish Constitution speaks of the indissoluble unity of the Spanish nation. Similarly, Article 185 of the Cypriot Constitution prohibits the integral or partial union of the island with another state and separatist independence.

The same applies with regard to several constitutions that exhibit federal characteristics. For instance, the ones of Australia,[XXVII] Brazil[XXVIII] and Comoros[XXIX] explicitly exclude the possibility of secession. In the case of Germany, although the Basic Law is silent on the matter, the Federal Constitutional Court has clarified that the Länder are not *Herren des Grundgesetzes* [Masters of the Constitution]. As such, there is no possibility for them to secede as they would breach the constitutional order.[XXX] In a heavily separatist context, the Constitutional Court of Bosnia and Herzegovina similarly stressed that the constitution 'does not leave room for any "sovereignty" of the Entities or a right to "self-organization" based on the idea of "territorial separation".'[XXXI] So did their South African counterpart which held that the right to self-determination as recognised in the text of the constitution of the 'rainbow nation' 'does not embody any notion of political independence or separateness.'[XXXII] Finally, the Italian Constitutional Court went a step further by proclaiming that the 'unity of the Republic is an aspect of constitutional law that is so essential to be protected even against the power of constitutional amendment.'[XXXIII]

Notwithstanding, external secession should not be understood as an absolute constitutional taboo. In fact, even some unitary States such as Denmark,[XXXIV] Liechtenstein[XXXV] and Uzbekistan[XXXVI] allow for the possibility of a consensual and democratic process of partition. In the past, a number of federal constitutions also allowed for secession. In addition to the socialist constitutions of the Soviet Union and Yugoslavia that famously included a right to secession in black and white,[XXXVII] the Burman constitution of 1947,[XXXVIII] the founding document of the State Union of Serbia and Montenegro[XXXIX] and the transitional constitution of Sudan[XL] all provided for a process of a consensual secession for part of their territory.

Currently, Article 39 of the Ethiopian constitution famously provides for 'an unconditional right to self-determination, including the right to secession' for every nation, nationality and people in Ethiopia. It also sets out the precise procedure and conditions to be met in order such secession to take place.[XLI] Equally, the Constitution of Saint Kitts and Nevis allows for the secession of Nevis Island following a process that is prescribed in a

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detailed manner in Article 113. In the case of the UK territorial constitution, which is characterised by devolution, the Belfast/Good Friday Agreement recognises a right for consensual secession to Northern Ireland in no uncertain terms.[XLII] Such right has also been enshrined in domestic legislation. Schedule 1 of the Northern Ireland Act 1998 describes the circumstances under which a referendum for the reunification of Ireland can and should be called by the UK Secretary of State.

> [T]he Secretary of State is given a discretionary power to order a border poll under Schedule 1 paragraph 1 even where she is not of the view that it is likely that the majority of voters would vote for Northern Ireland to cease to be part of the United Kingdom and to become part of a united Ireland. [XLIII]

However, if it appears to her that a majority would be likely to vote for a united Ireland, then, she is under a duty to call a poll.[XLIV]

Somewhere in between those federal constitutional orders that prohibit secession and those that explicitly recognise such right lie the ones that allow some space for the possibility of a negotiated secession via a constitutional amendment (Kössler 2021: 80). Perhaps the oldest example in this category can be found in the United States. Four years after the end of the civil war, the US Supreme Court held that the 'constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'[XLV] Notwithstanding, as Radan (2006: 191) pointed out, it also left the door ajar for the possibility for secession 'through revolution, or through consent of the States.'[XLVI] Following the logic of the court, secession of a state is not unconceivable, if the US constitution is amended accordingly.

Many years later, somehow similarly, the Spanish Constitutional Court on the one hand reaffirmed that the Autonomous Communities do not have a right to unilaterally organise self-determination referendums and on the other distanced itself from the German model of militant democracy that rules out the possibility of secession under any circumstances. Instead, they pointed out that

> Any approach that intends to change the very grounds of the Spanish constitutional order is acceptable in law, as long as it is not prepared or upheld through an activity that infringes democratic principles, fundamental rights or all other constitutional mandates, and its effective achievement follows the procedures foreseen.[XLVII]

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In other words, it highlighted to the relevant constitutional actors that a plebiscite on the constitutional future of Catalonia could be legally organised if they agree on a relevant amendment to the Spanish constitution.

Perhaps the most nuanced and influential view on negotiated secession was put forward by the Canadian Supreme Court in its decision on *Reference re Secession of Quebec*. There, the court clarified that 'the secession of Quebec from Canada cannot be accomplished […] unilaterally, that is to say, without principled negotiations, and be considered a lawful act.'[XLVIII] But it also pointed out that

> the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.[XLIX]

In other words, it denied the existence of a unilateral right of secession but accepted that 'a referendum unambiguously demonstrating the desire of a clear majority of Quebeckers to secede from Canada, would give rise to a reciprocal obligation of all parties of the Confederation to negotiate secession' (Mancini 2012: 497). It also underlined that in such negotiations 'the conduct of the parties […] would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities'[L] making a clear link between the federal spirit (Burgess 2012) of the Canadian constitutional order and the potential secessionist process of Quebec.

Interestingly, the uncodified UK constitution also allows for managed secession in the case of Scotland. According to section 29 of Scotland Act 1998, the Scottish Parliament has residual powers over the legislative competences that are not explicitly allocated to Westminster. The latter include the constitution of which 'the Union of the Kingdoms of Scotland and England' is part.[LI] This means that '[a]s a matter of UK law, the Scottish Parliament cannot pass a declaration of independence' (Smith and Young 2017). However, referendums are not listed as a reserved matter. Therefore, there was a question to be asked whether Holyrood can lawfully organise a referendum (devolved matter) on Scotland's constitutional future (reserved matter). This question was recently settled by the UK Supreme Court which held that

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> A Bill which makes provision of a referendum on independence –on ending the sovereignty of the Parliament of the United Kingdom over Scotland—has more than a loose or consequential connection with the sovereignty of that Parliament.[LII]

So, an Act of the Scottish Parliament providing for the organisation of an independence referendum would relate directly to the reserved matter of the Constitution and thus it would be deemed *ultra vires*.

Notwithstanding, it would still be possible to lawfully organise an independence plebiscite, if the process that led to the 2014 one is followed. Then, the 'two governments of Scotland' decided to resolve this important constitutional question with a political agreement. The *Edinburgh Agreement*[LIII] underscores the flexible nature of the UK idiosyncratic constitution. According to it, David Cameron and Alex Salmond agreed to amend the text of Scotland Act 1998. In accordance with section 30 of the Act, an Order[LIV] was issued that introduced new section 29A. This new section explicitly conferred the power on Holyrood to organise an independence referendum by no later than 31 December 2014. In other words, Westminster devolved this time-limited competence to Holyrood which was able to organise an independence referendum on 18 September 2014.

Overall, a comparative constitutional law analysis of how constitutional orders that exhibit federalism deal with the issue of secession reveals a much more nuanced picture than what conventional wisdom suggests. It is true that the majority of them reject the right to secession either explicitly or through a judicial interpretation of the overall constitutional settlement. But there is also a number of them that due to historical and political circumstances allow for that possibility either in black and white or through a constitutional amendment.

3.3 Withdrawal

Internal and external secession are procedures that lead to a part of a (constituent) state being separated from that existing (constituent) state. Supranational organisations such as the EU, however, are 'under international law, precluded by [their] very nature from being considered […] State[s].'[LV] This is one of the reasons why some authors have distinguished withdrawal from supranational organisations from the phenomenon of secession (Frantziou

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2022: 70). They understand the former more as a 'habitual way of referring to a decision to leave an international organisation' (Ibid.). However, secession is 'situated at the intersection of constitutional and international law' (Jackson 2016: 316-317) and has historically been defined as a form of withdrawal.[LVI]

More specifically, with regard to the most integrated supranational legal order i.e. the EU, we note the following. It is a '[c]ommunity of unlimited duration, having its own institutions, its own personality, its own legal capacity and . . . real powers stemming from a limitation of sovereignty or a transfer of powers from the [member] States.'[LVII] To the extent that Article 50 of the Treaty of the European Union (TEU) allows a member state's withdrawal from that community of law and the abrupt end to the symbiotic relationship between its domestic legal order and the EU one, it is also a process that 'is functionally akin to secession; it is not a simple severance of contractual obligations' (Vidmar 2019:371) as withdrawal from an international treaty usually is. In other words, 'given the special (constitutional) nature of EU legal order, its highly-institutionalized nature, and the entanglement of domestic law and EU legal regulation, [withdrawal from the EU] can be functionally compared to secession' (Vidmar 2018: 440).

Much like external secession, withdrawal from a supranational organisation like the EU leads to the separation of territory and citizenry (Pohjankoski 2018: 849). It also 'leads to legal problems that resemble those that arise when secession occurs, e.g. regarding the continuation of citizenship rights, succession of treaty obligations, relations with third states, and various financial settlements' (Vidmar 2019:371). Like internal and external secession, such functional secession also denotes the 'formal withdrawal from a central political authority by a member unit' (Wood 1981: 110; Skoutaris 2024: 342).

And yet, the procedural requirements of this functional secession are different from the ones applying to external secession. According to Friel, the Article 50 TEU secession right follows the state primacy or sovereignty model, which provides every constituent unit of a federal order with an unqualified right to secede (Friel 2004: 424-27). As the Court of Justice of the EU noted in *Wightman*, the Article 50 TEU process is characterised by unilateralism as '[t]he decision to withdraw is for [a] Member State alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice.'[LVIII] It 'is totally independent of the will of the EU [and] the remaining Member States' (Closa 2017: 193-194). Apart from being unilateral, the Article 50 TEU right is also unconditional in that

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'the exercise of the right to withdrawal is not subjected to any preliminary verification of conditions nor is it even conditional on the conclusion of the agreement foreseen in the provision' (Closa 2017: 195). Article 50(1) TEU allows a Member State 'to withdraw from the Union in accordance with its own constitutional requirements.' Article 50(3) TEU foresees that the withdrawal can take place two years after the member state has notified the EU of its intention to leave if no withdrawal agreement has been achieved by then. This is in marked contrast to the majority of constitutional provisions that regulate secessions. Usually, those provide for conditions with regard to the organisation of a referendum that could potentially lead to secession and/or foresee an *inter partes* agreement as an important step for finalising the process. Still, withdrawal leads to the separation of part of the territory and population as the other two forms of secession.

In sum, the most integrated supranational organisation provides for a unilateral and unconditional right of functional secession. This points again to the fact that states are more generous to provide themselves with the right to functionally secede from such an organisation than to accommodate a process of external secession that would alter their territorial borders.

4. Federalism and Secession: Two (in)compatible concepts?

So far, we have established that the voluntary withdrawal from a central political authority by a member unit may occur at every tier of a federal order. And although, the recognition of the right to external secession remains unpopular in federal constitutional orders, secession is far from a constitutional taboo.

By reference to the international law principle of territorial integrity, this section explains why federal orders recognise the right to external secession while they are more accommodating with regard to secessions that occur at the subnational (internal secession) and the supranational (withdrawal) levels. But it also goes a step further by offering an alternative conception of the relationship between those two concepts. It shows that it is possible to understand them as compatible without undermining the international legal and political order.

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4.1 Federalism and Secession: Two incompatible concepts

Ker-Lindsay (2014) has catalogued a number of reasons why States are reluctant to accept external secession. Those include emotional attachment to defined boundaries, the historical, political and economic significance of the withdrawing territory, a sense of injustice etc. Although all of them are true, they equally apply to internal secession –as the case of Jura highlights– and withdrawal from a supranational organisation as the Brexit experience suggests. And yet federal constitutional orders tend to be way more accommodating towards those other forms of secession that occur in the different tiers of those multi-level constitutional orders than they are with regard to external secession as our comparative analysis clearly shows.

To a certain extent, this discrepancy is due to the fact that States – whether unitary, regionalised or federal – remain the main actors and *loci* of constitutional politics. More so than substate entities which often participate in a hierarchical system that entails the primacy of the legislative and constitutional wills of the central State. In such system, the dominant position of the federal institutions is not undermined by internal secession processes. They remain at the apex of the hierarchy no matter how many new substate entities are created. In that sense, it is almost anodyne for any central State to absorb the tensions and frictions created by processes that involve the delineation of internal boundaries by allowing for the possibility of internal secession. At the end of the day, a process of internal secession does not lead to the loss of territory as external secession does.

Equally, States are *Herren der Verträge in supranational organisations such as the EU. In this capacity, they are able to provide themselves with the right to functional secession, which is often seen as* 'the only undeniable legal limit that member states have at their disposal against competence creep' (Garben 2020: 52) that often occurs within supranational organisations. By allowing themselves with the possibility to withdraw from such an organisation, they protect their sovereign rights as subjects of international law.

At the other end of the spectrum, '[a] paramount consideration in any [external] secession-related discussion is that, irrespective of the nature of secessionists claims, secessions are not prima facie desirable, because they jeopardize world stability' (Mancini 2012: 482). This is largely due to the fact that they are seen as undermining the territorial integrity of the main subjects of international law: the States. In a letter submitted to the Supreme Court of Canada at the request of the Government of Canada, Luzius Wildhaber

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(1998), explained why the territorial integrity of federal states is no less of a guarantee in law than that of unitary States. 'It would be unjust if it were otherwise. Not only to give member units of a federal State a claim or "privilege" to secede, but further to grant them a claim to secede with territorial integrity, would create an obvious inequality between States' (Ibid).

Having said that, in its *Advisory Opinion on Kosovo* in 2010,[LIX] the ICJ confirmed that there was no prohibition on declarations of independence in international law and that the legal obligation to respect territorial integrity is imposed only on states, not on non-state actors. So, although the protection of the territorial integrity of States is a fundamental tenet of the post-WWII international legal order, it does not bind substate entities. As Cassesse (1995: 340) pointed out:

> [I]nternational law does not ban secessionism: the breaking away of a nation or ethnic group is neither authorized nor prohibited by legal rules; it is simply regarded as a fact of life, outside the realm of law, and to which law can attach legal consequences depending on the circumstances of the case.

This international law orthodoxy is also echoed in *Opinion No. 1* of the Badinter Commission, among else, which underlined that 'the existence or disappearance of [a] state is a question of fact.'[LX]

Of course, a unilateral declaration of independence may be in breach of national constitutional law as we already noted. In fact, external secession *de facto* challenges the constitutional delineations of the national territory (Doyle 2018). In that sense, it is often seen as a threat to the territorial integrity of the State. And as such, it is often construed as somehow antithetical to the federal principle (Sunstein 2001).

4.2 Federalism and Secession: Two compatible concepts

The dominance of States in the post-WWII international legal order and the centrality of the principle of territorial integrity has led to 'the development of constitutional provisions that prevent the defeat of the basic enterprise' (Sunstein 1991: 633). An inherent instinct of self-preservation has meant that the majority of federal orders exclude the possibility of external secession. And yet, it is possible to construe an understanding of federalism that is

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compatible with the right to consensual secession if one looks at some of the fundamental tenets of the federal principle.

As mentioned before, the root of the term federalism can be found in the Latin word *foedus* which in Roman Law referred to an international treaty, and extended to concepts of 'covenant', 'compact' and 'agreement'. So, it is possible to conceive a federal order as a compact between the member units, especially in the case of coming-together federations. For instance, in the context of US federalism, proponents of the compact theory such as Calhoun argued that since the states created the federal government via compact, they should have final authority in determining when the federal government oversteps its constitutional limits. 'In Calhoun's view, secession was possible after an escalation of measures that could be triggered by the use of the nullification doctrine' ie. the declaration of federal acts as null and void by the states (Martinico and Skoutaris 2025). Having said that, the compact theory is far from a prevalent interpretation of any major federal constitutional order nowadays. Even in the US, the Supreme Court has largely rejected the idea that the Constitution is a compact among the states.[LXI] In that sense, it is rather difficult to bridge the gap between federalism and secession in federal legal orders other than supranational ones (Fabbrini and Kelemen 2020) by reference to this theory.

Instead, the principle of subsidiarity provides for a much more intellectually coherent avenue for the bridging between those two concepts. Federalism and subsidiarity have been inextricably linked throughout their conceptual history. For instance, Althusius' federal model that is comprised of four different levels –namely families, cities, provinces and the commonwealth— was 'grounded in the idea that the lowest possible level should exercise autonomous powers insofar as it has an interest in this exercise and is most suitable for it' (Palermo and Kössler 2017: 19). Nowadays, it is linked with the idea that public powers should be allocated at the lowest level of government where they can be exercised effectively. It is 'a presumption for local-level decision-making, which allows for the centralization of powers only for particular good reasons' (Jachtenfuchs and Krisch 2016:1). The principle has been recognised among else within the German,[LXII] the Italian[LXIII] and the EU[LXIV] constitutional orders. The extent to which this principle truly governs the functioning of those federal orders is debatable. Still, it is a constitutional guarantee of the autonomy of the lower tiers in a federal system and more importantly a principle that ensures that the exercise of legislative competences take place at a level that is closer to the citizen.

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In the modern globalized world where States participate in a dense network of legal relations, the 'voluntary withdrawal of a political territory from a larger one in which it was previously incorporated' (Bauböck 2019: 227-228) may also be seen 'as a move to change the status or affiliation of a territory within a wider constellation of polities.' (Ibid: 229) Seen that way, secession 'is really just another form of subsidiarity—a claim about the right level for governance within a multilayered system extending from the personal through the local, regional, [state,] and transnational' (Waters 2020: 227). It triggers the repositioning of the relevant subject of law within the wider global constitutional landscape. In the case of internal secession, a newly formed substate entity within a territorially plural state would be able to effectively use the channels of regional participation at the national level. As to external secession, its proponents, such as the mainstream Catalan and Flemish independentist parties, prioritise the 'upgrade' of their region from a subnational authority to a fully functional state within the global legal order, enjoying all relevant rights and obligations. Finally, the withdrawal of a member state from a supranational organisation such as the EU, inescapably leads to the recalibration of its relations with the organisation itself and its remaining member states.

More importantly for the purposes of the article, Jackson (2001: 273–74) has highlighted that 'federalism provisions of constitutions are often peculiarly the product of political compromise in historically situated moments, generally designed as a practical rather than a principled accommodation of competing interests.' In that sense, the codification of the right to consensual and democratic secession is the price that a system has to pay sometimes to hold together member units with divergent aspirations as to their constitutional future. Such 'domestication' of secession is based on 'the perceived advantages of handling secessionist politics and secessionist contests within the rule of law rather than as "political" issues that lie outside of, or are presumed (by the secessionists) to supersede, the law' (Norman 2006: 188-189). It follows the logic of the Canadian Supreme Court in *Reference re Secession of Quebec*, in which the Court constructed a procedural framework, 'a normative due process' (Tancredi 2006: 171) that made the secession of Quebec conditional upon compliance with certain fundamental principles such as democracy, constitutionalism and the rule of law and the protection of minorities.[LXV] Somewhat paradoxically, this approach transforms the potential formation and/or disappearance of a state from a pure fact—a political matter remaining outside the realm of law (Tancredi 2006: 171)—to a smoother transitional process in which

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both sides should respect certain values that secure their peaceful and democratic co-existence. In that way, a proceduralised democratic secession becomes 'an important message of hope' (Martinico 2019) since it recognises the fundamental role of the law in protecting peace and stability in a certain area.

By actually codifying the right to external secession, a federal legal order may create a clear procedural channel where the competing claims about the constitutional future of a member unit may continue to be negotiated in democratic and peaceful means. So, a codified procedure on secession may create a forum of meta-constitutional debate, a debate as to what type of constitutional vision will prevail at the domestic level (Bell 2008: 200). In that way, such a right can 'induce wary actors to experiment with unions with partners with whom they are involved but about whom they harbour some scepticism' and may 'lead to a stronger sense of loyalty that comes from an active, voluntary commitment—a forced renewal of vows of sorts that reinforces commitment' (Elkins 2016: 294).

5. Conclusion

During the last ten years we have witnessed a proliferation of secessionist claims and processes in a number of constitutional orders that exhibit federalism. The 2014 Scottish referendum, the *procés* in Catalonia, the debate on the future of Northern Ireland, the secessionist claims in *Republika Srpska* provide for some examples. Within this context, this article revisits the age-old debate on the relationship between secession and the federal principle. It points to the fact that secession may apply at the different tiers of the federal order; highlights and explains the reluctance of States towards external secession and puts forward an understanding of federalism that may accommodate even external secession.

Larsen (2021: 49) has convincingly explained that as a general rule federal orders are created out of necessity; when their member units 'are incapable of accomplishing separately one or more of their fundamental substantive aims: external security, internal stability, or the wellbeing of their citizens'. This historical reality underlines the pragmatic nature of many federal arrangements. Against this background, constitutional actors in federal orders have to decide whether the prohibition of secession contributes to the stability of the arrangement or leads to an endless, paralysing political and constitutional tug of war.

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[I] In the context of the US, in particular, because the Constitution should not be considered as a suicide pact, Paulsen (2004: 1257) explains that 'its provisions should not be construed to make it one, where an alternative construction is fairly possible.'

[II] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403, para. 119 (July 26) [hereinafter *Advisory Opinion on Kosovo*].

[III] *See* Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [hereinafter *Reference re Secession of Quebec*]

[IV] *See* Constitution of the Federal Democratic Republic of Ethiopia, Art 39.

[V] Northern Ireland Act 1998, s 1.

[VI] US Supreme Court, *US term Limits Inc v Thornton*, 514 U.S. 779, 838 (1995).

[VII] See for example the different perspectives that authors adopt in Cohen (2006).

[VIII] *See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution*, Advisory Opinion, 1971 I.C.J. 16 (June 21); *Advisory Opinion on Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 95 (Feb. 25).

[IX] *See* Non-Self-Governing Territories, United Nations, https://www.un.org/dppa/decolonization/en/nsgt#:~:text=Under%20Chapter%20XI%20of%20the,measure%20of%20self%2Dgovernment.

[X] *Case Concerning East Timor (Portugal v. Australia),* Judgment, 1995 I.C.J. 90, para. 29 (June 30).

[XI] *Reference re Secession of Quebec*, para. 126.

[XII] *Advisory Opinion on Kosovo*, para. 119.

[XIII] International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

[XIV] German Basic Law, Art 29.

[XV] Federal Constitution of the Swiss Confederation, Art 1.

[XVI] *See* e.g. Federal Constitution of the Swiss Confederation, Art 150.

[XVII] Federal Constitution of the Swiss Confederation, Arts 53 and 140.

[XVIII] Federal Constitution of the Swiss Confederation, Art 51.

[XIX] U.N. Charter Arts 55 and 73.

[XX] G.A. Res. 1514, at 66 (Dec. 14, 1960) and G.A. Res. 1541, at 29 (Dec. 15, 1960).

[XXI] *See* e.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, 1971 I.C.J. Rep. 16; *Western Sahara*, Advisory Opinion, 1975 I.C.J. Rep. 12 (Oct. 16); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. Rep. 95 (Feb. 25).

[XXII] *See Reference re Secession of Quebec*, para. 133.

[XXIII] *Advisory Opinion on Kosovo*, para. 82.

[XXIV] *Supra* note xii.

[XXV] *See Reference re Secession of Quebec*, para. 154.

[XXVI] *Ibid.*, para. 111.

[XXVII] *See* Commonwealth of Australia Constitution Act, Preamble.

[XXVIII] *See* Constitution of the Federative Republic of Brazil, Art 1.

[XXIX] *See* Constitution of the Union of Comoros, Art 7.

[XXX] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 16, 2016, BVerfGE, 2 BvR 349/16 (Ger.).

[XXXI] Constitutional Court of Bosnia and Herzegovina*, Case U 5/98 Partial Decision U 5/98 III* of 1 July 2000, para. 30.

[XXXII] The Constitutional Court of South Africa, *Certification of the Amended Text of the Constitution of The Republic Of South* Africa, 1996 (CCT37/96) [1996] ZACC 24, para. 24.

[XXXIII] Italian Constitutional Court, Judgment 118/2015, of 29 April 2015, para. 7(2).

[XXXIV] *See* The Act on Greenland Self-Government of 21 June 2009, Ch 8, Art 21(1). According to it, '[d]ecision regarding Greenland's independence shall be taken by the people of Greenland.'

[XXXV] *See* Constitution of the Principality of Liechtenstein, Art 4(2). According to it, '[i]ndividual communes have the right to secede from the State. A decision to initiate the secession procedure shall be taken by a

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majority of the citizens residing there who are entitled to vote. Secession shall be regulated by a law or, as the case may be, a treaty. In the latter event, a second ballot shall be held in the commune after the negotations have been completed.'

[XXXVI] *See* The Constitution of the Republic of Uzbekistan, Art 89. According to it, '[t]he Republic of Karakalpakstan shall have the right to secede from the Republic of Uzbekistan on the basis of a nation-wide referendum held by the people of Karakalpakstan.'

[XXXVII] *See* Constitution of the Union of Soviet Socialist Republics (1924), Art 4; Constitution of the Union of Soviet Socialist Republics (1936), Art 17; Constitution of the Union of Soviet Socialist Republics (1977), Art 72; Yugoslav Constitution, Introductory Part. Basic Principles.

[XXXVIII] *See* The Constitution of the Union of Burma, Ch X.

[XXXIX] *See* Preamble of the founding document of the State Union of Serbia and Montenegro.

[XL] The Interim National Constitution of Sudan, Arts 118 and 222.

[XLI] *See* Constitution of the Federal Democratic Republic of Ethiopia, Art 39(4).

[XLII]. The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland, N. Ir.-U.K., art. 1, Apr. 10, 1998, Cm 3883, provides that the United Kingdom and the Republic of Ireland:

> (i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;
> (ii) recognise that it is for the people of the island of Ireland alone, . . . to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland; . . .
> (iv) affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish[.]

[XLIII] High Court of Justice in Northern Ireland, *In re Raymond McCord* [2018] NIQB 106, para. 18.

[XLIV] *Ibid,* para. 20. A similar statutory duty for calling a referendum on Irish unification does not exist on the other side of the Irish border. The Irish Constitution, especially the text of the revised Articles 2 and 3, reveals that there is nothing that explicitly states that the Taoiseach or any other institution and/or office holder is obliged by the Constitution, and the duties of their office, to pursue a united Ireland. The procedure for holding a referendum in the Republic of Ireland can be found in Article 46 of the Constitution and in the Referendum Acts. In sum, the proposal must be supported by both houses of the *Oireachtas*, submitted to and approved by the electorate, and signed into law by the President.

[XLV] US Supreme Court, *Texas v White*, 74 (7 Wall) 700 (1869), 725.

[XLVI] *Ibid*., 726.

[XLVII] Constitutional Court of Spain, Judgment n. 42/2014 of 25 March 2014, 12-13 available in English at: https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%2042-2014E(2)%20%20DECLARACION%20SOBERANISTA%20%20SIN%20ANTECEDENTES.pdf

[XLVIII] *Reference re Secession of Quebec*, para. 104.

[XLIX] *Ibid*., para. 88.

[L] *Ibid*., para. 90.

[LI] *See* Scotland Act 1998, Schedule 5.

[LII] UK Supreme Court, *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998*, [2022] UKSC 81.

[LIII]<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/313612/scottish_referendum_agreement.pdf >.

[LIV] *See* The Scotland Act 1998 (Modification of Schedule 5) Order 2013.

[LV] Court of Justice of the EU, *Opinion 2/13, re Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedom*, ECLI:EU:C:2014:2454, para. 156.

[LVI] Letter from John C. Calhoun to General Hamilton on the Subject of State Interposition 14 (1832) ("Secession is a withdrawal from the Union; a separation from partners, and, as far as depends on the member withdrawing, a dissolution of the partnership. It presupposes an association; a Union of several States, or individuals, for a common object. Wherever these exist, Secession may; and where they do not, it cannot.") (emphasis omitted).

[LVII] *See* Court of Justice of the EU, Case 6/64 *Costa v E.N.E.L*, ECLI:EU:C:1964:66, at 593.

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LVIII *See* Court of Justice of the EU, Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union*, ECLI:EU:C:2018:999, para. 50.
LIX *See Advisory Opinion on Kosovo*.
LX Arbitration Commission of the Peace Conference on Yugoslavia, *Opinion No. 1,* available at (1992) *European Journal of International Law* 3(1): 178-185.
LXI *See* e.g. US Supreme Court, *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).
LXII German Basic Law, Art 23(1).
LXIII Constitution of the Italian Republic, Arts 117, 118, 120.
LXIV Art 5(1) TEU.
LXV *Reference re Secession of Quebec*, para. 90.

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