

Independence in Europe: Secession, Sovereignty, and the European Union

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INTRODUCTION

On September 11, 2012, hundreds of thousands of demonstrators took to the streets of Barcelona, in the Spanish region of Catalonia. What began as a celebration of Catalonia’s national holiday turned into the largest display of Catalan nationalist sentiment in recent memory, with marchers waving red, blue, and gold Catalan flags and carrying banners adorned with slogans such as “Independence Now!” and “Catalonia: the

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New European State.”¹ Almost overnight, Catalan independence went from an obscure nationalist dream to a real possibility, with ramifications for the futures of both Spain and the European Union (EU).

The demonstration in Barcelona was a striking example of the nationalism that has recently gained ascendancy in several of the EU’s most prominent “stateless nations.” In Belgium’s June 2010 elections, the separatist Nieuw-Vlaamse Alliantie (New Flemish Alliance, or N-VA) won the plurality of votes, triggering a record-setting political stalemate that left Belgium without a functioning national government for over 530 days, and causing many observers to predict that the Belgian state would soon come apart at the seams.² In May 2011, the Scottish National Party (SNP) won a majority of seats in the Scottish Parliament and immediately announced plans to hold a referendum on severing Scotland’s centuries-old union with England.³ Scotland’s referendum is scheduled for 2014.⁴

At first blush, the salience of separatist nationalism within the democracies of Western Europe might seem anomalous, or even comical. In Europe, talk of secession calls to mind the deadly seriousness of the Balkan wars of the 1990s; by contrast, the ethno-linguistic division at the heart of Belgium’s political troubles has been characterized as “a (very) civilized war as told by Dr. Seuss, with the French-speaking

¹ *Vast Crowds Demand Catalan Autonomy from Crisis-Hit Spain*, REUTERS, Sept. 11, 2012, <http://www.reuters.com/article/2012/09/11/us-spain-catalonia-idUSBRE88A19U20120911>.

² See Stephen Castle & Steven Erlanger, *Vote Widens Divide Between Flemish- and French-Speaking Regions*, N.Y. TIMES, June 13, 2010, <http://www.nytimes.com/2010/06/14/world/europe/14belgium.html>; Angelique Chrisafis, *Eurozone Crisis Forces Belgium to Finally Form a Government*, GUARDIAN (U.K.), Dec. 1, 2011, <http://www.guardian.co.uk/world/2011/dec/01/eurozone-crisis-forces-belgium-government>.

³ Severin Carrell, *Stunning SNP Election Victory Throws Spotlight on Scottish Independence*, GUARDIAN (U.K.), May 6, 2011, <http://www.guardian.co.uk/politics/2011/may/06/snp-election-victory-scottish-independence?cat=politics&type=article>.

⁴ See *infra* notes 52 through 54 and accompanying text.

Walloons on one side and the Dutch-speaking Flemings on the other.”⁵ Underscoring the incongruity of these nationalist movements is the ongoing process of European integration, often viewed as having ushered in a “post-sovereignty era” in which the significance of statehood is diminished.⁶ Why do Flemish, Scottish, and Catalan nationalists seek separation in the midst of an integrating continent?

The paradox of separatism within the EU implicates “[t]he interrelated concepts of sovereignty, self-determination, and the territorial integrity of states” that “form a Gordian knot at the core of public international law.”⁷ Like their counterparts throughout the world, Flemish, Scottish, and Catalan nationalists often couch their calls for independence in the language of the right to self-determination.⁸ Yet although self-determination has become a mainstay of nationalist political rhetoric, it possesses only

⁵ Geraldine Baum, *Belgium Fracturing Along Linguistic Lines*, L.A. TIMES, Nov. 13, 2007, at 5. See also Justin Stares, *Flanders Encouraged to Seek Independence from Belgium by EU’s Growing Power*, TELEGRAPH (U.K.), June 28, 2009, <http://www.telegraph.co.uk/news/worldnews/5664644/Flanders-encouraged-to-seek-independence-from-Belgium-by-EUs-growing-power.html> (“The notion that breaking up a country as insignificant as Belgium could lead to anything more appealing in its place may seem far-fetched beyond its shores.”).

⁶ See, e.g., MICHAEL KEATING, PLURINATIONAL DEMOCRACY: STATELESS NATIONS IN A POST-SOVEREIGNTY ERA 27-28 (2001) (describing “post-sovereignty” as “the end of state monopoly of ultimate authority”); JANET LAIBLE, SEPARATISM AND SOVEREIGNTY IN THE NEW EUROPE: PARTY POLITICS AND THE MEANINGS OF STATEHOOD IN A SUPRANATIONAL CONTEXT 28-32 (2008) (“Post-sovereign approaches agree with the proposition that the sovereignty of the modern state has long been challenged and compromised. Instead of claiming the monopoly on sovereignty, states in the contemporary global order, and most significantly in the EU, ‘must share their prerogatives with supra-state, sub-state, and trans-state systems.’”).

⁷ Christopher J. Borgen, *Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia’s “Frozen Conflicts,”* 9 OR. REV. INT’L L. 477, 477 (2007) [hereinafter Borgen, *Imagining Sovereignty*].

⁸ See, e.g., New Flemish Alliance, <http://www.n-va.be/english> (“[T]he N-VA stands for the right of self-determination of peoples, this being a fundamental principle of international law According to international law, Flanders meets all requirements to become a state on its own”); Scottish National Party-Glasgow, SNP in Glasgow, http://www.glasgow SNP.org/SNP_in_Glasgow/ (“The [SNP] has been at the forefront of the campaign for Scottish self-determination for almost seventy years. The evolution of the SNP has been paralleled by the political evolution of Scotland herself—from an almost totally unionist country to a nation on the brink of independence.”); Fiona Govan, *Catalonia Calls Snap Elections in Independence Drive from Madrid*, TELEGRAPH (U.K.), Sept. 25, 2012, <http://www.telegraph.co.uk/news/worldnews/europe/spain/9566649/Catalonia-calls-snap-elections-in-independence-drive-from-Madrid.html> (quoting Artur Mas, the nationalist leader of Catalonia’s regional government, as proclaiming that “[t]he time has come to exercise the right to self-determination We want the same instruments that other nations have to preserve our common identity.”).

limited utility as a legal right. Self-determination exists in tension with the principles of sovereignty and territorial integrity that form the foundation of the international system of states. The international community has sought to resolve this tension by effectively eliminating the circumstances in which the right to self-determination equates with a right to secession and independence. Under current conceptions of international law, Flanders, Scotland, and Catalonia do not possess a right to statehood.

But as notions of a post-sovereignty era suggest, the nature of statehood has undergone profound changes in recent decades, particularly in Europe. Those changes inform separatist politics in Europe's stateless nations and add a new dimension to the analysis of their self-determination claims. The SNP's old campaign slogan, "Independence in Europe,"⁹ captures the essence of sub-state nationalist attitudes towards European integration: Flemish, Scottish, and Catalan nationalists have tethered the traditional goal of sovereign statehood to the realities of an integrating Europe in which state sovereignty is constrained. To be sure, the relationship between European integration and sub-state nationalism is complex and at times contradictory: while the EU provides avenues for the articulation and pursuit of nationalist objectives beyond the borders of the state, it also limits full participation in its institutions to member states, thereby bolstering the significance of statehood; while integration creates certain safety nets that make it easier for stateless nations to contemplate going it alone, the European dimension might also complicate the process of secession. Regardless of these complexities, however, the EU has become a critical component of sub-state nationalist aspirations. Accordingly, legal and political factors within the EU—most notably the

⁹ See LAIBLE, *supra* note 6, at 105-13 (tracing the origins of the SNP's pro-Europe ideology and "Independence in Europe" slogan).

respective roles of states and regions within the EU's institutional structure, the rules governing membership in the EU, and the broader debates over the future of European integration occasioned by the "eurozone crisis"—have as much to say about the prospects for Flemish, Scottish, and Catalan nationalism as do the state-centric principles of international law.

This article explores the meaning of "Independence in Europe" in light of the current parameters of the right to self-determination, which remains rooted in notions of state sovereignty and territorial integrity, and the process of European integration, which has given rise to a more nuanced understanding of sovereignty and statehood. Part I provides background on Catalonia, Scotland, and Flanders, paying particular attention to the ways in which the nationalist movements in these regions have been influenced by their unique identities, their acquisition of political autonomy, and economic disputes with their respective parent states. Part II addresses the scope of the right to self-determination in international law and demonstrates that Flanders, Scotland, and Catalonia do not possess a unilateral right to secede. By applying the framework articulated by the Canadian Supreme Court in its advisory opinion on Quebec's possible secession from Canada, however, this part describes how Europe's stateless nations could negotiate independence from their parent states. Part III places Flemish, Scottish, and Catalan nationalism within the context of European integration and explores how the EU both encourages and places limits on self-determination claims. Finally, Part IV returns to the paradox of separatism in the midst of integration, and suggests how international law and state practice might evolve to reflect new realities at a time when the building

block of the international system—the state—is being challenged both from above and from below.

I. NATIONALISM IN EUROPE’S STATELESS NATIONS: IDENTITY, AUTONOMY, AND THE ECONOMY

The contours of present-day Catalan, Scottish, and Flemish nationalism have been shaped by three interrelated factors: identity, autonomy, and the economy. First, Catalonia, Scotland, and Flanders are paradigmatic examples of stateless nations: they are well-defined territories with unique historical, cultural, economic, and political identities, and they have maintained their unique identities despite being incorporated for long periods of time within larger states.¹⁰ Second, consistent with the trend towards decentralization evident in many Western European states since the end of the Second World War,¹¹ they have obtained autonomous political institutions, which have tended to reinforce their separate identities and prompt demands for even greater self-rule. Third, the nationalist movements in these stateless nations have been given impetus by economic disputes with their respective parent states—disputes that have been exacerbated by the eurozone crisis, and which in many respects mirror the economic dilemmas faced by the EU.

¹⁰ See Montserrat Guibernau, *Nations Without States: Political Communities in the Global Age*, 25 MICH. J. INT’L L. 1251, 1254 (2003) (defining “nations without states” as “nations which, in spite of having their territories included within the boundaries of one or more States . . . maintain a separate sense of national identity generally based upon a common culture, history, attachment to a particular territory and the explicit wish to rule themselves”). See also KEATING, *supra* note 6 (examining politics in several stateless nations, including Catalonia, Scotland, and Flanders).

¹¹ See TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* 701-13 (2005); John Hopkins, *The Future of Sub-National Governments in a Supra-National World—Lessons from the European Union*, 38 VICTORIA U. WELLINGTON L. REV. 19, 22-23 (2007).

A. Catalonia: Rising Separatist Sentiment

Prior to its gradual incorporation into the nascent Spanish state following the marriage of Ferdinand and Isabella in 1469, Catalonia formed the dominant part of the Crown of Aragon, which controlled a powerful trading empire that stretched throughout the Mediterranean.¹² Even at this early stage, Catalonia exhibited characteristics associated with modern statehood, such as a common language and well-developed political, legal, and economic structures.¹³ As Madrid extended its authority, Catalonia maintained its own currency, tax system, and distinct culture rooted in the Catalan language.¹⁴ The vestiges of Catalan self-government were not fully extinguished until the early eighteenth century, after Catalonia backed the losing Hapsburg side in the War of Spanish Succession.¹⁵

The nineteenth and early twentieth centuries witnessed a revival of Catalan cultural and political awareness, as well as the growth of Catalan nationalism as an organized political movement.¹⁶ This renaissance coincided with the development of an industrial economy that made Catalonia more prosperous and advanced than the rest of Spain.¹⁷ For a brief period in the 1930s, Catalonia regained a measure of self-rule.¹⁸ Following the Spanish Civil War, however, General Francisco Franco established a centralized dictatorship that “was determined once and for all to put an end to the

¹² See NORMAN DAVIES, VANISHED KINGDOMS: THE RISE AND FALL OF STATES AND NATIONS 151-227 (2011) (providing a detailed history of the Crown of Aragon).

¹³ According to one historian, “[b]etween 1250 and 1350, the Catalan principality was perhaps the European country to which it would be the least inexact or risky to use such seemingly anachronistic terms as political and economic imperialism or ‘nation-state’.” KENNETH MCROBERTS, CATALONIA: NATION BUILDING WITHOUT A STATE 13 (2001) (quoting PIERRE VILAR, LA CATALOGNE DANS L’ESPAGNE MODERNE 220 (1962)).

¹⁴ *Id.* at 14-16.

¹⁵ See DAVIES, *supra* note 12, at 222-23.

¹⁶ See MCROBERTS, *supra* note 13, at 16-39.

¹⁷ *Id.* at 16-17.

¹⁸ See *id.* at 33-39.

‘Catalan problem.’”¹⁹ What followed was “one of the darkest periods of Catalan history,” during which Catalans “endured repression of individual and collective cultural rights, such as the prohibition of the use of the Catalan language, the public denial of the Catalan identity and the punishment [of] cultural expression.”²⁰

Catalan identity—and the quest for political autonomy—reemerged during the transition to democracy that followed Franco’s death in 1975.²¹ Article 2 of the 1978 Spanish Constitution proclaimed “the indissoluble unity of the Spanish Nation,” but also “recognize[d] and guarantee[d] the right to autonomy of the nationalities and regions of which it is composed.”²² The Constitution provided a framework for self-government for those regions “with common historic, cultural and economic characteristics”—Catalonia, the Basque Country, and Galicia.²³ A Statute of Autonomy enacted in 1979 established a Catalan regional government, the Generalitat de Catalunya.²⁴ Ultimately, in an effort to downplay the uniqueness of its three “historic nationalities,” Spain also extended autonomous institutions to its other regions.²⁵ As Michael Keating explains, “Spain’s system of autonomous governments is the result of contradictory pressures for differentiation, coming from the historic nationalities, and for uniformity, coming from the central state.”²⁶ Despite its significant degree of decentralization, Spain has resisted

¹⁹ *Id.* at 40.

²⁰ Josep Desquens, *Europe’s Stateless Nations in the Era of Globalization: The Case for Catalonia’s Secession from Spain*, BOLOGNA CTR. J. INT’L AFF., Spring 2003, <http://www.jhubc.it/bcjournal/articles/desquens.cfm>.

²¹ See MCROBERTS, *supra* note 13, at 44-65.

²² Spanish Constitution, art. 2 (1978).

²³ *Id.*, arts. 143-58.

²⁴ The full text of the 1979 statute is available in English at Generalitat de Catalunya, Statute of Autonomy of 1979, <http://www.gencat.cat/generalitat/eng/estatut1979/index.htm>.

²⁵ The granting of autonomy to all of Spain’s regions is known as *café para todos*, or “coffee for all.” See *How Much Is Enough?*, ECONOMIST, Nov. 6, 2008, <http://www.economist.com/node/12501023>.

²⁶ KEATING, *supra* note 6, at 116.

outright federalization, and remains (at least in formal constitutional terms) a unitary state.

For the most part, Catalan nationalists have been willing to work within the parameters of this political structure. Catalonia's largest political party, *Convergència i Unió* (CiU), has been a strong advocate of Catalan autonomy but has typically stopped short of calling for secession.²⁷ In recent years, however, increased tensions between Catalonia and the Spanish state have precipitated a spike in support for separation. The turn towards a more robust nationalism can be traced to June 2006, when Catalans voted in favor of an amended Statute of Autonomy that expanded the authority of the *Generalitat*—and, most contentiously, defined Catalonia as a “nation.”²⁸ Spain's leading conservative political party, the *Partido Popular*, challenged the constitutionality of the amended statute, particularly on the ground that the Constitution recognizes only one, Spanish, nation.²⁹ In June 2010, the Spanish Constitutional Court struck down several parts of the amended Statute of Autonomy, including those defining Catalonia as a nation and giving formal preference to the use of the Catalan language.³⁰ The court's decision sparked widespread nationalist demonstrations in Barcelona.³¹

²⁷ See McROBERTS, *supra* note 13, at 66-72. Catalonia's smaller nationalist party, *Esquerra Republicana de Catalunya* (ERC), has often taken a stronger pro-independence line. *See id.* at 86-87.

²⁸ *Parlament de Catalunya*, Organic Law 6/2006 of the 19th July, on the Reform of the Statute of Autonomy for Catalonia, http://www.parlament-cat.net/porteso/estatut/estatut_angles_100506.pdf.

²⁹ See Gaspar Pericay Coll, *The Spanish Constitutional Court Shortens the Current Catalan Statute of Autonomy*, CATALAN NEWS AGENCY, June 28, 2010, <http://www.catalannewsagency.com/news/politics/the-spanish-constitutional-court-shortens-the-current-catalan-statute-of-autonom>.

³⁰ *See id.*

³¹ See Gaspar Pericay Coll, *Catalonia Answers Back Through Colossal Demonstration: “We Are a Nation”*, CATALAN NEWS AGENCY, July 10, 2010, <http://www.catalannewsagency.com/news/politics/catalonia-answers-back-through-a-colossal-demonstration-we-are-a-nation>.

Indeed, the legal wrangling over the amended Statute of Autonomy took place against a backdrop of increased nationalist activity. Beginning in December 2009 and culminating in Barcelona in April 2011, Catalan nationalists staged a series of non-binding referendums in which the majority of voters expressed support for secession.³² Meanwhile, Catalonia's successful campaign to ban the traditional Spanish pastime of bullfighting was widely viewed as "a provocation from a region where many want independence from Spain."³³

Economic issues have long been a source of friction between Barcelona and Madrid. Catalonia is one of Spain's wealthiest regions, but it does not control its own taxes; instead, Catalonia's tax revenue goes to the central government, which then remits what Catalan nationalists argue is a disproportionately small amount of funds.³⁴ The eurozone crisis has exacerbated disputes over this taxation arrangement. The Partido Popular government of Prime Minister Mariano Rajoy blames Spain's economic woes on free-spending regional governments; by contrast, Catalonia attributes its deficit to its inability to control its own finances. In the wake of the nationalist rally in Barcelona on September 11, 2012, Prime Minister Rajoy rejected Catalan leader Artur Mas's request for a new tax revenue distribution plan.³⁵ The Generalitat responded by voting in favor

³² See *Spain's Catalonia Region in Symbolic Independence Vote*, BBC NEWS, Dec. 14, 2009, <http://news.bbc.co.uk/2/hi/europe/8410730.stm>; Giles Tremlett, *Catalan Independence Boost After Barcelona Vote*, GUARDIAN (U.K.), Apr. 11, 2011, <http://www.guardian.co.uk/world/2011/apr/11/catalan-independence-boost-barcelona-vote?cat=world&type=article>.

³³ Tracy Rucinski, *Spanish Regions Scrap Over Bullfighting*, REUTERS, Mar. 5, 2010, <http://uk.reuters.com/article/2010/03/05/uk-spain-bullfighting-idUKTRE62424U20100305>.

³⁴ See Ricard González & Jaume Clotet, *Spanish Prisoners*, N.Y. TIMES, Oct. 2, 2012, <http://www.nytimes.com/2012/10/03/opinion/a-new-call-for-catalonias-independence.html?emc=tnt&tntemail1=y> (characterizing the financial arrangement between Catalonia and Madrid as "fiscal looting"). See also Desquens, *supra* note 20.

³⁵ Rafael Minder, *Spain's Prime Minister Fails to Reach Deal With Catalonia*, N.Y. TIMES, Sept. 20, 2012, <http://www.nytimes.com/2012/09/21/world/europe/spains-prime-minister-fails-to-reach-revenue-deal-with-catalonia.html>.

of holding a referendum on Catalan independence, and moved up regional elections to November 2012 in an effort to capitalize on anticipated nationalist support.³⁶ Despite CiU's disappointing showing in the November elections, nationalists still managed to capture the majority of seats in the Generalitat.³⁷ In January 2013, the Generalitat adopted a "Declaration of Sovereignty" proclaiming Catalonia's right to determine its political future in a referendum to be held by 2014—a move to which the Spanish government has expressed vehement opposition.³⁸

B. *Scotland: The Road to the Referendum*

If Catalans hold a referendum on independence, they will likely look to Scotland as a guide. Scotland's existence as an independent state ended in 1707, when the Scottish parliament entered into the Treaty of Union with England.³⁹ The Treaty dissolved the Scottish parliament and transferred ultimate political authority to London. One Scottish parliamentarian of the time lamented that the day on which the Treaty was put to a vote in the Scottish parliament was "the last day Scotland was Scotland."⁴⁰ But Scotland "entered the [United Kingdom] with a distinct institutional trajectory of its own," and following union it retained a robust civil society, including its own legal and educational systems, social welfare programs, and established (Presbyterian) church.⁴¹ Scots also

³⁶ *Madrid and Catalonia Clash Over Independence Referendum*, REUTERS, Sept. 27, 2012, <http://www.reuters.com/article/2012/09/27/us-spain-catalonia-idUSBRE88Q1JE20120927>.

³⁷ *Trouble Ahead*, ECONOMIST, Dec. 1, 2012, at 58-59.

³⁸ Parliament of Catalonia, Declaration of Sovereignty and of the Right to Decide of the People of Catalonia, Jan. 22, 2013, http://www10.gencat.cat/gencat/binaris/declaration_of_sovereignty_tcm34-239795.pdf [hereinafter "Declaration of Sovereignty"]. See also Gareth Platt & Olivia Fandino, *Spain: Government to Challenge Catalonia Independence Declaration in Court*, INT'L BUS. TIMES, Mar. 1, 2013, <http://www.ibtimes.co.uk/articles/441159/20130301/spain-barcelona-catalonia.htm>.

³⁹ See T.M. DEVINE, *THE SCOTTISH NATION: A HISTORY 1700-2000* 3-30 (1999) (describing events in Scotland leading up to and following the Treaty of Union).

⁴⁰ TOM NAIRN, *AFTER BRITAIN: NEW LABOUR AND THE RETURN OF SCOTLAND* 94 (2000).

⁴¹ SCOTT L. GREER, *NATIONALISM AND SELF-GOVERNMENT: THE POLITICS OF AUTONOMY IN SCOTLAND AND CATALONIA* 44 (2007).

made significant contributions to the British Empire, which, according to historian T.M. Devine, “did not dilute the sense of Scottish identity but strengthened it by powerfully reinforcing the sense of national esteem and demonstrating that the Scots were equal partners in the great imperial mission.”⁴²

Although Scottish culture and identity flourished in the United Kingdom and the Empire, Scottish nationalism as a political force largely lay dormant until the 1960s, when the SNP surprised the British establishment by winning a parliamentary by-election.⁴³ Thereafter, the discovery of oil in the North Sea in 1970 led many nationalists to argue for greater Scottish control over its own resources and revenues, and to claim that Scotland could survive economically as an independent state.⁴⁴ Diverting the flow of North Sea oil revenues from London to Edinburgh remains a central plank in the SNP’s economic platform.⁴⁵

During the 1970s, in an effort to co-opt Scottish national sentiment and maintain its position as the dominant political party in Scotland, the Labour Party announced plans for the devolution of political authority to Scottish institutions, but its proposal failed to obtain a sufficient number of votes in a 1979 referendum.⁴⁶ The issue of devolution was shelved during the 1980s and early 1990s, when the Conservative Party governed the United Kingdom. The Conservatives followed an unabashedly pro-Union line, which

⁴² DEVINE, *supra* note 39, at 289-90.

⁴³ *See id.* at 574.

⁴⁴ *See id.* at 585-86.

⁴⁵ *See, e.g.,* SCOTTISH NATIONAL PARTY, YOUR SCOTLAND, YOUR VOICE: A NATIONAL CONVERSATION 38-39 (2009), available at <http://www.scotland.gov.uk/Resource/Doc/293639/0090721.pdf> [hereinafter YOUR SCOTLAND, YOUR VOICE] (noting that oil revenues currently go to the British government, and proposing that after independence, Scotland could invest those revenues in a sovereign wealth fund that would “creat[e] a permanent source of revenue”).

⁴⁶ *See* GREER, *supra* note 41, at 50-63.

alienated many Scottish institutions accustomed to being afforded a wide berth by London, and which in turn increased Scottish support for autonomy.⁴⁷

The Labour Party returned to power under Tony Blair in 1997 promising devolution of powers throughout the United Kingdom, in part to “‘lance the boil’ of independence.”⁴⁸ In 1998, the Labour government introduced the Scotland Act, which provided for the creation of a local Scottish parliament.⁴⁹ In contrast to the failed devolution referendum of 1979, Scottish voters enthusiastically backed the Scotland Act, and in 1999 the first Scottish Parliament since 1707 met at Holyrood outside Edinburgh.⁵⁰ Ultimately, the Scotland Act formed part of a broader pattern of devolution that also resulted in the establishment of a Welsh Assembly and, under the terms of the Good Friday Agreement, a power-sharing government composed of unionists and nationalists in Northern Ireland.

The Labour Party initially controlled the devolved Scottish Parliament, but in the 2007 elections the SNP cut deeply into Labour’s majority, and its leader, Alex Salmond, became First Minister in an SNP-led minority government.⁵¹ The SNP’s decisive May 2011 victory pushed independence to the forefront of Scotland’s political agenda. On January 25, 2012, the birthday of the Scottish national poet Robert Burns, Salmond announced plans to hold a referendum on Scottish independence in the autumn of 2014,

⁴⁷ See *id.* at 69-88. As Scott L. Greer explains, “Conservative governments of these years pursued policies and policymaking strategies that eroded Scottish organizations’ autonomy and stability. The organizations’ backlash took the form of support for devolution.” *Id.* at 69.

⁴⁸ James Macintyre, *From Devolution to Independence*, N.Y. TIMES, Feb. 8, 2012, http://www.nytimes.com/2012/02/09/opinion/from-devolution-to-independence.html?pagewanted=1&_r=0&ref=opinion.

⁴⁹ The full text of the Scotland Act, including revisions made subsequent to 1998, is available at <http://www.legislation.gov.uk/ukpga/1998/46>.

⁵⁰ See DEVINE, *supra* note 39, at 616-17.

⁵¹ See Neal Ascherson, *Will Scotland Go Its Own Way?*, N.Y. TIMES, Feb. 26, 2012, <http://www.nytimes.com/2012/02/27/opinion/independence-for-scotland.html?pagewanted=all>.

which would coincide with the 700th anniversary of the victory of Scottish forces over English invaders at the Battle of Bannockburn.⁵² The government of Prime Minister David Cameron came out strongly in opposition to Scottish independence.⁵³

Nonetheless, in the Edinburgh Agreement reached on October 15, 2012, the British government granted the Scottish Parliament authority to hold a referendum, and the two governments agreed to the ground rules for the referendum process.⁵⁴

C. Flanders: Breaking Up “The Most Successful Failed State of All Time”

Unlike Scotland and Catalonia, Flanders has no history of independence. Instead, it coalesced as an identifiable territorial and political unit following the creation of the Belgian state.⁵⁵ Belgium itself is a product of secession: in 1830, at the instigation of the local French-speaking bourgeoisie, and with the support of the Great Powers, the Belgian provinces declared independence from the Netherlands, and a German nobleman, Leopold of Saxe Coburg Gotha, was installed as the first King of the Belgians.⁵⁶

⁵² See John F. Burns & Alan Cowell, *Scots Begin Bid for Vote on Independence*, N.Y. TIMES, Jan. 25, 2012, <http://www.nytimes.com/2012/01/26/world/europe/scots-launch-bid-for-vote-on-independence.html?pagewanted=all>.

⁵³ See John F. Burns & Alan Cowell, *Cameron Details Arguments Against Scottish Independence*, N.Y. TIMES, Feb. 16, 2012, <http://www.nytimes.com/2012/02/17/world/europe/cameron-speech-scotland-independence-referendum.html>.

⁵⁴ Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, Oct. 15, 2012, *available at* <http://www.scotland.gov.uk/Resource/0040/00404789.pdf> [hereinafter *Edinburgh Agreement*].

⁵⁵ See KRIS DESCHOUWER, *THE POLITICS OF BELGIUM: GOVERNING A DIVIDED SOCIETY* 42-43 (2009) (explaining that, unlike in Spain or the United Kingdom, “the Belgian regions and communities did not exist before Belgium was created”). The Flemish provinces were distinguishable, however, from neighboring areas of the Low Countries due to their use of the Dutch language (which separated them from the French-speaking Catholic areas to the south) and adherence to Catholicism (which differentiated them from the Protestant Dutch-speaking areas to the north). See *id.* at 18-19. Moreover, Flanders lay at the heart of the Kingdom of Burgundy during the fifteenth and sixteenth centuries. See DAVIES, *supra* note 12, at 128-43.

⁵⁶ See Robert Mnookin & Alain Verbeke, *Persistent Nonviolent Conflict with No Reconciliation: The Flemish and Walloons in Belgium*, 72 LAW & CONTEMP. PROBS. 151, 156-57 (2009).

Prior to 1830, “there was no shared sense of ‘Belgian’ identity, no sense of a single people seeking nationhood.”⁵⁷ Even after independence, the fostering of a shared identity often proved difficult, in large part because the new state straddled a linguistic fault line separating the Dutch-speaking north (Flanders) from the French-speaking south (Wallonia).⁵⁸ From the outset, the francophone minority dominated Belgium. French was the language of politics, commerce, and culture, and the capital, Brussels, gradually became a predominantly French-speaking city despite being located in Flanders.⁵⁹ The mines and factories of Wallonia drove the economy and concentrated wealth in the south.⁶⁰ In contrast, Flanders remained poor and agricultural. To the francophone elite, Dutch was a language “for domestics and animals,”⁶¹ and the Flemish themselves were “uneducated, backward peasants, suitable to do manual labor but little else.”⁶²

The roots of modern Flemish nationalism can be traced to the “Flemish Movement,” which during the late nineteenth and early twentieth centuries sought greater equality in the area of language rights.⁶³ Under pressure from the movement, the Belgian government gradually extended the official use of Dutch in legal, educational, and administrative matters.⁶⁴ Yet “the national language policy essentially became one of dual monolingualism, based on the principle of territorial location, not bilingualism, with language rights attaching to individuals.”⁶⁵ In other words, language rights were

⁵⁷ *Id.* at 157.

⁵⁸ This fault line was historically entrenched. “Julius Caesar’s *Gallica Belgica* lay athwart the line that was to separate Gallo-Roman territories from the Franks and mark the boundary thenceforth demarcating Latinate, French-dominated Europe from the Germanic north.” JUDT, *supra* note 11, at 708 n.1.

⁵⁹ See Mnookin & Verbeke, *supra* note 56, at 157-59, 169.

⁶⁰ *Id.* at 158.

⁶¹ Ian Buruma, *Le Divorce*, NEW YORKER, Jan. 10, 2011 [hereinafter Buruma, *Le Divorce*], at 37.

⁶² Mnookin & Verbeke, *supra* note 56, at 158.

⁶³ See *id.* at 159-60.

⁶⁴ See *id.*

⁶⁵ *Id.* at 160.

determined by where an individual lived rather than by the individual's native tongue.⁶⁶ By 1963, Belgium's "language border," separating Dutch-speaking Flanders and French-speaking Wallonia, had become fixed.⁶⁷

Meanwhile, following the Second World War, the economic circumstances of the Flemish and Walloons were dramatically reversed—Flanders developed a modern economy and emerged as one of the wealthiest regions in Europe, while Wallonia, faced with decreased mining productivity and the shuttering of factories, suffered a sharp post-industrial decline.⁶⁸ Wallonia became dependent on subsidies from the national government, which the newly prosperous Flemish often viewed as being unfairly paid out of their taxes.⁶⁹ Financial transfers from Flanders to Wallonia remain a critical source of Flemish nationalist grievance—"the average Flemish person on the street resents the idea of substantial subsidies from Flanders to the Walloon region."⁷⁰

The economic rise of Flanders was accompanied by sweeping changes to the Belgian political system. Beginning in 1970, a series of constitutional reforms reflecting the territorial-linguistic divide transformed Belgium from a highly centralized unitary

⁶⁶ In a landmark decision in 1968, the European Court of Human Rights largely upheld Belgian legislation providing for monolingual educational systems based on territory. *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, Eur. Court Human Rights, Judgment of 23 July 1968, Series A No. 6.

⁶⁷ See DESCHOUWER, *supra* note 55, at 42-47. Prior to 1963, the regional borders had been defined by a linguistic census conducted every ten years, and thus had been subject to occasional modifications. *Id.* at 44.

⁶⁸ Mnookin & Verbeke, *supra* note 56, at 161.

⁶⁹ See JUDT, *supra* note 11, at 708 ("Most of the former miners, steel-workers and their families in [Wallonia] now depended upon a welfare system administered from the country's bi-lingual capital and paid for—as it seemed to Flemish nationalists—out of the taxes of gainfully employed northerners.").

⁷⁰ Mnookin & Verbeke, *supra* note 56, at 171-72. See also JUDT, *supra* note 11, at 710 (describing Flemish nationalism as the product of "two self-ascribed identities—repressed linguistic minority and frustrated economic dynamo").

state into a highly decentralized federal state.⁷¹ Broadly, the constitutional reforms established three regions (Flanders, Wallonia, and Brussels-Capital) and three “language communities” (Dutch, French, and German), each with their own parliaments and areas of competency.⁷² Flanders and Wallonia are officially monolingual, while Brussels-Capital is officially bilingual, although the majority of its population speaks French.⁷³ Only those residual powers not explicitly reserved for the regions or language communities belong to the federal government.⁷⁴ As Kris Deschouwer explains, Belgium is not a “coming together” federation like the United States or Switzerland, where smaller political entities united for a common purpose; rather, it might best be described as a “falling apart” federation in which the federal components were created specifically to reflect differences, and where the centrifugal forces of federalism have served to hollow out the national core.⁷⁵

To a far greater extent than either Spain or the United Kingdom, Belgium exhibits the hallmarks of an ethnic conflict. The Flemish and Walloons speak different languages, live in different areas, attend different schools, consume different media, and largely are governed by different institutions.⁷⁶ Indeed, they may no longer even vote for the same

⁷¹ See DESCHOUWER, *supra* note 55, at 48-54. In 1993, Article I of the Belgian Constitution was amended to declare Belgium a federal state composed of three regions and three language communities. *Id.* at 41.

⁷² See *id.* at 48-54. In addition to its Dutch- and French-speaking communities, Belgium has a small German-speaking population along its eastern border. See *Belgium’s German-Speaking Cantons Ponder Their Position*, DEUTSCHE WELLE, Apr. 19, 2012, <http://www.dw.de/belgiums-german-speaking-cantons-ponder-their-position/a-15890523> (describing the political position of German-speaking Belgians in the midst of the Flemish-Walloon divide).

⁷³ Mnookin & Verbeke, *supra* note 56, at 169 & n.98.

⁷⁴ DESCHOUWER, *supra* note 55, at 56.

⁷⁵ *Id.* at 42.

⁷⁶ See, e.g., Christopher Caldwell, *Belgian Waffles: Two Nations, After All?*, WEEKLY STANDARD, Dec. 21, 2009, <http://www.weeklystandard.com/Content/Public/Articles/000/000/017/327fxssq.asp?nopager=1> (“French speakers and Dutch speakers inhabit different cultural universes. Most people have never heard of the major politicians, the major actresses, and sometimes even the major athletes on the other side of a country that is smaller than Maryland.”); Doug Saunders, *For Bitterly Divided Belgium, The Future Looks*

political parties—between 1968 and 1978, the three major parties (the Christian Democrats, Socialists, and Liberals) each splintered into French- and Dutch-speaking factions, which only contest elections within their respective territorial and linguistic spheres.⁷⁷ Where the two communities do come into regular contact—such as in the increasingly francophone Flemish suburbs of Brussels—relationships are strained by disputes over language use and voting rights.⁷⁸ Yet despite these divisions, Belgium remains peaceful and prosperous—an anomaly that led one German newspaper to dub Belgium “the most successful ‘failed state’ of all time.”⁷⁹

Grim, GLOBE & MAIL (Canada), Sept. 26, 2007, at A3 (describing Belgium as being “divided into twin solitudes of extraordinary isolation: The French-speaking Walloon minority and Dutch-speaking Flemish majority have long existed in isolated worlds. With no shared national media, few shared institutions and no form of bilingualism, forming governments has never been easy.”); Baum, *supra* note 5, at 5 (“After decades of snubs and bitter grudges, the two halves of Belgium have separate languages, political parties, schools and media. Some claim that even the birds of Flanders and Wallonia sing in different languages.”).

⁷⁷ See JUDT, *supra* note 11, at 712.

⁷⁸ In particular, Flemish nationalists have opposed rules entitling francophones in many Brussels suburbs to municipal services in French, even though Flanders is otherwise an exclusively Dutch-speaking region, and the existence of the Brussels-Halle-Vilvoorde (“BHV”) electoral district, in which French-speakers, despite living in Flanders, may vote for francophone political parties from the Brussels-Capital region. See Mnookin & Verbeke, *supra* note 56, at 169-71. Consequently, the Brussels suburbs have become flashpoints for ethno-linguistic tension. See *Thousands of Flemish Separatists Stage March Near Brussels*, AGENCE FRANCE-PRESSE, Sept. 18, 2011, available at http://www.expatica.com/be/news/belgian-news/thousands-of-flemish-separatists-stage-march-near-brussels_176273.html (reporting on a provocative march by hard-line Flemish separatists through the largely francophone town of Lindebeek); Michael Kimmelman, *With Flemish Nationalism on the Rise, Belgium Teeters on the Edge*, N.Y. TIMES, Aug. 4, 2008, <http://www.nytimes.com/2008/08/04/arts/04abro.html?pagewanted=all> (describing linguistic tensions in the Brussels bedroom community of Linkebeek); Steven Erlanger, *Seams of Belgium’s Quilt Threaten to Burst*, N.Y. TIMES, May 14, 2008, <http://www.nytimes.com/2008/05/14/world/europe/14belgium.html?pagewanted=all> (describing the efforts of Flemish nationalist politicians in the Brussels suburb of Liedekerke to maintain the “Flemish nature” of the town in the face of an influx of French-speakers); Delphine Schrank, *Belgians Limp Along, Hobbled by Old Language Barriers*, WASH. POST, Feb. 3, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/29/AR2008012903286.html> (noting the passage of regulations in the suburb of Zaventem restricting the sale of public land to those who speak Dutch or who demonstrate a willingness to learn it). Tensions over the BHV electoral district were finally eased in July 2012, when the government agreed to split the constituency in two. *Row Over Key Belgian Constituency Resolved*, EURONEWS, July 14, 2012, <http://www.euronews.com/2012/07/14/row-over-key-belgium-constituency-resolved/>.

⁷⁹ Siobhán Dowling, *‘Belgium is the World’s Most Successful Failed State,’* SPIEGEL ONLINE, July 16, 2008, <http://www.spiegel.de/international/europe/0,1518,566201,00.html> (quoting an article from the German newspaper *Die Tageszeitung*).

Belgium's recent national elections put its dysfunctional political culture on full display. Following the June 2007 elections, calls for greater Flemish self-rule triggered political deadlock that took over nine months to resolve.⁸⁰ The N-VA's unexpected success in the June 2010 elections precipitated an even longer crisis: in February 2011, Belgium set a record for the most number of days without a functioning national government, surpassing the previous record set by war-torn Iraq.⁸¹ Both the 2007 and 2010 national elections caused many observers to question whether Belgium would survive as a state.⁸²

Belgium only managed to form a coalition government in December 2011, and then only in the face of pressures stemming from the economic crisis, which led to a downgrade of Belgium's credit rating.⁸³ Yet even this pact has failed to quell talk of a Belgian breakup. In order to form the coalition, Belgium's political parties agreed to a further devolution of powers to the regional governments.⁸⁴ Still, the N-VA refused to join the governing coalition and, as the leading opposition party, remains committed to eventual Flemish independence. Flemish regional elections in October 2012 confirmed the N-VA's position as the largest party in Flanders, and its leader, Bart De Wever, was

⁸⁰ See Stephen Castle, *Belgium Forms Coalition Government, Ending Standoff*, N.Y. TIMES, Mar. 21, 2008, http://www.nytimes.com/2008/03/21/world/europe/21belgium.html?_r=0.

⁸¹ See Leo Cendrowicz, *Belgian Waffling: Who Needs Government, Anyway?*, TIME, Feb. 21, 2011, <http://www.time.com/time/world/article/0,8599,2052843,00.html>.

⁸² Frequently, these observers compared the relationship between Flanders and Wallonia to an unhappy marriage, and the potential breakup of Belgium to a divorce. For an extended use of the divorce metaphor, which serves as a concise overview of the Flemish-Walloon conflict, see Mnookin & Verbeke, *supra* note 56, at 154-56. See also Caldwell, *supra* note 76 ("But the marriage of Flanders and Wallonia, never a love match, has in recent decades entered a thrown-crockery phase.").

⁸³ Chrisafis, *supra* note 2.

⁸⁴ See Stanley Pignal, *Belgium Deal Paves Way for New Government*, FIN. TIMES, Oct. 11, 2011, <http://www.ft.com/cms/s/0/58abb49c-f41f-11e0-8694-00144feab49a.html>.

elected mayor of Antwerp.⁸⁵ De Wever envisions the gradual breakup of the Belgian state through the continued transfer of powers to the regions; his goal is that “Belgium will be snuffed out slowly . . . like a candle, barely noticed by anyone.”⁸⁶

II. SECESSION AND SELF-DETERMINATION IN INTERNATIONAL LAW

Of course, the breakup of Belgium—or the independence of Scotland or Catalonia—would hardly go unnoticed by the international community. Secession strikes at the twin pillars of the Westphalian state system: sovereignty and territorial integrity.⁸⁷ A successful secession shrinks the territorial reach of the former parent state’s sovereign authority and establishes a new sovereign in its place.⁸⁸ At its most extreme, one or more successful secessions might trigger the dissolution (*i.e.*, the legal extinction) of the former parent state, as was the case with Yugoslavia in the 1990s.⁸⁹ The Yugoslav example also points to another disruptive characteristic of secession: secessionist disputes often involve armed conflict and human rights abuses that pose a threat to international security.⁹⁰

⁸⁵ *Belgian Flemish Separatists Make Gains at Polls*, BBC NEWS, Oct. 15, 2012, <http://www.bbc.co.uk/news/world-europe-19943890>.

⁸⁶ Buruma, *Le Divorce*, *supra* note 61, at 36.

⁸⁷ See Michael J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT’L L. & FOR. AFF. 361, 372-82 (2005) (providing an overview of the impact of the 1648 Peace of Westphalia on the modern concept of the sovereign state); Daniel Philpott, *Religious Freedom and the Undoing of the Westphalian State*, 25 MICH. J. INT’L L. 981, 983 (2004) (characterizing the Westphalian state as “Janus-faced, its government staring both inward at its subjects, over which it had supreme authority, and outward beyond the state’s borders, where no rival authority was entitled to force a change in the governance of its inhabitants.”).

⁸⁸ See Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT’L L. 177, 178 (1991) (“Secessionist claims involve, first and foremost, disputed claims to territory.”).

⁸⁹ See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 390-91 (2d ed. 2006). For a further consideration of issues pertaining to continuity and extinction, see *infra* Part III.B.

⁹⁰ See, e.g., Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT’L L. 1, 62-77 (1998) (discussing the origins of the violent breakup of Yugoslavia and the international community’s response). See also Aleksandar Pavkovic, *By Force of Arms: Violence and Morality in Secessionist Conflict*, in *SECESSION AS AN INTERNATIONAL PHENOMENON: FROM AMERICA’S CIVIL WAR TO CONTEMPORARY SEPARATIST MOVEMENTS* 259, 259-76 (Don H. Doyle ed., 2010) [hereinafter *SECESSION AS AN INTERNATIONAL PHENOMENON*] (examining whether the use of force to achieve or prevent secession is morally justifiable).

International law is frequently described as taking a neutral stance towards secession; acts of secession are evaluated under domestic law, while international law is only concerned with regulating secession's consequences.⁹¹ Nonetheless, secession is clearly disfavored. Although international law recognizes a right to self-determination, such a right, if applied broadly to offer the possibility of statehood to the world's myriad potential claimants, would result in "the radical undermining of State sovereignty and a dramatic reshaping of the present framework of the world community."⁹² Application of the right to self-determination therefore has been "*selective and limited* in many respects."⁹³ In fact, in the post-colonial era, it would appear that the right to self-determination never amounts to a unilateral right to secede.

A. *Unilateral Secession: Limits on the Right to Self-Determination*

The modern concept of self-determination has its origins in U.S. President Woodrow Wilson's famous Fourteen Points and similar pronouncements following the First World War.⁹⁴ Wilson's vision of self-determination was expansive and idealistic: he argued that "well-defined national elements" should be given "the utmost satisfaction that can be accorded them without introducing new, or perpetuating old, elements of

⁹¹ See CRAWFORD, *supra* note 89, at 390 ("The position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally."); Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT'L L. 1, 8 (2009) [hereinafter Borgen, *The Language of Law*] ("[O]ne also cannot say that international law makes secession illegal. If anything, international law is largely silent regarding secession, and attempted secessions are, first and foremost, assessed under domestic law.").

⁹² ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 317 (1998).

⁹³ *Id.* (emphasis in original).

⁹⁴ Although the Fourteen Points did not explicitly mention self-determination, they addressed specific territorial settlements that proposed to carve new states out of the defeated German, Austro-Hungarian, and Ottoman empires. For the text of the Fourteen Points, see MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD 495-96 (2003).

discord or antagonism.”⁹⁵ The potential perils of this vision were apparent from the outset. Wilson’s Secretary of State, Robert Lansing, recognized that given the innumerable “national elements” in the world and the impossibility of providing each one with its own state, self-determination would “raise hopes which can never be realized.”⁹⁶ Moreover, although the victorious Allies were happy to dismantle the defeated Central Powers at Versailles, they were far less willing to extend self-determination to the national minorities within their own borders or, even more unthinkably, to their colonial subjects.

Thus, as Antonio Cassese explains, “in the era after the First World War self-determination, although in vogue as a political postulate and a rhetorical slogan . . . was not a part of the body of international legal norms.”⁹⁷ In 1920 and 1921, two expert commissions tasked by the League of Nations with determining the status of the Aaland Islands rejected the notion of self-determination in favor of maintaining the territorial integrity of existing states.⁹⁸ The first commission, the Committee of Jurists, declared that “Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish”⁹⁹ According to the second commission, the Commission of Rapporteurs, to recognize such a right “would be to destroy order and stability within states and to

⁹⁵ HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 28 (Rev. ed. 1996) (citing CHARLES L. MEE, JR., *THE END OF ORDER* 53-54 (1980)).

⁹⁶ MACMILLAN, *supra* note 94, at 11. Wilson ultimately came to the same conclusion: “When I gave utterance to those words [that ‘all nations had a right to self-determination’], I said them without the knowledge that nationalities existed, which are coming to us day after day.” *Id.* at 12.

⁹⁷ CASSESE, *supra* note 92, at 27.

⁹⁸ The Aaland Islands were part of Finland, but their population was of Swedish descent, spoke Swedish, and wished to separate from Finland and unite with Sweden. See HANNUM, *supra* note 95, at 370-71.

⁹⁹ Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, L.N.O.J., Special Supp. No. 3, at 5 (1920).

inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.”¹⁰⁰ Rather than allow the Aaland Islands to separate from Finland and unite with Sweden, the League of Nations directed Finland to implement certain linguistic and educational measures to protect the Aaland Islanders’ cultural rights within the Finnish state.¹⁰¹

The legal status of self-determination shifted following the Second World War, when it was referenced prominently in several foundational United Nations (UN) documents. Article I of the UN Charter identified the development of “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” as one of the UN’s primary purposes.¹⁰² Similarly, Common Article I of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) declared that “[a]ll 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.”¹⁰³ According to Christopher J. Borgen, “[t]he concept of self-determination definitively moved from an aspirational ideal to a recognized right” by means of its inclusion in the ICCPR and ICESCR.¹⁰⁴

Yet despite its gradual acceptance as a legal right, self-determination has continued to suffer from a fundamental problem: nobody can agree on exactly what it

¹⁰⁰ The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7/21/68/106, at 27 (1921) [hereinafter Aaland Islands Report].

¹⁰¹ The Aaland Agreement in the Council of the League of Nations, L.N.O.J. at 701 (1921).

¹⁰² U.N. Charter, art. 1, para. 2. The same language also appears in Article 55 of the UN Charter.

¹⁰³ International Covenant on Civil and Political Rights (1966), 999 U.N. Treaty Ser. 171 (1967), art. 1; International Covenant on Economic, Social and Cultural Rights (1966), 993 U.N. Treaty Ser. 3 (1967), art. 1.

¹⁰⁴ Borgen, *The Language of Law*, *supra* note 91, at 7.

means. Separatists throughout the world have taken a broad, essentially Wilsonian view of self-determination in an attempt to provide legal support for their claims; in the political realm, self-determination has become “a shibboleth that all pronounce to identify themselves with the virtuous.”¹⁰⁵ But international law is, first and foremost, a set of rules made by and for states, and states unsurprisingly have been reluctant to condone a right that would justify their own dismemberment.

In the decades following the adoption of the UN Charter, self-determination became almost exclusively associated with the process of decolonization. Indeed, self-determination inarguably amounts to a right to “external self-determination”—*i.e.*, a right to independent statehood—only when applied to overseas (or “saltwater”) colonies, such as those of the former European empires in Africa and Asia.¹⁰⁶ The UN General Assembly first proclaimed the right of colonies to external self-determination in its 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples,¹⁰⁷ and the International Court of Justice (ICJ) subsequently held that the right to external self-determination in the colonial context has achieved the status of customary international law.¹⁰⁸ The granting of external self-determination to saltwater colonies was consistent

¹⁰⁵ HANNUM, *supra* note 95, at 49 (quoting Vernon Van Dyke, *Self-Determination and Minority Rights*, 13 INT’L STUDIES Q. 223, 223 (1969)).

¹⁰⁶ See Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STANFORD J. INT’L L. 255, 272-73 (1996). For a thorough discussion of the right to self-determination as applied to colonial territories, see CASSESE, *supra* note 92, at 71-89.

¹⁰⁷ G.A. Res. 1514, 15 UN GAOR, Supp. (No. 16), UN Doc. A/4684 (1960), Preamble, paras. 2, 3 (affirming that “[a]ll peoples have the right to self-determination” and “solemnly proclaim[ing] the necessity of bringing a speedy and unconditional end to colonialism in all its forms and manifestations”).

¹⁰⁸ See *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, at 110 (Oct. 16) (“Inspired by a series of resolutions of the General Assembly . . . a veritable law of decolonization is in the course of taking shape. It derives essentially from the principle of self-determination.”); *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion, 1971 I.C.J. 6, 31 (“[T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them.”). See also *Case Concerning East Timor* (Port. v. Austl.), 1995 I.C.J. 90, 102-03 (June 30) (characterizing East Timor as a

with the preservation of the Westphalian state system: with few exceptions, overseas colonies were not considered integral parts of the European states that governed them, and their loss, however painful, therefore did not threaten the sovereignty or alter the borders of the parent state.¹⁰⁹

There is little support for the proposition that a right to external self-determination exists beyond the colonial context. Even the former colonies, having achieved independence under the banner of self-determination, promptly rejected the notion that the right might be used to adjust their own borders.¹¹⁰ At most, only three non-colonial territories in the UN Charter era—Bangladesh, Eritrea, and most recently Kosovo—have successfully seceded without their former parent states’ consent.¹¹¹ All three involved unique circumstances that arguably limit their precedential value.¹¹² By contrast, the vast majority of attempted non-colonial secessions have failed.¹¹³

“non-self-governing territory,” and therefore possessing a right to external self-determination).

¹⁰⁹ Where overseas colonies were considered integral parts of metropolitan states, the process of decolonization was particularly long, complex, and violent. The most obvious example is Algeria, which was an integral part of France, and which suffered through a brutal anti-colonial war between 1954 and 1962 before gaining independence. See IAN LUSTICK, *UNSETTLED STATES, DISPUTED LANDS: BRITAIN AND IRELAND, FRANCE AND ALGERIA, ISRAEL AND THE WEST BANK-GAZA* 81-120, 239-301 (1993) (examining the difficulties that France faced in extricating itself from Algeria due to Algeria’s integration with the French state).

¹¹⁰ See, e.g., Organization of African Unity, Resolution 16(1) (July 21, 1964) (stating “that border problems constitute a grave and permanent factor of dissention” and committing its member states to “respect the borders existing on their achievement of national independence”).

¹¹¹ See Borgen, *The Language of Law*, *supra* note 91, at 9-10. All other successful non-colonial secessions since 1945 were either achieved with the parent state’s consent (e.g., Senegal, Singapore, and the Baltic States) or were the result of the dissolution of the parent state (e.g., the Soviet Union, Yugoslavia, and Czechoslovakia). See CRAWFORD, *supra* note 89, at 416. The most recent example of secession with the parent state’s consent is South Sudan’s separation from Sudan in July 2011, pursuant to a peace agreement brokered with assistance from the United States. See Jeffrey Gettleman, *South Sudan, the Newest Nation, Is Full of Hope and Problems*, N.Y. TIMES, July 7, 2011, http://www.nytimes.com/2011/07/08/world/africa/08sudan.html?_r=0.

¹¹² Bangladesh achieved independence from Pakistan due largely to the intervention of the Indian Army, which produced a *fait accompli* on the ground that the international community (including Pakistan) eventually accepted. See CRAWFORD, *supra* note 89, at 415-16; HANNUM, *supra* note 95, at 46 (arguing that Bangladesh’s successful secession “was due more to the Indian army than to the precepts of international law”). Eritrea’s independence from Ethiopia resulted from the overthrow of Ethiopia’s military regime and the installation of a Transitional Government that accepted Eritrean independence. See

The most common argument in favor of a right to external self-determination outside of the colonial context is that international law should condone “remedial secession” as a last resort where a group within the territory of an existing state is denied basic democratic freedoms and is subjected to severe human rights abuses.¹¹⁴ The concept of remedial secession finds support in the League of Nations reports on the Aaland Islands¹¹⁵ and, more recently, in the UN General Assembly’s 1970 Declaration Concerning Friendly Relations and Co-operation among States.¹¹⁶ But remedial secession is far from accepted by the international community. Kosovo, whose population suffered human rights abuses at the hands of the Serbian state, was perhaps the clearest recent example of a situation in which a right to remedial secession would apply. Nonetheless, in its 2010 advisory opinion on the legality of Kosovo’s secession from Serbia, the ICJ sidestepped the thorny issue of remedial secession altogether,

Borgen, *The Language of Law*, *supra* note 91, at 10 n.28. This leads James Crawford, for one, to classify Eritrea as an example of non-colonial secession achieved with the consent of the parent state. CRAWFORD, *supra* note 89, at 415-16. In recognizing Kosovo’s 2008 declaration of independence from Serbia, numerous states, including the U.S., characterized Kosovar independence as the *sui generis* result of a unique set of circumstances, specifically Serbia’s human rights abuses in Kosovo during the 1990s and the international community’s subsequent military intervention and administration of the province. *See, e.g.*, U.S. Recognizes Kosovo as Independent State, Feb. 18, 2008, <http://2001-2009.state.gov/secretary/rm/2008/02/100973.htm> (quoting then-U.S. Secretary of State Condoleezza Rice as stating that “Kosovo cannot be seen as a precedent for any other situation in the world today”). Unlike the secessions of Bangladesh and Eritrea, which have gained universal acceptance, Kosovo’s secession remains disputed, with many states, including Serbia and Russia, refusing to recognize its independence.

¹¹³ *See, e.g.*, CRAWFORD, *supra* note 89, at 403-15 (examining unsuccessful secession attempts in the Faroe Islands, Katanga, Biafra, Republika Srpska, Chechnya, Quebec, and Somaliland).

¹¹⁴ *See* ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 331-400 (2007) (presenting a comprehensive argument that “[i]nternational law should recognize a remedial right to secede” where “secession is a remedy of last resort against serious injustices”).

¹¹⁵ Aaland Islands Report, *supra* note 100 (“The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.”).

¹¹⁶ G.A. res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 (1970) (protecting the territorial integrity of those states “possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour,” thereby suggesting that states that fail to meet this standard might forfeit their right to territorial integrity).

choosing instead to confine itself to the narrower question of whether Kosovo's declaration of independence violated international law.¹¹⁷ Accordingly, while acknowledging the "radically different views" of whether a right to remedial secession exists, the court determined that "it is not necessary to resolve these questions in the present case."¹¹⁸ By avoiding the issue, the ICJ's opinion cast serious doubt on the viability of non-colonial external self-determination claims.

B. Negotiated Secession: Lessons from Quebec

Thus, where the people claiming a right to self-determination resides within the borders of an existing state, the most that the right can be said to guarantee is "internal self-determination," which may be understood as basic human and democratic rights coupled with certain minority rights designed to recognize and protect the people's culture and identity. This concept was at the heart of the League of Nations' resolution of the Aaland Islands issue.¹¹⁹ More recently, in 1998—amidst ongoing debates over the possible secession of Quebec from Canada, and following Quebecois separatists' narrow defeat in a 1995 independence referendum¹²⁰—the Canadian Supreme Court reaffirmed international law's preference for internal self-determination in *Reference re Secession of Quebec*.¹²¹

¹¹⁷ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141 (July 22) at ¶ 83. The question referred to the court by the General Assembly was: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" *Id.*, ¶ 1. The ICJ found, unsurprisingly, that international law does not prohibit declarations of independence. *Id.*, ¶ 84.

¹¹⁸ *Id.*, ¶¶ 82-83.

¹¹⁹ See *supra* note 101 and accompanying text.

¹²⁰ For background and analysis of Quebecois nationalism and Quebec's 1995 referendum, see William J. Dodge, *Succeeding in Seceding? Internationalizing the Quebec Secession Reference Under NAFTA*, 34 TEX. J. INT'L L. 287, 287-96 (1999). For an in-depth consideration of the possible contours and consequences of Quebec's secession, see ROBERT A. YOUNG, THE SECESSION OF QUEBEC AND THE FUTURE OF CANADA (Rev. ed. 1998).

¹²¹ Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

The Canadian government sought the court’s advisory opinion on whether Quebec possessed a unilateral right to secede under either domestic or international law.¹²² After finding that Canadian domestic law did not support a right to unilateral secession,¹²³ the court explained that under international law, “the right to self-determination of a people 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.”¹²⁴ According to the court, this reflects the fact that “[t]he international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states.”¹²⁵ Relying largely on the number of Quebecois who have held prominent positions in the Canadian government, and on an assertion that “[t]he international achievements of Quebecers in most fields of human endeavour are too numerous to list,” the court determined that the people of Quebec exercised their right to internal self-determination through their ability to “freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world.”¹²⁶ The court therefore concluded that even if international law were to support a right to remedial secession, such a right was “manifestly inapplicable to Quebec under existing conditions.”¹²⁷

But the court also went one step further, drawing on “the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities” enshrined in

¹²² *Id.*, ¶ 2. The Canadian government also posed a third question: whether, in the event of a conflict of authorities on the legality of Quebec’s secession, domestic or international law would take precedence. *Id.* Because the court held that both domestic and international law denied Quebec a unilateral right to secede, it did not reach this third question. *Id.*, ¶ 147.

¹²³ *Id.*, ¶¶ 32-108.

¹²⁴ *Id.*, ¶ 126.

¹²⁵ *Id.*, ¶ 127.

¹²⁶ *Id.*, ¶¶ 135-36.

¹²⁷ *Id.*, ¶ 138.

the Canadian Constitution to outline a process of negotiated secession.¹²⁸ According to the court, although Canadian domestic law does not condone unilateral secession, the Constitution “is not a straightjacket”—thus, “a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.”¹²⁹ In other words, the democratically expressed will of the people of Quebec to secede would oblige the rump Canadian state to engage with Quebec in negotiations concerning possible separation. Although “[n]o one suggests that it would be an easy set of negotiations,” the court nonetheless concluded that this process was the only way to ensure “the ultimate acceptance of the result by the international community.”¹³⁰

The court’s discussion of negotiated secession left two fundamental questions unanswered—what is a “clear majority,”¹³¹ and what constitutes a “clear question”? Developments subsequent to the court’s opinion provided guidance on the latter. The perceived lack of clarity in the question posed during Quebec’s 1995 referendum was a major source of contention between pro- and anti-independence groups, and is often identified as one of the reasons why the vote was so close.¹³² In 2000, the Canadian government passed the Clarity Act, which obliges Canada to negotiate with Quebec over

¹²⁸ *Id.*, ¶ 148.

¹²⁹ *Id.*, ¶ 150.

¹³⁰ *Id.*, ¶¶ 151-52.

¹³¹ The court obviously envisioned more than a simple majority of 50% plus one. Particularly for purposes of this article, it is worth noting that in 2006, based on a proposal made by the EU, Montenegro held a referendum on separation from Serbia that required a majority of 55% to succeed. See Office of Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights, Serbia and Montenegro Referendum 21 May 2006, Mar. 14, 2006, at 3-4, *available at* <http://www.osce.org/odihr/elections/montenegro/18431>.

¹³² See Dodge, *supra* note 120, at 291. The question was: “Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the Bill Respecting the Future of Quebec, and of the agreement signed on June 12, 1995?” KEATING, *supra* note 6, at 92 n.18.

the terms of a possible separation only following a vote on a question that sets forth a stark choice between either full separation or continued inclusion in the Canadian state.¹³³ Accordingly, the Clarity Act prohibits any “referendum question that envisages other possibilities in addition to the secession of the province from Canada”¹³⁴ The aim of this provision was to foreclose a referendum on “sovereignty-association,” a somewhat nebulous proposal often made by Quebecois nationalists under which Quebec, though nominally independent, would retain some form of political and economic partnership with the rest of Canada.¹³⁵

Given the many similarities between Quebec and the stateless nations of Europe,¹³⁶ the Canadian Supreme Court’s analysis of the right to self-determination has important implications for Flanders, Scotland, and Catalonia. As a threshold matter, as with the Canadian Constitution, nothing in either the Belgian or Spanish constitutions allows for secession.¹³⁷ Indeed, the Spanish Constitution not only expressly affirms the existence of a single Spanish nation, but also vests exclusive competence for holding referendums in the national government¹³⁸ and arguably authorizes the use of military force to combat any attempt at secession.¹³⁹ For its part, the 1707 Treaty of Union does

¹³³ Clarity Act, 2000 S.C., ch. 26 (Can.).

¹³⁴ *Id.*, ¶ 1(4)(b).

¹³⁵ See KEATING, *supra* note 6, at 89-90 (explaining that the nationalist Parti Québécois’ proposal for sovereignty-association would provide “for a Canadian common market, the continued use of the Canadian currency in Quebec, and joint executive and parliamentary institutions between Canada and Quebec to decide on matters of common interest. There would also be free movement of labour between Canada and Quebec and dual citizenship would be freely available.”). See also *id.* at 92 (describing the question posed in the 1995 referendum as “hovering between the sovereignty and sovereignty-association options”).

¹³⁶ See generally *id.* (characterizing Quebec as a stateless nation and analyzing its politics alongside the stateless nations of Europe).

¹³⁷ See Mnookin & Verbeke, *supra* note 56, at 180 (“Nothing in the Belgian constitution allows secession.”); Spanish Constitution, *supra* note 22, art. 2 (describing the Spanish state as “indivisible”).

¹³⁸ *Id.*, art. 149.

¹³⁹ See *id.*, art. 8(1) (“The mission of the Armed Forces . . . is to guarantee the sovereignty and independence of Spain and to defend its territorial integrity and the constitutional order.”).

not contemplate separation, but rather proclaims that “the two kingdoms of England and Scotland shall . . . for ever after be united into one kingdom”¹⁴⁰ And like Quebec, Flanders, Scotland, and Catalonia are neither saltwater colonies possessing a right to external self-determination, nor victims of repression such that a right to remedial secession would apply. In short, Flanders, Scotland, and Catalonia are only entitled to—and already possess—internal self-determination.

This leaves open the possibility of negotiated secession. The British government, despite its staunch opposition to Scottish independence, has thus far demonstrated a willingness to negotiate with Scottish nationalists. In language reminiscent of the Canadian Supreme Court’s advisory opinion, the Edinburgh Agreement states that a referendum will “deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect.”¹⁴¹ Additionally, the Agreement’s approach to the referendum question reflects the Clarity Act’s view of what constitutes a “clear question.” The Agreement specifies that the referendum will be held on the basis of a single question,¹⁴² thereby thwarting the SNP’s plans to include two questions on the referendum ballot—the first addressing independence, and the second gauging support for “devolution max,” a scenario similar to Quebecois “sovereignty-association” in which Scotland would obtain virtually complete internal autonomy (including full fiscal powers)

¹⁴⁰ Union of Scotland Act 1706 (6 Anne c.11). *See also* KEATING, *supra* note 6, at 108 (noting that “[t]here is no constitutional provision for the secession of Scotland,” but that British politicians have largely conceded that “there would be no obstacles placed in Scotland’s way” if it chose to secede).

¹⁴¹ Edinburgh Agreement, *supra* note 54, Preamble.

¹⁴² *Id.*, ¶ 6.

but would remain part of the United Kingdom for external purposes, such as defense and foreign affairs.¹⁴³

Whereas the British government has demonstrated a willingness to negotiate with Scottish nationalists over the contours of a referendum, the Spanish government has thus far refused to engage with Catalan nationalists in a similar fashion. In the wake of the Catalan government's call for an eventual independence referendum, the Spanish government insisted that such a referendum would be illegal under the Constitution, and vowed to prevent it.¹⁴⁴ A serving general in the Spanish army even went so far as to warn that Catalan independence would only occur "[o]ver my dead body and that of many soldiers."¹⁴⁵ It remains to be seen whether Spain will adhere to its hard-line position in the event Catalan nationalists push forward with their plans for a referendum. Spain's inflexibility is troubling, however, both legally in light of the Canadian Supreme Court's opinion and politically in comparison to the accommodating stance taken by Britain under similar circumstances.

Even if referendum-related issues were resolved and a clear majority vote demonstrated support for independence, Flemish, Scottish, or Catalan secession would require negotiations between the seceding region and the parent state. As in Quebec, these would not be an easy set of negotiations. For example, according to one constitutional scholar, the separation of the Czech Republic and Slovakia in 1993

¹⁴³ See Michael Buchanan, *Scottish Independence Referendum: What is Devolution Max?*, BBC NEWS, Feb. 20, 2012, <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-17094333>.

¹⁴⁴ See Platt & Fandino, *supra* note 38. See also *Spain Votes to Stop Independence Referendum*, REUTERS, Oct. 9, 2012, <http://www.reuters.com/article/2012/10/09/us-spain-catalonia-idUSBRE8981GO20121009>.

¹⁴⁵ Paul Mason, *Catalan Leaders Seek Independence Vote, Legal or Not*, BBC NEWS, Oct. 5, 2012, <http://www.bbc.co.uk/news/world-19847252>.

required 30 treaties and 12,000 legal agreements.¹⁴⁶ Secession would require agreement not only on the format of the political process leading to separation, but also on thornier issues such as the allocation of resources and debt.¹⁴⁷ And in Belgium, negotiations following a referendum would almost certainly involve disputes over the fate of Brussels that would likely determine whether a state entitled to claim the mantle of Belgium's legal personality would emerge following Flemish secession.¹⁴⁸

Regarding the right to self-determination in Quebec, Cassese observed that “international law has already played (and will be playing) a role as a guiding standard” insofar as “it has presented a path to be taken regarding decisions about the destiny of a people, even where no legal entitlement to that people is granted by any specific legal rule.”¹⁴⁹ The same may be said of international law's role with respect to possible Flemish, Scottish, or Catalan secession. International law does not grant these stateless nations a unilateral right to secede. At most, it delineates how independence may be achieved through referendum and negotiation. This position is consistent with international law's inherent deference to state sovereignty and territorial integrity. Unlike in Quebec, however, the debates over Flemish, Scottish, and Catalan secession also occur within the context of the EU, which provides a unique setting in which to consider self-determination claims.

¹⁴⁶ Honor Mahony, *EU in Uncharted Legal Waters on Scottish Independence*, EU OBSERVER, Jan. 18, 2012, <http://euobserver.com/843/114896> (quoting University College London professor Robert Hazell).

¹⁴⁷ See YOUNG, *supra* note 120, at 176-212 (identifying numerous issues that would likely be addressed as part of negotiations over Quebec's secession from Canada).

¹⁴⁸ See *infra* notes 210 through 215 and accompanying text.

¹⁴⁹ CASSESE, *supra* note 92, at 254 (emphasis in original).

III. THE EUROPEAN UNION AS A FORUM FOR SELF-DETERMINATION CLAIMS

European integration was not always popular among nationalists in Europe's stateless nations. The SNP, for example, argued that integration amounted merely to the transfer of sovereignty over Scotland from one alien government in London to another in Brussels.¹⁵⁰ Yet by the 1980s, the SNP had become a firm supporter of the European project and a proponent of "Independence in Europe."¹⁵¹ Flemish nationalists have also embraced integration, and the N-VA describes itself as "an extremely pro-European party" that supports both "a stronger Flanders and a stronger Europe."¹⁵² The centrality of the EU to Catalan nationalist discourse is evident in the banners carried by demonstrators in Barcelona calling for Catalonia to become a "New European State,"¹⁵³ in the Declaration of Sovereignty's assurance that "[t]he founding principles of the European Union shall be defended and promoted,"¹⁵⁴ and in Artur Mas's proposed wording for a future referendum question: "Do you want Catalonia to become a new state within the European Union?"¹⁵⁵

It is overly simplistic to conclude that the EU encourages or discourages separatism, or that it makes it easier or more difficult to secede. Nonetheless, European integration "affect[s] how the parties to a [separatist] conflict perceive their own interests and identities."¹⁵⁶ Three aspects of the EU play a particularly important role in shaping

¹⁵⁰ See LAIBLE, *supra* note 6, at 83-88.

¹⁵¹ See *id.* at 106-13.

¹⁵² New Flemish Alliance, FAQ: Is the N-VA a pro-Europe party?, <http://international.n-va.be/en/about/faq>.

¹⁵³ *Vast Crowds Demand Catalan Autonomy from Crisis-Hit Spain*, *supra* note 1.

¹⁵⁴ Declaration of Sovereignty, *supra* note 54.

¹⁵⁵ Giles Tremlett, *Catalonia Leader Threatens to Draw EU Into Independence Row With Spain*, GUARDIAN (U.K.), Oct. 15, 2012, <http://www.guardian.co.uk/world/2012/oct/15/catalonia-leader-threat-independence-eu-spain>.

¹⁵⁶ Bruno Coppieters, *Secessionist Conflicts in Europe*, in SECESSION AS AN INTERNATIONAL PHENOMENON, *supra* note 90, at 237, 243.

Flemish, Scottish, and Catalan self-determination claims, and considering how such claims might be addressed: the respective roles of states and regions in EU institutions, the rules governing EU membership, and the debates over the future of Europe in the wake of the eurozone crisis.

A. States and Regions

Although it is often obscured by considerations of the EU's impact on sovereignty, the fact remains that the EU is in many ways governed "through cooperation among the governments of its member states" rather than by supranational structures with independent authority.¹⁵⁷ States remain the primary actors within the EU system. Membership in the EU is limited to sovereign states that meet the EU's admissions criteria and that are admitted through a unanimous vote by member states.¹⁵⁸ Once admitted to membership, states participate directly in the EU's primary governing institutions: the European Council (consisting of ministers from each member state), the European Commission (consisting of one commissioner from each member state), and the European Parliament (consisting of elected representatives from the member states).¹⁵⁹ Thus, as Janet Laible explains, "[s]tatehood in the EU . . . retains meaning for nationalists because it still remains the sole means by which nationalists can be recognized as sovereign equals in the European political system."¹⁶⁰

Attempts to establish formal channels for regional participation in EU governance have produced only limited results. During the 1980s and 1990s, it became popular to

¹⁵⁷ LAIBLE, *supra* note 6, at 36.

¹⁵⁸ See Treaty on European Union, OJ C 191 of 29.7.1992, art. 49(1), Feb. 7, 1992, entered into force Nov. 1, 1993 (setting forth the application process for EU membership).

¹⁵⁹ See JOHN PINDER & SIMON USHERWOOD, *THE EUROPEAN UNION: A VERY SHORT INTRODUCTION* 36-55 (2d ed. 2007).

¹⁶⁰ LAIBLE, *supra* note 6, at 23.

envision a “Europe of the Regions” in which local governments would replace states as the primary building blocks of a more fully integrated Europe. Many regions established “information offices” in Brussels in an effort to access the emerging European policymaking structures.¹⁶¹ The Maastricht Treaty, which entered into force in 1993, bolstered the Europe of the Regions idea by enshrining the principle of subsidiarity in EU law (pursuant to which authority over any given area of competency should be vested at the lowest possible political level), establishing a Committee of the Regions, and allowing regional ministers to sit on member state delegations in the European Council where the member state deemed such participation appropriate.¹⁶²

Yet on balance, the robust regional role that the Maastricht Treaty appeared to promise has never fully materialized. According to Laible, “many observers point not to the strength of regions in EU policymaking, but to their weakness. Even before the signing of the Maastricht Treaty, analysts were suggesting that the notion of a ‘Europe of the Regions’ was premature; post-Maastricht developments have not altered this perception.”¹⁶³ Indeed, the Committee of the Regions has come to symbolize the limitations on regional participation: its powers are essentially consultative, and the Commission and Council need not follow its recommendations.¹⁶⁴ Furthermore, membership in the Committee is open to a wide range of local governments (including, for example, municipalities), which arguably dilutes its value as a vehicle for pursuing the interests of stateless nations with considerable domestic autonomy.¹⁶⁵

¹⁶¹ *Id.* at 25.

¹⁶² *See* Hopkins, *supra* note 11, at 26-27.

¹⁶³ LAIBLE, *supra* note 6, at 36.

¹⁶⁴ *See* Hopkins, *supra* note 11, at 27-29.

¹⁶⁵ *See id.* at 28 (describing the Committee of the Regions as “a committee with a huge variety of local, regional, and national representatives. The idea that a Minister-President of Bavaria could talk

The Lisbon Treaty of 2009 provided notable, though modest, expansions of formal regional power.¹⁶⁶ Consequently, it gained appreciable support from sub-state nationalists.¹⁶⁷ The Treaty strengthens the Committee of the Regions by requiring the Commission, Council, and Parliament to consult it on matters concerning local or regional government, and it allows the Committee to challenge EU laws that it believes run afoul of the subsidiarity principle in the European Court of Justice (ECJ).¹⁶⁸

Although it remains to be seen whether the Lisbon Treaty signals a shift towards greater formal regional participation in the EU, the Treaty's guarantees for regions fall short of the direct authority afforded to member states, and thus seem to provide only a glimmer of hope to those still dreaming of a Europe of the Regions.

Beyond the Committee of the Regions, the nature and extent of formal regional participation in EU affairs remains largely in the hands of individual member states. Consistent with the high degree of regional autonomy within the Belgian state, Flemish and Walloon representatives often represent Belgium in the European Council, although they must advance Belgian (rather than regional) positions.¹⁶⁹ By contrast, Spain and the United Kingdom have been more reluctant to allow representatives of their stateless

meaningfully with a local councillor from the UK was farcical and there was soon a major split in the committee.”).

¹⁶⁶ See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, entered into force Dec. 1, 2009.

¹⁶⁷ See Nick Meo & Patrick Hennessey, *European Union's Lisbon Treaty Fuels Flames of Dissent Across Continent*, TELEGRAPH (U.K.), June 28, 2009, <http://www.telegraph.co.uk/news/worldnews/europe/eu/5664631/European-Unions-Lisbon-Treaty-fuels-flames-of-dissent-across-continent.html> (“[L]eaders of some of Europe’s separatist movements are celebrating the progress of the treaty towards full ratification. They are convinced that the more powerful the EU’s own institutions become, the weaker the nation state—and the stronger the case for granting breakaway regions their independence.”).

¹⁶⁸ See Committee of the Regions, *A New Treaty: A New Role for Regions and Local Authorities*, available at <http://cor.europa.eu/en/documentation/brochures/Documents/84fa6e84-0373-42a2-a801-c8ea83a24a72.pdf>.

¹⁶⁹ See KEATING, *supra* note 6, at 156.

nations to participate formally in the EU.¹⁷⁰ One consequence of the general lack of regional participation is the potential for a disconnect between powers devolved to regions within their respective parent states and competency areas falling under the umbrella of the EU—a region might have authority over a particular issue at the domestic level, but be unable to fully participate in EU policymaking concerning that issue.

Yet despite the foregoing constraints on formal regional participation, regions have created informal networks to advance their interests. For example, Flemish, Scottish, and Catalan nationalist members of the European Parliament have joined with representatives of other stateless nations to form the European Free Alliance, “which unites progressive, nationalist, regionalist and autonomist parties in the European Union” that “subscribe [to] the right of peoples to self-determination.”¹⁷¹ Moreover, Flanders, Scotland, and Catalonia participate in the Conference of European Regions with Legislative Power (REGLEG), an informal network dedicated to increasing the role of legislative regions in EU affairs through “policy formation in accordance with the principles of subsidiarity.”¹⁷² It is also important to note that regions derive benefits from their status as regions—for example, they receive EU structural funds funneled through their parent states,¹⁷³ and they fall within the ambit of the EU’s “rights regime,” which ensures cultural and linguistic protections for minority groups and provides a degree of formal recognition of minority cultures at the supranational level.¹⁷⁴

¹⁷⁰ See *id.* at 155-57.

¹⁷¹ European Free Alliance, What’s EFA?, <http://www.e-f-a.org/whatsefa.php>.

¹⁷² Conference of European Regions with Legislative Power, About Regleg, http://www.regleg.eu/index.php?option=com_content&view=section&layout=blog&id=2&Itemid=2.

¹⁷³ See KEATING, *supra* note 6, at 153-54.

¹⁷⁴ See *id.* at 143-47.

Perhaps most significantly, the EU provides stateless nations with opportunities to engage in “paradiplomacy.”¹⁷⁵ Catalonia in particular has actively projected Catalan interests beyond the borders of the Spanish state by integrating itself into the broader European economy, promoting Catalan culture, and cultivating inter-regional links such as the “Four Motors of Europe”—a collaboration among Catalonia and the similarly wealthy regions of Baden-Württemberg (Germany), Rhône-Alpes (France), and Lombardy (Italy) designed to promote regional economic development.¹⁷⁶ Catalonia has thus been described as a “region state” that manages to participate in European affairs, particularly economic affairs, despite remaining within Spain.¹⁷⁷ The success of Catalan paradiplomacy may help to explain why, until recently, Catalan nationalism typically took the form of demands for increased autonomy rather than outright independence.

Flanders has likewise engaged in paradiplomacy beyond the borders of Belgium, often by promoting Flemish culture and courting international investment.¹⁷⁸ Unlike Scotland or Catalonia, Flanders possesses the ability to enter into international agreements in those areas over which it has authority at the domestic level.¹⁷⁹ The impact of successful paradiplomacy on nationalist discourse in Flanders—operating within a conspicuously weak Belgian state—is far different than in Catalonia. Whereas paradiplomacy has arguably tempered calls for Catalan independence, in Flanders it has lent support to the argument that the parent state is irrelevant in the emerging

¹⁷⁵ See generally PARADIPLMACY IN ACTION: THE FOREIGN RELATIONS OF SUBNATIONAL GOVERNMENTS (Francisco Aldecoa & Michael Keating eds., 1999).

¹⁷⁶ See MCROBERTS, *supra* note 13, at 110-11; Four Motors of Europe, <http://4motors.eu>.

¹⁷⁷ MCROBERTS, *supra* note 13, at 113-14.

¹⁷⁸ See KEATING, *supra* note 6, at 156. Flanders is also associated with the Four Motors of Europe, although it is not a full member. See Four Motors of Europe, Organization, <http://4motors.eu/-Organization-.html>.

¹⁷⁹ See KEATING, *supra* note 6, at 156 (“Belgian regions and communities have full external competencies corresponding to their internal competencies, and this has led to a large presence abroad . . .”).

supranational order. The perceived irrelevance of the Belgian state in an integrating Europe underlies Bart De Wever's claims that Belgium is "doomed"¹⁸⁰ and that Belgium's breakup would be "barely noticed by anyone."¹⁸¹ In advancing such claims, Flemish nationalists often draw on the principle of subsidiarity to argue that authority should reside at the Flemish regional level, which already plays a more significant role in the lives of its citizens than does the diminished Belgian state.¹⁸² In this respect, paradiplomacy and subsidiarity dovetail with a belief (often also expressed by Scottish nationalists) that the EU makes independence more practical and desirable by over-representing small states in EU institutions¹⁸³ and providing them with ready access to a common market.¹⁸⁴

¹⁸⁰ *Flemish Leader Says Belgium is Doomed*, EURACTIV, Nov. 10, 2011, <http://www.euractiv.com/elections/flemish-leader-belgium-doomed-news-508873>.

¹⁸¹ See *supra* note 86 and accompanying text.

¹⁸² See, e.g., *Flemish Leader Says Belgium is Doomed*, *supra* note 180 (noting De Wever's statement that the N-VA "believe[s] in subsidiarity" and his argument that "smaller countries are more efficient in decision-making and economic reform"); Stares, *supra* note 5 (quoting an N-VA spokesman as saying that "democracy needs to be closer to the people, and that is why we are a regionalist party"). But for an overview of the subsidiarity principle that challenges the Flemish nationalist position, see Andrew Evans, *Regional Dimensions to European Governance*, 52 INT'L & COMP. L.Q. 21, 28-32 (2003). As Evans explains, while sub-state nationalist interpretations of subsidiarity have some support, there is equal or greater support for the narrower position that subsidiarity refers primarily to relationships between the EU and its member states. See *id.* Ultimately, according to Evans, "subsidiarity fails to secure the structural adaptation of Union law necessary for legal organisation of regionalism." *Id.* at 31.

¹⁸³ See, e.g., YOUR SCOTLAND, YOUR VOICE, *supra* note 45, at 111 ("Within the United Kingdom, Scotland has six MEPs [Members of the European Parliament], but independent countries of comparable size to Scotland, such as Denmark, have thirteen MEPs as representation is calculated so that there are proportionally fewer MEPs for larger states than for smaller ones.").

¹⁸⁴ See *id.* at 44 ("As a full member of the European Union, Scotland would continue to have access to its markets. Independence would enhance the opportunities for Scotland's wider international trade and investment, underpinned by foreign and fiscal policies dedicated to Scotland's political, social and economic interests."); Alex Salmond, *How Scotland Will Lead the World*, ECONOMIST: THE WORLD IN 2012, Dec. 2011, at 106 (arguing for the economic benefits of Scottish independence); New Flemish Alliance, FAQ: Is Flanders too small to be able to do it all alone?, <http://international.n-va.be/en/about/faq#faq-fla-eur> ("Only one country on the list of the top 10 most prosperous countries in the world has more inhabitants than Flanders: the U.S. Therefore, being small doesn't have to be a problem, if people openly and effectively participate in globalisation. A country like Denmark, for example, has almost the same number of inhabitants as Flanders and is listed as number one in all European ranking systems.").

The differing outcomes of Catalan and Flemish paradiplomacy reflect the contradictory influence of EU institutions on sub-state nationalism. On the one hand, formal and informal regional participation in these institutions can operate as an escape valve for nationalist pressures, thereby lowering the demand for separation. On the other hand, by largely limiting direct participation in its affairs to member states, and by providing regions with opportunities to demonstrate that they can act on their own, the EU can encourage separatist aspirations. For any stateless nation contemplating the leap from sub-state region to sovereign state within the confines of the EU, however, a fundamental question remains: would it automatically obtain a seat at the EU table?

B. The Membership Question

The membership question has become the elephant in the room as sub-state nationalism has gained momentum in recent years. “Independence in Europe” arguments often take the European dimension for granted; sub-state nationalists simply assume either that their new states would automatically possess membership in the EU or, at the very least, that they would easily gain admission through an expedited and streamlined process.¹⁸⁵ Thus, it was viewed as a major setback for sub-state nationalists when, during a September 2012 interview with the BBC and again in a December 2012 letter to the House of Lords, European Commission president José Manuel Barroso opined that a new

¹⁸⁵ See, e.g., Stephen Castle, *Scots' Referendum Raises a Slew of Legal Issues*, N.Y. TIMES, Feb. 13, 2012, <http://www.nytimes.com/2012/02/11/world/europe/scots-referendum-raises-a-slew-of-legal-issues.html> (quoting Scottish deputy first minister Nicola Sturgeon as stating that, following independence, “[w]e would automatically be members of the E.U.,” and Catalan nationalist Oriol Junqueras’s position that “Catalonia should become an independent state and automatically a member state of the E.U.”).

state created by secession from an EU member state would have to apply for membership on its own, following the EU's standard application procedure.¹⁸⁶

Unfortunately for sub-state nationalists, Barroso's position is supported by international law and the practice of international organizations. New states typically do not succeed to (*i.e.*, automatically inherit) the international treaty obligations of their former parent states, especially with regard to treaties governing membership in international organizations. Instead, international organizations usually require new states to accede to (*i.e.*, separately obtain) membership. Although secession from an EU member state would be without precedent, and the EU's governing treaties are silent as to how such a situation should be handled, there are both legal and political reasons why it might adhere to the general requirement of accession.

At first glance, Article 34 of the 1978 Vienna Convention on Succession of States in Respect of Treaties suggests that a new state's succession to the treaty obligations of its former parent state is automatic:

1. When a part or parts of a territory of a State separate to form one or more States, whether or not the predecessor state continues to exist:
 - (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor state so formed.¹⁸⁷

¹⁸⁶ See Severin Carrell, *Barroso Casts Doubt on Independent Scotland's EU Membership Rights*, GUARDIAN (U.K.), Sept. 12, 2012, <http://www.guardian.co.uk/politics/2012/sep/12/barroso-doubt-scotland-eu-membership?CMP=email> (quoting Barroso as stating that “[a] new state, if it wants to join the European Union, has to apply to become a member like any state” and that the EU's membership procedure is “a procedure of international law”); *Scottish Independence: EC's Barroso Says New States Need “Apply to Join EU”*, BBC NEWS, Dec. 10, 2012, <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-20664907> (describing Barroso's letter to a House of Lords economic committee investigating the potential ramifications of Scottish independence). The full text of Barroso's letter to the House of Lords is available at http://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA68_Scotland_and_the_EU_Barroso's_reply_to_Lord_Tugendhat_101212.pdf (“[A] new independent state would, by the fact of its independence, become a third country with respect to the EU and the treaties would no longer apply on its territory.”).

¹⁸⁷ Vienna Convention on Succession of States in Respect of Treaties, art. 34(1)(a), U.N. Doc. A/CONF.80/31 (1978).

With respect to treaties governing membership in international organizations, however, the effect of Article 34 is limited by Article 4 of the Convention, which stipulates that the Convention applies “without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization.”¹⁸⁸ In other words, the membership rules of a given international organization take precedence over the provisions of the Vienna Convention. As the UN General Assembly’s International Law Commission explained during the drafting of the Convention:

In many organizations, membership, other than original membership, is subject to a formal process of admission. Where this is so, practice appears now to have established the principle that a new State is not entitled automatically to become a party to the constituent treaty and a member of the organization as a successor State, simply by reason of the fact that at the date of the succession its territory was subject to the treaty and within the ambit of the organization.¹⁸⁹

Although the Vienna Convention does not represent customary international law,¹⁹⁰ it does tend to reflect the approach of international organizations to membership issues arising from the creation of new states on the former territory of member states. The UN first confronted the question of treaty succession in 1947, when British India, an original member of the UN, achieved independence and immediately was partitioned into two separate states, India and Pakistan.¹⁹¹ After considerable debate, the UN concluded that India continued British India’s legal personality, including its membership in the UN,

¹⁸⁸ *Id.*, art. 4.

¹⁸⁹ Draft Articles on Succession of States in Respect of Treaties with Commentaries, [1974] Y.B. Int’l L. Comm’n 177-78, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/3_2_1974.pdf.

¹⁹⁰ See United Nations Treaty Collection, Status of the Vienna Convention on Succession of States in Respect of Treaties, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en (indicating that the Vienna Convention has been ratified by only 22 states and, moreover, that Belgium, Spain, and the United Kingdom have not ratified the Convention).

¹⁹¹ See Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT’L L.J. 29, 34-35 (1995).

while Pakistan would be required to apply for UN membership as a new state.¹⁹² In reaching this conclusion, the UN's Sixth (Legal) Committee established general guidelines for evaluating succession to UN membership:

1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the Organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.
2. That when a new State is created, whatever may be the territory and populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim that status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.
3. Beyond that, each case must be judged according to its merits.¹⁹³

The overarching principle that the UN established in addressing the partition of India and Pakistan—that a member state retains its membership despite a loss of territory, while a new state established on the former territory of a member state must apply for membership on its own—has continued to guide the UN's approach to membership issues arising from changes to the territorial composition of its member states.¹⁹⁴ Other international organizations, such as the International Monetary Fund and the World Bank, have adopted similar approaches.¹⁹⁵

¹⁹² *See id.*

¹⁹³ U.N. GAOR, 1st Comm., Annex 14g, at 582-83, U.N. Doc. A/C.1/212 (1947) (letter from Chairman of the Sixth Committee).

¹⁹⁴ *See* Matthew Happold, *Independence: In or Out of Europe? An Independent Scotland and the European Union*, 49 INT'L & COMP. L.Q. 15, 23-25 (2000).

¹⁹⁵ *See id.* at 25-26.

Like the UN Charter, the EU's governing treaties do not contain any provisions for dealing with secession or the membership issues it raises.¹⁹⁶ Nonetheless, there are reasons to believe that the EU would follow the UN's approach. Like most international organizations, the EU may be viewed as a voluntary association of like-minded states with a fundamental interest in maintaining control over its membership. In other words, "membership of any international organization has as its essence a willingness to cooperate in the furtherance of schemes of international solidarity. Such a willingness cannot be assumed on the part of a new State whose territory falls within the ambit of these schemes."¹⁹⁷ Indeed, as noted above, EU membership is limited to states that meet certain criteria and that are admitted through a unanimous vote.¹⁹⁸ To allow for automatic treaty succession would be to allow a new state to make an end run around the EU's membership rules. Moreover, the EU's governing treaties allocate representation in EU institutions and access to structural funds proportionally among the member states, and these treaties must therefore be amended each time a new state is admitted.¹⁹⁹

EU member states' responses to Kosovo's declaration of independence suggest that, if secessionist states do not automatically succeed to EU membership, obtaining the necessary unanimous vote for accession would be fraught with political complications. Five EU member states faced with separatist movements of their own—Spain, Cyprus, Romania, Slovakia, and Greece—refused to recognize Kosovo as an independent state,

¹⁹⁶ See Arabella Thorp & Gavin Thompson, *Scotland, Independence and the EU*, House of Commons Library, Nov. 8, 2011, <http://www.parliament.uk/briefing-papers/SN06110>, at 4 ("Nothing in the EU Treaties sets out what would happen in the event of part of a Member State becoming independent.").

¹⁹⁷ D.P O'CONNELL, *THE LAW OF STATE SUCCESSION* 65 (1956).

¹⁹⁸ See *supra* note 158 and accompanying text.

¹⁹⁹ See Thorp & Thompson, *supra* note 196, at 4-5.

lest doing so set a precedent for their own dismemberment.²⁰⁰ These states (not to mention Belgium or the United Kingdom) might withhold the votes necessary for accession. At the very least, the EU's member states could make secession painful by holding up the membership applications of seceding states or admitting them on less generous terms (*e.g.*, by limiting their access to structural funds) than they currently enjoy as sub-state regions.²⁰¹

Secession would further require the EU to address issues pertaining to continuity and extinction. As the UN's response to the partition of India and the Sixth Committee's subsequent guidelines demonstrate, the threshold question for evaluating membership issues is whether, following secession, the predecessor state continues to exist.

International law generally presumes the continued existence of states, even where those states experience losses of territory or population; the extinction of states is relatively rare.²⁰² Michael P. Scharf has identified six factors that the international community has considered when determining whether a state has dissolved or whether a potential successor territory has inherited its legal personality: "whether the potential successor has: (a) a substantial majority of the former [state's] territory (including the historic territorial hub), (b) a majority of its population, (c) a majority of its resources, (d) a majority of its armed forces, (e) the seat of government and control of most central government institutions, and (f) entered into a devolution agreement [*i.e.*, an agreement

²⁰⁰ See Simon James, *EU Reactions to Kosovo's Independence: The Lessons for Scotland* 4-7 (2008), available at <http://www.docstoc.com/docs/39433019/EU-Reactions-to-Kosovos-Independence-The-Lessons-for-Scotland>.

²⁰¹ See Happold, *supra* note 194, at 33-34.

²⁰² See CRAWFORD, *supra* note 89, at 716 (listing the small number of states that ceased to exist between 1945 and 2005).

on continuation of legal personality] . . . with the other components of the former State.”²⁰³

Where a potential successor state satisfies most or all of these factors, it has typically been deemed to continue the predecessor state’s legal personality. Thus, for example, the UN deemed India (following the partition of Pakistan) and Russia (following the independence of numerous former Soviet republics) to have inherited the legal personalities of British India and the Soviet Union, respectively.²⁰⁴ Put another way, where an established state experiences an instance of secession but nonetheless continues to satisfy most or all of the six factors, its sovereign reach is compromised but its legal existence is unaffected. By contrast, if following an instance of secession there is no potential successor that can demonstrate continuity with the predecessor state, then the international community may conclude that the predecessor state is extinct. The most recent example of such involuntary state extinction was the dissolution of Yugoslavia following the violent breakaway of most of its constituent republics in the early 1990s.²⁰⁵

²⁰³ Scharf, *supra* note 191, at 67.

²⁰⁴ *See id.* at 33-41, 43-52, 68.

²⁰⁵ *See id.* at 52-65. The international community’s determination that the Yugoslav state had dissolved was deeply controversial. Until 2000, Serbia and Montenegro laid claim to Yugoslavia’s legal personality and its seat at the UN. *See* CRAWFORD, *supra* note 89, at 707-14. As Scharf points out, several factors supported Serbia and Montenegro’s claim of continuity, including its possession of a large proportion (though not the majority) of the former Yugoslavia’s territory and population, its capital (Belgrade), and most of its central government institutions and armed forces. Scharf, *supra* note 191, at 53-54. Undoubtedly, the international community’s rejection of Serbia and Montenegro’s claim was based in large part on Serbia’s perceived role in fomenting the violence associated with the breakup of Yugoslavia. As Crawford explains:

In the end—or rather, very soon after the beginning [of the wars in the former Yugoslavia]—a position had to be taken as to whether one of the six republics [*i.e.*, Serbia] was not, under the guise of the federal State, waging through the national army and various surrogates in the other Republics an irredentist war. If so . . . it should not be given the moral and legal advantage which would flow from being able to characterize the conflict as civil and its own position as metropolitan.

CRAWFORD, *supra* note 89, at 714.

Questions concerning continuity or extinction would be most easily answered in the cases of Scotland and Catalonia. Owing to Scotland's relatively small size, population, and proportion of Britain's economic wealth, the rump United Kingdom would almost certainly continue its legal personality following Scottish independence, including its membership in the EU.²⁰⁶ An independent Scotland would thus be considered a new state with respect to the EU treaties and would be required to apply for admission on its own. A similar analysis may be applied to Catalonia, which, while a significant component of the Spanish state, comprises only a fraction of Spain's population, territory, and economy, and lies beyond Spain's historic territorial hub and seat of government. In the Scottish and Catalan cases, then, secession would result in the creation of new states without breaking the continuity of the predecessor states. Still, the diminished British and Spanish states would face a reduction of their representation in EU bodies, which would require amendments to EU treaties even before the issue of membership for the new Scottish and Catalan states was addressed.

Belgium is more complicated. There, straightforward application of Scharf's six factors would lead to an anomalous result: Flanders comprises the majority of Belgium's territory and population, and controls the lion's share of its economic wealth, and thus would be the most obvious candidate to inherit Belgium's legal personality. To allow for this outcome, however, would be to transform Flemish secession into a situation where Flanders had, in effect, kicked Wallonia out of the Belgian state.

The future of the Belgian state would undoubtedly be addressed as part of the negotiations leading to Flemish secession. The obvious precedent is the "velvet divorce"

²⁰⁶ See Happold, *supra* note 194, at 28.

that dissolved Czechoslovakia and created separate Czech and Slovak states in 1993. The Czech Republic could have made a convincing claim to be the successor to the Czechoslovak state given that it possessed the majority of the former state's territory, population, and resources.²⁰⁷ Instead, the agreement between the Czech Republic and Slovakia stipulated that, as of December 31, 1992, Czechoslovakia ceased to exist.²⁰⁸ Pursuant to the agreement, neither of the new states laid claim to the predecessor state's legal personality, but instead established their own legal personalities, *e.g.*, through applying separately for membership in international organizations such as the UN.²⁰⁹

Observers have frequently suggested that Belgium might be headed towards its own “velvet divorce.”²¹⁰ The critical complication, however—which had no corollary in the Czechoslovak case—is Brussels. Flemish nationalists envision Brussels as a part of any future Flemish state.²¹¹ But many Walloons—not to mention many francophones in Brussels itself—argue that in the event of Flemish secession, Brussels should be joined to Wallonia.²¹² This might involve incorporation not only of Brussels proper, but also of

²⁰⁷ See Scharf, *supra* note 191, at 65 & n.191.

²⁰⁸ *Id.* at 65. Notably, the dissolution of Czechoslovakia was effectuated through legislation negotiated by political leaders, and without any popular referendum. CRAWFORD, *supra* note 89, at 706. In fact, it would appear that at the time of dissolution, a majority of Czechoslovakians opposed the breakup of their state. See Salvatore Massa, Note, *Secession By Mutual Assent: A Comparative Analysis of the Dissolution of Czechoslovakia and the Separatist Movement in Canada*, 14 WIS. INT'L L. J. 183, 189-95 (1995-96).

²⁰⁹ See Scharf, *supra* note 191, at 65-67. At first, the Czech Republic and Slovakia attempted to divide Czechoslovakia's seats in various UN subsidiary bodies between themselves, but the UN rejected this approach. See *id.*

²¹⁰ See, *e.g.*, Jan Hunin, *We Need a Velvet Divorce*, DE VOLKSKRANT (Amsterdam), June 21, 2011, available at <http://www.presseurop.eu/en/content/article/728711-we-need-velvet-divorce>; Jan Silva, *Belgium Studies Czechoslovakia Breakup*, USA TODAY, Sept. 11, 2007, http://www.usatoday.com/news/world/2007-09-11-1753401458_x.htm.

²¹¹ See New Flemish Alliance, FAQ: What will happen to Brussels if Flanders becomes independent?, <http://international.n-va.be/en/about/faq> (“Brussels therefore remains an extremely important city for Flanders, even if far fewer Flemings are living there now. The N-VA therefore definitely does not want to let it go.”).

²¹² See, *e.g.*, Philippe Van Parijs, *Brussels After Belgium: Fringe Town or City-State?*, BULLETIN (Brussels), Oct. 2007, at 14, available at

some francophone suburbs or a corridor of territory between Brussels and the Walloon border.²¹³ In such circumstances, Wallonia could make a more credible case that it represents the continuation of the Belgian state. Under a third scenario, Brussels would become an autonomous capital district—in effect, the EU’s version of Washington, D.C.²¹⁴ While this latter scenario might solve continuity and extinction issues (the international community would almost certainly consider Belgium dissolved), it would nonetheless present a different headache for the EU: the loss of one member state and two new states (or perhaps three, depending on the status of the Brussels capital district within the EU) seeking admission.²¹⁵

For obvious reasons, the EU is unlikely to endorse any scenario that leaves its capital outside of the EU.²¹⁶ Indeed, much as international law, the practice of international organizations, and the EU’s membership rules suggest that secessionist states would be required to accede to membership, there are also legal and practical reasons for engaging in “internal enlargement” on more streamlined terms. These

http://www.uclouvain.be/cps/ucl/doc/etes/documents/2007zp.Brussels_Bulletin.final.pdf (arguing that most residents of Brussels would oppose inclusion in an independent Flanders).

²¹³ See *id.* (suggesting that the majority French-speaking areas around Brussels could be joined to Wallonia to allow Brussels and Wallonia to become contiguous).

²¹⁴ See Mnookin & Verbeke, *supra* note 56, at 174 & n.122 (citing REFLECTION GROUP “IN DE WARANDE,” MANIFESTO FOR AN INDEPENDENT FLANDERS WITHIN EUROPE 201-12 (2005)). But see also Van Parijs, *supra* note 212 (arguing that a Brussels city-state would possess “the status of an EU member state, with all the corresponding rights and obligations, and thus would be in no way comparable to Washington DC”).

²¹⁵ In yet another possible scenario, Wallonia might forego independent statehood and instead seek to unite with France. See Leo Cendrowitz, *No Love Lost: Is Belgium About to Break in Two?*, TIME, June 30, 2010, <http://www.time.com/time/world/article/0,8599,2000517,00.html> (“In Wallonia, polls have suggested voters would seek to join France if the country was divided (on the other side of the border, polls show the French would gladly accept them).”). In that case, Wallonia might automatically remain within the EU in much the same way that East Germany became part of the European Community (EC) when it united with West Germany, an EC member. See Happold, *supra* note 194, at 33.

²¹⁶ The EU’s position with respect to Brussels is similar to the UN’s position with respect to the Soviet Union’s seat on the UN Security Council. Had the UN concluded that the Soviet Union dissolved and that no successor state existed, it would have left open a Security Council seat. The UN’s desire to avoid this outcome undoubtedly influenced its decision to recognize Russia as the successor to the Soviet Union’s legal personality, and thus as the heir to its seat on the Security Council. See Scharf, *supra* note 191, at 47-49.

reasons highlight the fundamental difference between the EU and typical international organizations—unlike, say, the UN, the EU operates in some respects like a federal state. Thus, the people of Flanders, Scotland, and Catalonia possess rights as EU citizens, and requiring accession would involve stripping them of citizenship pending readmission.²¹⁷ Moreover, EU law is already applicable in Flanders, Scotland, and Catalonia, and Flanders and Catalonia fall within both the eurozone, which provides for the use of a common currency, and the terms of the Schengen Agreement, which eliminated border controls between most EU member states. To disentangle these stateless nations from the EU system would be highly problematic and arguably not worth the effort—especially since they would almost certainly qualify for membership as independent states. While putting them to the back of the membership queue might conform with the letter of the law and satisfy the punitive impulses of EU member states threatened by their own secessionist movements, it might also be an unnecessary adherence to form over function.

In the end, how the EU answers the membership question—whether it is guided strictly by the law or by a desire for political compromise—may depend on the nature of the EU these new states are seeking to join. Here, the eurozone crisis and its potential long-term effects on European integration come into play.

²¹⁷ See Jordi Matas i Dalmases et al., *The Internal Enlargement of the European Union: Analysis of the Legal and Political Consequences for the European Union in the Case of a Member State's Secession or Dissolution* 25-28 (2011), available at http://www.ideasforeurope.eu/image_files/CMC%20activities/The%20internal%20enlargement%20of%20the%20EU%20Final.pdf.pdf (identifying EU citizenship as a cornerstone of the EU's "system of constitutional and democratic values," and thus a reason for supporting the "internal enlargement" of the EU in the event of secession). See also Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm in International Law?*, 4 EUR. J. INT'L L. 447, 469 (1993) ("The creation of a 'citizenship of the Union' as provided in the Maastricht Treaty gives legal expression to broader political identifications going beyond the State of the individual's nationality. European citizenship ensures freedom of movement and residence in the entire Community, allows participation in local elections and in elections for the European Parliament irrespective of the place of residence of a candidate within the Community, and confers the right to diplomatic protection by any Member State.").

C. *The Eurozone Crisis*

As a founding member of the European Coal and Steel Community (the forerunner of the EU), the site of the EU's *de facto* capital, and a wealthy multinational state in the heart of Europe, Belgium may be viewed as emblematic of the goals of European integration. Thus, when set against the backdrop of the eurozone crisis, Belgium's recent political woes have raised troubling questions concerning the future of Europe. According to the *Economist*:

The two crises have parallels: for both Belgium and the single currency, breaking up is no longer unthinkable. Indeed, Belgium might be seen as a microcosm of the EU, with a wealthy, Germanic north fed up with subsidising a poorer, Latin south. If prosperous little Belgium cannot resolve its internal rivalries, say many, what chance for the EU?²¹⁸

Similar parallels can be drawn between the EU and Spain, where Catalans seek independence in part to end what they view as onerous economic ties to a poorer parent state.²¹⁹

The eurozone crisis is not the sole, or even primary, explanation for the recent rise of sub-state nationalism. Nationalist movements existed in Flanders, Scotland, and Catalonia long before the current economic downturn and, indeed, before the process of European integration even began.²²⁰ Still, the eurozone crisis and sub-state nationalism are linked in at least three important respects.

First, the eurozone crisis has affected the degree of support for separation. Here, Catalonia and Scotland offer contrasting examples. In Catalonia, the eurozone crisis has been a boon to the nationalist cause. Spain's increasingly uncertain position within the

²¹⁸ *Ceci n'est plus un pays*, *ECONOMIST*, July 21, 2011, <http://www.economist.com/node/18988904>.

²¹⁹ See *supra* notes 34 through 38 and accompanying text.

²²⁰ See *supra* Part II.

eurozone, and the squabbles among the Spanish government and its regions over how to revive Spain's crippled economy, have laid bare the longstanding fiscal tensions between Madrid and Barcelona.²²¹ Catalan nationalists have capitalized on the eurozone crisis by arguing that a Catalonia freed from the shackles of the Spanish economy would take its place among the wealthier and more stable states of the European "north."²²²

Two political science explanations of separatist nationalism shed light on Catalan nationalists' response to the eurozone crisis. First, according to Scott L. Greer, historical fluctuations in support for Catalan nationalism may be characterized as the reaction of Catalan institutions to threats to their autonomy emanating from Madrid.²²³ When the Spanish state seeks to rein in these institutions by implementing centralizing policies—as it has done during the eurozone crisis by imposing austerity measures on the regions and refusing Catalonia's demand for a new tax distribution arrangement—the result is an uptick in nationalist sentiment.²²⁴

Second, the recent rise of separatist nationalism in Catalonia may be explained in terms of Donald L. Horowitz's theories concerning the logic of secessionist politics in economically advanced regions. Horowitz observes that advanced regions may consider breaking with their more backward parent states in order to retain control of their

²²¹ See *supra* notes 34 through 35 and accompanying text.

²²² See, e.g., *Vast Crowds Demand Catalan Autonomy from Crisis-Hit Spain*, *supra* note 1 ("Mas has managed to deflect fury over his region's economic problems onto the central government, saying if the tax system were set up differently Catalonia would not be in its quagmire.").

²²³ GREER, *supra* note 41, at 119-26 (describing Catalan institutions' backlash against the centralizing policies of the Spanish state during the 1980s).

²²⁴ See *id.* at 182-83 (arguing that "the possibility of a near-existential threat to regional organizations' autonomy and environmental stability" might increase support for secession). See also *Vast Crowds Demand Catalan Autonomy from Crisis-Hit Spain*, *supra* note 1 ("Many Catalans are suspicious of what they see as the centralizing aims of the People's Party.").

revenues and avoid subsidizing poorer regions.²²⁵ Yet he also argues that these potential benefits of secession are often trumped by the benefits that inure to advanced regions that remain within their parent states: namely, the ability to export surplus capital outside of the region, to take advantage of domestic markets for manufactured goods, and to allow residents of the advanced region to move freely throughout the parent state in search of further economic opportunities.²²⁶ Under ordinary circumstances, secession would result in the loss of such benefits. The EU, however, changes the calculus for advanced regions such as Catalonia: following independence, if EU membership were secured, Catalans would still enjoy access to Spanish markets and the markets of other EU member states. Thus, the EU may be viewed as eliminating an important brake on the separatist aspirations of economically advanced regions. To be sure, Catalan nationalist arguments concerning the economic benefits of secession may be overstated—there is a distinct possibility that an independent Catalonia would go from being Spain’s Germany to a member of the EU’s poorer “south.”²²⁷ Still, the prospect of economic independence from a crisis-wracked Spain has played a major role in increasing support for Catalan nationalism.

In Scotland, the eurozone crisis has had the opposite effect on nationalist support: the continent’s economic uncertainty has highlighted the potential pitfalls of independence. Whereas Catalonia is Spain’s economic powerhouse, Scotland plays a

²²⁵ DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 249-54 (2d ed. 2000).

²²⁶ *See id.* at 250-53 (arguing that “[m]ost of the time, the lure of interests and opportunities throughout the undivided state is enough to ward off the possibility” of secession).

²²⁷ *See* Harriet Alexander, *Catalonia’s Growing Calls for Independence Add to Spain’s Worsening Euro Crisis Woes*, TELEGRAPH (U.K.), Sept. 30, 2012, <http://www.telegraph.co.uk/news/worldnews/europe/spain/9576459/Catalonias-growing-calls-for-independence-add-to-Spains-worsening-euro-crisis-woes.html> (“An economist just this morning told me that he saw Catalonia as being to Spain what Germany is to Europe,” said Joan Vidal, chief of staff for the president of Spain’s most economically powerful region.”).

more marginal role in the United Kingdom's economy and is more dependent on subsidies from the central government.²²⁸ Prior to the eurozone crisis, in the midst of the economic boom of the early 2000s, the SNP was able to argue that an independent Scotland would join an "arc of prosperity" consisting of smaller states, such as Ireland and Iceland, whose economies were experiencing astounding growth.²²⁹ Such arguments are less tenable in the face of the economic downturn, which caused the Irish and Icelandic economies, among others, to collapse.²³⁰ The *Financial Times*, for one, has argued that the key role played by central governments in weathering the eurozone crisis gives lie to the claim that smaller states are better positioned than larger ones to withstand fluctuations in the global economy.²³¹

Furthermore, the decreased confidence in the euro complicates calls for Scottish independence. Pursuant to the Maastricht Treaty, new EU member states are ultimately required to adopt the euro as their currency.²³² The United Kingdom, however, is exempt from this rule, and continues to use the pound.²³³ Despite arguments by Scottish nationalists to the contrary,²³⁴ it is doubtful that the United Kingdom's exemption from

²²⁸ See Stephanie Flanders, *Scotland: A Case of Give and Take*, BBC NEWS, Jan. 9, 2012, <http://www.bbc.co.uk/news/business-16477990> (noting, however, that the discrepancy between Scotland's financial contribution to the United Kingdom and the subsidies it receives in return narrows appreciably when North Sea oil revenue is attributed to Scotland).

²²⁹ *Salmond Sees Scots in "Arc of Prosperity,"* SCOTSMAN (Edinburgh), Aug. 12, 2006, <http://www.scotsman.com/news/scottish-news/top-stories/salmond-sees-scots-in-arc-of-prosperity-1-1130200>.

²³⁰ See Simon Johnson, *Alex Salmond Abandons "Absurd" SNP Economic Strategy*, TELEGRAPH (U.K.), Sept. 14, 2011, <http://www.telegraph.co.uk/news/uknews/scotland/8763472/Alex-Salmond-abandons-absurd-SNP-economic-strategy.html> (noting the SNP's abandonment of the "arc of prosperity" argument).

²³¹ Tony Barber, *Europe's Regions Go It Alone At Their Peril*, FIN. TIMES, Jan. 17, 2012, <http://www.ft.com/intl/cms/s/0/d8955a74-4121-11e1-b521-00144feab49a.html#axzz2Lp4phYrp>.

²³² See Thorp & Thomson, *supra* note 196, at 9.

²³³ See *id.*

²³⁴ See, e.g., Eddie Barnes, *Independent Scotland to Stick with Sterling*, SCOTSMAN (Edinburgh), Feb. 2, 2012, http://www.scotsman.com/the-scotsman/politics/independent_scotland_to_stick_with_sterling_1_2090953 (detailing SNP finance secretary John Swinney's proposal to maintain the pound as Scotland's currency following independence).

the eurozone would apply to an independent Scotland, especially given that following secession the rump United Kingdom would retain its legal personality, whereas Scotland would be viewed as a new state.²³⁵ An independent Scotland in the EU might thus be required to adopt the euro at a time when doing so is less than desirable.

The second link between the eurozone crisis and sub-state nationalism concerns broader questions of state sovereignty and the future course of European integration. The economic downturn has precipitated the emergence of two diametrically opposed viewpoints regarding sovereignty within the EU. The first regards the eurozone crisis as emblematic of fundamental flaws in the idea of European integration and a reason for states to reassert their sovereign prerogatives. Proponents of this view have advocated the breakup of the EU or, in the alternative, the creation of a smaller common currency zone consisting only of the wealthier states of northern Europe.²³⁶ This pro-sovereignty view of the crisis is evident in Germany's initial reluctance to bail out the poorer states of the eurozone and the German Constitutional Court's assumption of authority over the question of whether to engage in a bailout,²³⁷ as well as in calls from many British "Euroskeptics" for the United Kingdom to leave the EU altogether.²³⁸ It is also evident in

²³⁵ See *supra* note 206 and accompanying text.

²³⁶ See, e.g., Charles Dumas, *A Failed Euro Zone, Financed by Germany*, N.Y. TIMES, Jan. 28, 2013, <http://www.nytimes.com/roomfordebate/2013/01/28/should-the-eu-stick-together/a-failed-euro-zone-financed-by-germany> (arguing that "[t]he euro was a straightforward wrong turn for Europe" and that Germany should exit the eurozone); *Staring into the Abyss*, ECONOMIST, Nov. 12, 2011, <http://www.economist.com/node/21536872> ("Some people speculate that Germany might lead a breakaway core of euro-zone countries.").

²³⁷ See *Green Light for ESM: German High Court OKs Permanent Bailout Fund with Reservations*, SPIEGEL ONLINE, Sept. 12, 2012, <http://www.spiegel.de/international/germany/german-high-court-oks-permanent-bailout-fund-with-reservations-a-855338.html>.

²³⁸ See Stephen Castle, *Euro-Skeptics Turn Up Heat on Cameron*, N.Y. TIMES, Dec. 10, 2012, <http://www.nytimes.com/2012/12/11/world/europe/euro-skeptics-turn-up-heat-on-cameron.html?ref=europe> (describing increased support within the Conservative Party for holding a referendum on whether Britain should withdraw from the EU). See also *Making the Break*, ECONOMIST, Dec. 8, 2012, at 23-26 (considering the potential consequences if Britain were to leave the EU). In January

the resentment of poorer states, such as Greece, towards the austerity measures imposed by Brussels and Berlin.²³⁹

Conversely, the eurozone crisis has bolstered calls for the establishment of a more fully integrated Europe. These calls are premised on the belief that the eurozone crisis demonstrates the impracticality of sustaining an economic union in the absence of a political union.²⁴⁰ Taken to its logical conclusion, this process could lead to the “United States of Europe” that many proponents of European integration have long sought.²⁴¹ For now, at least, this solution to the eurozone crisis appears to be in the ascendancy.

The outcome of this debate will have important ramifications for sub-state nationalists. The breakup or substantial modification of the EU would impede nationalist goals as presently stated. The primacy of sovereignty and territorial integrity would be reasserted, and Europe would revert to a political structure more closely resembling the Westphalian system that underlies international law’s approach to self-determination and secession. The foundations of the “Independence in Europe” argument would therefore be weakened—although, by prioritizing statehood, this process could produce even greater demands for secession. On the other hand, a Europe that functions politically as a closer union might offer greater opportunities for Europe’s stateless nations. To be sure, there are practical limits on these opportunities—a Europe consisting of dozens upon

2013, Prime Minister Cameron pledged to hold a referendum on continued EU membership by 2017 at the latest. *David Cameron Promises In/Out Referendum on EU*, BBC NEWS, Jan. 23, 2013, <http://www.bbc.co.uk/news/uk-politics-21148282>.

²³⁹ See, e.g., Anthea Carassava, *Greek General Strike Protests Austerity Measures*, L.A. TIMES, May 11, 2011, <http://articles.latimes.com/2011/may/11/world/la-fg-greece-austerity-20110512>.

²⁴⁰ See Steven Hill, *What Will a United States of Europe Look Like?*, GUARDIAN (U.K.), Mar. 21, 2012, <http://www.guardian.co.uk/commentisfree/2012/mar/21/united-states-europe-transfer-union>.

²⁴¹ See *id.*; see also Viviane Reding, *Why We Need a United States of Europe Now*, Nov. 8, 2012, available at http://europa.eu/rapid/press-release_SPEECH-12-796_en.htm (text of a speech made by the Vice President of the European Commission).

dozens of small states might prove unworkable, and “independence” within this system might bear almost no resemblance to sovereign statehood as traditionally understood. Indeed, some nationalists might even conclude that formal independence within a fully integrated Europe is unnecessary. Nonetheless, it would appear that “Independence in Europe” is a more realistic possibility within a stronger EU.

Lurking in the background of the debates over sovereignty and European integration is the third link between sub-state nationalism and the eurozone crisis: the destructive potential of the political mobilization of national identity. In many respects, the modern map of Europe is the product of unchecked nationalism.²⁴² The project of European integration owes as much, if not more, to the desire to cabin nationalist disputes as it does to the perceived benefits of a common economic market.²⁴³ Nationalism, in the prevailing view, represents a threat to the relative peace that Europe has enjoyed since the end of the Second World War.²⁴⁴

The eurozone crisis has spawned a resurgence of right-wing ultranationalist movements throughout the continent.²⁴⁵ These movements are frequently xenophobic,

²⁴² See generally MARK MAZOWER, *DARK CONTINENT: EUROPE'S TWENTIETH CENTURY* (1998).

²⁴³ See Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3, Preamble (indicating that European integration was initially undertaken in order to “preserve and strengthen peace and liberty”).

²⁴⁴ See Coppieters, *supra* note 156, at 247 (“The EU condemns exclusive types of nationalism as morally retrograde and conducive to conflict.”).

²⁴⁵ See, e.g., William Wheeler, *Europe's New Fascists*, N.Y. TIMES, Nov. 17, 2012, <http://www.nytimes.com/2012/11/18/opinion/sunday/europes-new-fascists.html?emc=tnt&tntemail=y> (charting the rise of far-right parties in Greece and Hungary); Ian Traynor, *Marine Le Pen's Success Reveals Populists' Appeal to European Voters*, GUARDIAN (U.K.), Apr. 23, 2012 (describing the success of the far-right Front National in France's 2012 national elections); *Truly Amazing*, ECONOMIST, Apr. 18, 2011, http://www.economist.com/blogs/newsbook/2011/04/finlands_election (noting the success of the anti-euro True Finn party in Finland); Ian Traynor, *Geert Wilders's Election Success Could be a Mini-Earthquake*, GUARDIAN (U.K.), Mar. 4, 2010, <http://www.guardian.co.uk/world/2010/mar/04/geert-wilders-victory-elections-netherlands> (discussing the nationalist, anti-immigrant trend in Dutch politics symbolized by the electoral success of the Freedom Party, and noting that “[s]imilar shifts have already occurred in Austria with the late Joerg Haider, with the Danish People's party in Copenhagen, with the Northern

violent, and suspicious of (if not hostile towards) integrationist policies that infringe on state sovereignty. In many respects, then, they have little in common with Flemish, Scottish, and Catalan nationalism. The nationalist movements in Scotland and Catalonia are typically characterized as “civic” and inclusive, resting on shared geography, institutions, and civil societies rather than on exclusivist notions of ethnic identity.²⁴⁶ Likewise, the N-VA is often viewed as departing from the extremist ethnic politics that previously dominated Flemish nationalism.²⁴⁷ And in all three of these stateless nations, nationalism goes hand-in-hand with a commitment to European integration. Yet the success of Flemish, Scottish, or Catalan nationalism could embolden more divisive nationalist forces elsewhere. The Dutch journalist Ian Buruma expressed this concern prior to the onset of the eurozone crisis. Writing in the midst of Belgium’s 2007 political gridlock, Buruma argued that “[t]he fate of Belgium should interest all Europeans, especially those who wish the European Union well. For what is happening in Belgium now could end up happening on a continental scale.”²⁴⁸ Buruma warned that the process of supranational integration that had weakened the authority of the Belgian state and provided fertile ground for Flemish nationalism might also promote similar rifts

League in Italy or the National Front in France, where the political mainstream has moved to the right to accommodate the extreme right and co-opt some of their supporters”).

²⁴⁶ See GREER, *supra* note 41, at 183 (“Scotland and Catalonia are also often cited as admirable exponents of civic nationalism, of inclusive, diverse national communities free of ethnic exclusivism and based on healthy civil societies, and the regional settlements in these two countries are widely admired as models of ethnic conflict regulation.”).

²⁴⁷ Flemish nationalism was long tarnished by collaboration with the Nazi occupation during the Second World War. See Jan Craeybeckx, *From the Great Depression to the Second World War*, in *POLITICAL HISTORY OF BELGIUM FROM 1830 ONWARDS*, 183, 201-08 (Els Witte et al. eds., 2009). Prior to the recent success of the N-VA, the standard-bearer for Flemish nationalism was the Vlaams Belang (formerly the Vlaams Blok), which espouses far-right, anti-immigrant policies. See LAIBLE, *supra* note 6, at 55-72. The N-VA has made strides in distancing itself from the more sordid aspects of Flemish nationalism’s past. See Buruma, *Le Divorce*, *supra* note 61, at 38 (“Because Bart De Wever and his party pointedly avoid the xenophobic rhetoric that’s customary among right-wing populists, they have helped make Flemish nationalism respectable again, and his electoral gains in Flanders have come, in part, at the expense of the Vlaams Belang.”).

²⁴⁸ Ian Buruma, *Breaking Up is Hard to Do*, *GLOBE & MAIL* (Canada), Aug. 7, 2008, at A17.

elsewhere in Europe, with disastrous consequences: “We know what happened when the twin pulls of blood and soil determined European politics before. Without having intended it, the EU now seems to be encouraging the very forces that postwar European unity was designed to contain.”²⁴⁹ Buruma’s warnings are particularly relevant now, at a time when many Europeans are falling back on national pride in the face of global economic uncertainty.

It is thus impossible to consider the future prospects for sub-state nationalism without also considering the future of the EU. The outcome of the eurozone crisis will help to determine whether the nationalist projects in places like Flanders, Scotland, and Catalonia succeed in establishing new states, reach some other form of accommodation with their parent states, or fail entirely to remake the political map of Europe.

IV. SEPARATISM IN THE MIDST OF INTEGRATION

Writing at the time of the Maastricht Treaty, Christoph Schreuer observed that:

[c]ontemporary international law presupposes [a] structure of co-equal sovereign States. The international community’s constitutive set-up is dominated by it. The classical sources of international law depend on the interaction of States in the form of treaties and customary law. Diplomatic relations are conducted between States. Official arenas, like international organizations and international courts, are largely reserved to States. The protection of individual rights still depends mostly on diplomatic protection through state representatives. Central concepts of international law, like sovereignty, territorial integrity, non-intervention, self-defence or permanent sovereignty over natural resources all rely on the exclusive or dominant role of the State.²⁵⁰

Of course, the world order that Schreuer described has always been somewhat of a fiction. Some states are more sovereign than others—by virtue of their size and strength, they are capable of acting with few impediments on the world stage, whereas

²⁴⁹ *Id.*

²⁵⁰ Schreuer, *supra* note 217, at 447.

smaller and weaker states often find their exercise of sovereignty constrained.²⁵¹ Even within their own borders, the capacity of states to assert effective control over their territories and populations varies widely.²⁵² Moreover, non-state actors have long participated in international affairs and have been recognized as subjects of international law.²⁵³

Nonetheless, sovereign, co-equal states remain at the core of the international system. Perhaps nowhere is the primacy of statehood more apparent than in international law's conception of the right to self-determination and its attitude towards secession. Susanna Mancini has described secession as "at once the most revolutionary and the most institutionally conservative of political constructs. Its revolutionary character lies in its ultimate challenge to state sovereignty; its conservative side, in the reinforcement of the virtues of the latter."²⁵⁴ International law has served to blunt the revolutionary potential of self-determination and reinforce the status quo by, in most cases, upholding the sovereignty and territorial integrity of existing states.²⁵⁵

For Schreuer, the process of European integration held out the possibility of a fundamental shift away from the state-centric system towards a post-sovereignty era.²⁵⁶ And to be sure, the growth of the EU has altered the nature of statehood in Europe: from

²⁵¹ See Richard H. Sternberg, *Who is Sovereign?*, 40 STAN. J. INT'L L. 329, 330-33 (2004).

²⁵² See, e.g., Brian Finucane, *Fictitious States, Effective Control, and the Use of Force Against Non-State Actors*, 30 BERKELEY J. INT'L L. 35, 37 (2012) ("Fictitious states' lack central authority capable of exercising effective control over a substantial fraction of the territory and population within their internationally recognized boundaries, making their sovereignty a legal fiction.").

²⁵³ See Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977, 994 (2011) ("[I]t is irrefutable that traditional international law, even through the early twentieth century, recognized roles, rights, and duties of nations, tribes, peoples, belligerents, and other entities and communities in addition to the state, even though their roles were at times uneven, shifting, complex, and misperceived.").

²⁵⁴ Susanna Mancini, *Secession and Self-Determination*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 481, 481 (Michael Rosenfeld & Andras Sajó eds., 2012).

²⁵⁵ See *supra* Part II.A.

²⁵⁶ See generally Schreuer, *supra* note 217.

trade to the environment, from immigration to external security, the EU now exercises authority in many areas traditionally reserved to states.²⁵⁷ Yet at the same time, states remain the primary actors in the continent's political system. "Westphalia is dead Long live Westphalia."²⁵⁸

The nationalist movements in Flanders, Scotland, and Catalonia sit on the borderline between a state-centric international system and an integrating continent. In its broad contours, the objective of these nationalist movements mirrors the objective of nationalists throughout history—the attainment of sovereign statehood. Yet upon closer inspection, it is clear that they reflect the realities of the supranational order in which they find themselves. As Stephen Tierney explains, "it is simplistic to caricature [the sub-state nationalist phenomenon] as a last desperate attempt to leap aboard the sinking ship of statehood, just as this vessel disappears beneath the waves of globalization."²⁵⁹ Insofar as Flemish, Scottish, and Catalan nationalists seek statehood, they do so fully aware of—and, indeed, supportive of—the limits on sovereignty imposed by the EU. By, for example, engaging in paradiplomacy and seeking to secure domestic autonomy, these nationalist movements attempt to carve out a radically different space within the European supranational system and the constitutional orders of their parent states.²⁶⁰ Consequently, they invite a rethinking of the content and parameters of statehood and sovereignty.

²⁵⁷ See PINDER & USHERWOOD, *supra* note 159, at 104, 114-17, 141-44.

²⁵⁸ Borgen, *Imagining Sovereignty*, *supra* note 7, at 534-35.

²⁵⁹ Stephen Tierney, *Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State*, 54 INT'L & COMP. L.Q. 161, 168 (2005).

²⁶⁰ *See id.* at 168-75.

How should the international community approach the challenges posed by sub-state nationalism? Tierney, for one, has identified the predominant state-centric paradigm of international law as a hindrance to the formal acceptance of the realities of an international system in which sovereignty is increasingly dispersed both within and beyond state borders.²⁶¹ Given the continued primacy of statehood in the international system, however, it is unlikely that international law will undergo a fundamental shift in its approaches to statehood, self-determination, or secession anytime in the near future.

Nonetheless, there are at least three steps that the EU and its member states could take to engage constructively with sub-state nationalist demands. First, consistent with the Canadian Supreme Court's advisory opinion on Quebec, states faced with separatist movements should allow for referendums to gauge support for separation.²⁶² There is no reason why the democratic principles that guided the Canadian Supreme Court's framework for negotiated secession should not apply with equal force in democracies like Spain, the United Kingdom, and Belgium. Britain's response to Scottish nationalism has already started down this path, with the British state allowing for a referendum despite its strong opposition to Scottish independence.²⁶³ Spain should follow suit in the event that Catalan nationalists continue to seek a plebiscite to determine their future relationship with the Spanish state.

Where independence referendums should diverge from the Canadian Supreme Court's opinion, however, is on the issue of how referendum questions should be framed. To be sure, referendum questions must be written with clarity to ensure that voters

²⁶¹ *See id.* at 170 (“In fact it is in many respects international law rather than the constitutional order of their own States which has held back radical approaches to shared sovereignty within particular multinational states.”).

²⁶² *See supra* notes 128 through 130 and accompanying text.

²⁶³ *See* Edinburgh Agreement, *supra* note 54.

understand the choice that is being presented to them. But that choice need not be limited to either outright independence or continued inclusion in the state.²⁶⁴ Rather, a question that allows for some political arrangement short of full independence would better reflect the extent to which political authority is already dispersed within states. “Devolution max” will not be on the ballot when Scottish voters go to the polls.²⁶⁵ Yet the increased autonomy envisioned by that proposal might have been sufficient to satisfy many Scottish nationalists. By taking the option off the table and making the referendum an all-or-nothing affair, the British government is running the risk that many Scottish voters might instead opt for independence.

Second, the EU should consider expanding the formal opportunities for sub-state regions to participate in EU policymaking. For example, the EU could elevate the Committee of the Regions to what amounts to a fourth branch of government, on par with the Commission, Council, and Parliament. It could also require (rather than simply condone) the participation of regional ministers in EU policymaking that touches on areas of regional competency. Strengthening the role of the regions at the supranational level would be consistent with the important role that regions already play within many EU member states. It is also consistent with a broad interpretation of the principle of subsidiarity,²⁶⁶ and would make sense insofar as the EU emerges from the eurozone crisis with a firmer commitment to integration.²⁶⁷ To be sure, there is always the possibility that expanding the role of the regions at the EU level could increase support for

²⁶⁴ See *supra* notes 132 through 135 and accompanying text.

²⁶⁵ See *supra* note 142 and accompanying text.

²⁶⁶ See *supra* note 182 and accompanying text.

²⁶⁷ See *supra* notes 240 through 241 and accompanying text.

separation. But it could also reduce separatist tensions by making statehood less of a prerequisite for formal participation in the European project.

Third, the EU should clarify its position on how it would deal with secession from a member state. Because each instance of secession would raise its own unique issues, it is impossible for the EU to set out in detail all of the possible consequences of separation. But the broad question—whether a new state would automatically succeed to membership, whether it could negotiate membership on more streamlined terms, or whether it would be required to accede to membership through the EU’s normal application procedures—is one that the EU should be in a position to answer.²⁶⁸ Given the significance of the EU to the ways in which sub-state nationalists define their interests and identities, all of the parties to these separatist disputes would benefit from greater clarity concerning the future that awaits a secessionist state.²⁶⁹ It would, in short, go a long way towards shaping what Bruno Coppieters has termed “a strategic European culture with respect to secession.”²⁷⁰

The purpose of these three steps would not be to make secession easier or more likely. Rather, they would acknowledge the fact that “[i]n the case of EU member states or prospective member states, the EU will be perceived as a potential institutional framework within which conflict transformation and resolution may take place.”²⁷¹ Indeed, the end result may very well be to dampen support for secession. As Susanna Mancini has argued, “demonizing secession, turning it into a constitutional taboo, often

²⁶⁸ See *supra* Part III.B.

²⁶⁹ For a sense of the level of confusion among EU member states on this issue, see Glenn Campbell, *Scottish Independence: Scotland and EU Membership*, BBC NEWS, Feb. 27, 2013, <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-21602456> (summarizing the varied responses of member states to the question of how the EU would handle Scottish independence).

²⁷⁰ Coppieters, *supra* note 156, at 254-56.

²⁷¹ *Id.* at 256.

adds fuel to secessionist claims. On the other hand, if secession is constructed as one among the many rights and options offered to a state's subnational groups, chances are that it will lose much of its appeal."²⁷² If stateless nations perceive that "Independence in Europe" is a possibility, it may free them to redirect their agendas away from separatism towards other forms of accommodation within both their parent states and the EU.

Furthermore, how the EU addresses self-determination claims could have important ramifications beyond Europe. To be sure, the EU's level of supranational integration is without parallel in other parts of the world. Moreover, the peaceful and democratic nature of Western Europe's separatist disputes—the lack, as one journalist quipped, of "Wallonian death squads roaming the Flemish countryside"²⁷³—is at odds with the circumstances prevailing in the many states where separatist conflicts fuel violence and political instability. There would appear to be less at stake in Scotland or Catalonia than in Kashmir or Kurdistan. But the environment in which Western Europe's separatist disputes play out offers a stable space in which to attempt unique solutions to self-determination claims that might have value elsewhere. These solutions need not reflect the state/non-state duality inherent in current conceptions of the right to self-determination, but rather could be built on more nuanced interpretations of statehood and sovereignty. As Nico Krisch has observed, "[i]nternational law doesn't have much on offer, but the EU might be the place to invent intermediate forms."²⁷⁴

²⁷² Mancini, *supra* note 254, at 482.

²⁷³ Joshua Keating, *Why Belgium Matters (No, Seriously)*, FOREIGN POLICY PASSPORT, Nov. 15, 2007, http://blog.foreignpolicy.com/posts/2007/11/15/why_belgium_matters_no_seriously.

²⁷⁴ Nico Krisch, *Catalonia's Independence: A Reply to Joseph Weiler*, EJIL TALK!, Jan. 18, 2013, <http://www.ejiltalk.org/catalonias-independence-a-reply-to-joseph-weiler/>.

CONCLUSION

So will they stay or will they go? That question will begin to be answered in the autumn of 2014, when the people of Scotland go to the polls to decide their political future. It would be foolhardy to predict the outcome of Scotland's referendum, or to speculate on whether Catalans will follow through on their demands for "Independence Now!",²⁷⁵ or whether Bart De Wever will ultimately succeed in snuffing out Belgium "like a candle."²⁷⁶ There are an abundance of reasons why they might stay, such as the high degree of autonomy that they already possess at home, the extent to which the EU allows them to operate both formally and informally abroad, and the uncertainty of their position vis-à-vis the EU if they were to secede. But the lure of independence within a supranational Europe might yet convince them to go.

What can be predicted, however—and what this article has sought to explain—is that the EU will play a leading role in determining the outcome of Flemish, Scottish, and Catalan nationalist claims. The right to self-determination as currently understood in international law provides little in the way of guidance for addressing separatist claims in Europe's stateless nations or, for that matter, in other parts of the world. In many respects, self-determination has become "a principle without a purpose—a right bereft of potential beneficiaries."²⁷⁷ In Europe, however, self-determination claims will increasingly be dealt with through the institutions of the EU, as part of the ongoing push and pull among the EU, its member states, and sub-state regions. Whether this results in

²⁷⁵ *Vast Crowds Demand Catalan Autonomy from Crisis-Hit Spain*, *supra* note 1.

²⁷⁶ Buruma, *Le Divorce*, *supra* note 61, at 36.

²⁷⁷ Simpson, *supra* note 106, at 259.

“Independence in Europe” or some form of accommodation short of secession remains to be seen.