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Populus Interruptus: Self-Determination, the Independence of Kosovo, and the Vocabulary of Peoplehood

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Abstract

This article uses the contested independence of Kosovo as an opportunity to re-examine the theoretical imagery behind the concept of self-determination, and then confront those findings with the more recent approaches to polity formation from other theoretical genres: normative theories of secession, on the one hand, and the global governance approach to self-determination, on the other. What emerges from the encounter between these bodies of thought is not a new interpretation, or a theory of self-determination and its relationship to *uti possidetis*, but rather a plea for an approach to polity formation which is simultaneously critical and prudential. That is, an approach which would accept the role of external actors as inevitable, but goes further and unmasks them as complicit in labelling certain projects as 'civic' and 'multicultural' on the one hand and 'ethno-nationalist' on the other. Equally, the proposed approach reveals the ever-present aspiration to unanimity as a concealed ideal of polity formation, shared by both the 'civic' and the 'ethnic' variants of self-determination. Finally, this approach to polity formation sketches the contours of an alternative, thin vision of a political community – one not wearing the badge of peoplehood – one glued together not by normative imperatives of participation and solidarity, but rather by the acknowledgement of geopolitical fiat.

Key words

Hobbes; Kosovo; *pouvoir constituant*; Rousseau; secession; self-determination; unanimity

1. Introduction

Through a declaration claiming to answer '[the] call of the people to build a society that honours human dignity', and to reflect the 'will of [the] people', Kosovo's National Assembly unilaterally declared independence on 17 February 2008.[1] Addressing the members of the Assembly, Hashim Thaçi, Kosovo's prime minister, extended – in 'the people's' name – his gratitude to 'those watching us now'.[2]

Thaçi's speech invoked the will of a collective constitutional subject, which, after years of oppression and struggle, finally decided its political

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1 Declaration of Independence, 17 February 2008, www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf.

2 Prime Minister's Speech on Independence Day, Republic of Kosovo Assembly, available at www.assembly-kosova.org/?krye=news&newsid=1639&faq=1&lang=en.

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destiny by means of creating an independent state. Kosovo's Declaration of Independence – to date supported by 62 countries – represented the culmination of a set of events including military action, political fiats and diplomatic manoeuvres involving the most powerful Western states, on the one hand, and a resurgent Russian Federation, on the other. One of the most significant milestones in this process was the April 2005 statement of the Contact Group, which effectively determined who count as 'the people of Kosovo'. In its statement, the Contact Group – an informal politico-diplomatic forum of the United States, Russia, Germany, France, and Italy – set out three political axioms that were to be respected in negotiations over the final status of Kosovo: that the final status of Kosovo will not entail Kosovo joining another country or a part of another country; that there will be no return to the political arrangement of before 1999; and that Kosovo will not be partitioned. In announcing these axioms, the great powers not only determined who is 'the people', but also what range of fundamental political options is available to it. Even as Russia eventually signalled its determination to reject any outcome not acceptable to Serbia, the Western members of the Contact Group stood behind the so-called Ahtisaari Plan, which further constrained the range of constitutional options available to 'the people of Kosovo'. This unabashedly political fiat concerning the identity of the constitutional subject, and its range of available political options, was mirrored in the absence of the vocabulary of self-determination. While congratulating 'the people' of Kosovo on its independence, the United States Secretary of State asserted that it was

> [t]he *unusual combination of factors* found in the Kosovo situation – including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration – [which] are not found elsewhere . . . [that] make Kosovo a special case. Kosovo cannot be seen as a precedent for any other situation in the world today.[3]

Except for Albania, Kosovo's kin-state, which justified the recognition of Kosovo by explicitly invoking the right of the people to self-determination,[4] other major Western powers followed the example of the United States in omitting any reference to a principle of international law. The same applies to the principle of *uti possidetis juris* – invoked to justify the territorial integrity of the Yugoslav seceding republics eighteen years earlier.[5] Even though the Contact Group decided to uphold the territorial integrity of Kosovo, it did not back this decision by invoking a rule of international law.

Of course, political rhetoric will rarely neatly correspond with the doctrinal schemata of theorists and ideologues. In making sense of this hesitant vocabulary of peoplehood – present as a rhetorical embellishment, and absent as invocation of a legal principle – we have two options. We can proceed to argue about the

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3 US Department of State, 'US Recognizes Kosovo as Independent State', available at www.state.gov/secretary/rm/2008/02/100973.htm (emphasis added).

4 'Albania Recognizes Kosovo', *Balkan Insight*, 19 February 2008, available at www.balkaninsight.com/en/main/news/8009/.

5 See generally P. Radan, *The Break-Up of Yugoslavia and International Law* (2002).

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correct interpretation and role of self-determination in determining the political fate of Kosovo. Alternately, we can take the opportunity opened by the absence of self-determinationist vocabulary and by the rejection of the discourse of legality to uncover the assumptions and implications of the interface between external constitutive influence, self-determination, and *uti possidetis*.

While this paper stops short of claiming that post-Cold War external self-determination is inoperative, or that it should be abandoned as a single, overarching principle of territorial reconstructions, it opts to take this latter tack, and uses the Kosovo crisis as an opportunity to re-examine the theoretical imagery behind the concept of self-determination and then confront those findings with the more recent approaches to polity formation from other theoretical genres: normative theories of secession, on the one hand, and the global governance approach to self-determination, on the other. What emerges from the encounter between these bodies of thought is not a new interpretation, or a theory of self-determination and its relationship to *uti possidetis*, but rather a plea for an approach to polity formation which is simultaneously critical and prudential. That is, an approach which would accept the role of external actors as inevitable, but goes further and unmasks them as complicit in labelling certain projects as 'civic' and 'multicultural' on the one hand and 'ethno-nationalist' on the other. Equally, the proposed approach reveals the ever-present aspiration to unanimity as a concealed ideal of polity formation, shared by both the 'civic' and the 'ethnic' variants of self-determination. Finally, this approach to polity formation sketches the contours of an alternative, thin vision of a political community – one not wearing the badge of peoplehood – which is glued together not by normative imperatives of participation and solidarity, but rather by the acknowledgment of geopolitical fiat.

2. THE DEMISE OF SELF-DETERMINATION? A PRELIMINARY OBSERVATION

During its ninety-year political career as a major principle of polity formation, self-determination has been called 'ridiculous',[6] 'evil',[7] 'entirely undefinable',[8] and, more recently, 'hopelessly confused and anachronistic'[9] – a '*lex obscura*'.[10] Even during the Cold War – when self-determination enjoyed a period of conceptual stability – some authors argued that 'the very principle . . . has already reached the limits of its applicability'.[11] More recently, after the end of the Cold War, some have argued

6 I. Jennings, *The Approach to Self-Government* (1956), 56.

7 A. Etzioni, 'The Evils of Self-Determination', (1992) 89 *Foreign Policy* 21, at 21.

8 J. H. W. Verzijl, 'The Right to Self-Determination', in Verzijl, *International Law in Historical Perspective*, Vol. 1 (1968), 321.

9 G. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-colonial Age', (1996) 32 *Stanford Journal of International Law* 255, at 257.

10 J. Crawford, 'Right of Self-Determination in International Law: Its Development and Future', in P. Alston (ed.), *Peoples' Rights* (2001) 7, at 10.

11 S. Prakash Sinha, 'Is Self-Determination Passé?', (1973) 12 (2) *Columbia Journal of Transnational Law* 260, at 260.

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that the 'concept [is] increasingly at war with itself'.[12] It has also been argued that the 'normative scope of the principle of self-determination lacks precision'.[13] Even those who seem more sympathetic to the concept admit that self-determination is a 'multidimensional goal, not a single right',[14] and 'a conventional name for a complex social phenomenon'.[15]

While the contemporary application of self-determination is most often associated with the *uti possidetis* principle, in terms of conceptual genealogy, however, *uti possidetis* bears no intrinsic relationship to the self-determination of peoples. Initially, *uti possidetis* was used by the Roman praetor as possessory interdict, as a means of preventing the 'disturbance of the existing state of possession of immovables as between two individuals'.[16] In terms of modern historical usage, *uti possidetis* was first invoked in the Latin American colonies in the early nineteenth century, well before self-determination gained purchase as a dominant legal principle in territorial reconfigurations.[17] Only after the Second World War, in the process of decolonization, was *uti possidetis* linked explicitly to self-determination.

The most important case in the jurisprudential solidification of that relationship was *Burkina Faso* v. *Mali* (*Frontier Dispute* case). There, the International Court of Justice (ICJ, the Court) linked the early exercise of self-determination in the Latin American context – where it was used to 'scotch any designs' that non-Latin American colonial powers might have with respect to 'uninhabited or unexplored lands'[18] – to the modern application of the principle in the context of African decolonization and self-determination. In the words of the Court, 'the maintenance of the territorial status quo in Africa is often seen as the *wisest course*, to preserve what has been achieved by peoples who struggled for their independence, and to avoid disruption which would deprive the continent of the gains achieved by much sacrifice'.[19] In sum, *uti possidetis* is an 'essential requirement of stability in order to survive, develop and gradually consolidate their independence in all fields'.[20]

In that case, the ICJ reconciled self-determination with *uti possidetis* by postulating the *joint* struggle of several 'peoples' against outside colonial rule within a single jurisdiction. The purpose of *uti possidetis* was to prevent a potential colonial rollback. That rollback would have been be made possible if the newly independent states were unconsolidated by internal bickering. However, as the early cases of decolonization – such as Togoland and Cameroons – demonstrated, an equally important issue that arose during decolonization was the respect for the 'horizontal' preference – with

12 G. H. Fox, 'Self-Determination in the Post-Cold War Era: A New Internal Focus?', (1995), 16 *Michigan Journal of International Law* 733, at 733.
13 V. P. Nanda, 'Self-Determination and Secession under International Law', (2000–1) 29 (1) *Denver Journal of International Law and Policy* 305, at 314.
14 A. Buchanan, 'The Right to Self-Determination: Analytical and Moral Foundations' (1991) 8 *Arizona Journal of International and Comparative Law* 41, at 41.
15 P. Allot, 'Self-Determination – Absolute Right or Social Poetry?', in C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993), 177, at 177.
16 J. Castellino and S. Allen, *Title to Territory in International Law: A Temporal Analysis* (2003), at 9.
17 For an authoritative account see generally S. Lalonde, *Determining Boundaries in a Conflicted World: The Role of* Uti Possidetis (2003).
18 *Frontier Dispute Case (Burkina Faso v. Mali)*, Judgment of 22 December 1986, [1986] ICJ Rep. 554, para 23.
19 Ibid., para 25 (emphasis added).
20 Ibid.

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whom to live together – and not only the 'vertical' one: a life without the colonial sovereign. However, that 'horizontal' issue was settled from the outside, by the decisions on boundary drawing by either the colonial sovereign – the United Kingdom – or the UN Trusteeship Council.[21]

The contingent consensus among African nationalist elites on respecting inherited boundaries, the fact that decolonization – for the most part – took place under the umbrella of the United Nations, the existence of consensus between the United States and the Soviet Union about the desirability and contours of decolonization: all these aspects seem to have muted conceptual qualms about the external influence and the legal vocabulary of self-determination. In his classic *Creation of States in International Law*, James Crawford, without apparent disquiet, stated that self-determination is not about a self-defined 'people' creating its own state from scratch, but rather about the predetermined 'units' which are 'in general those territories established and recognized as [being] separate'.[22]

But that fragile consensus – about what counts as the legitimate subject of, or candidate 'unit' for, self-determination – has all but disappeared in the aftermath of the Cold War. What is more, in Kosovo the very vocabulary of self-determination appears defunct, and the integrity of administrative boundaries was upheld not by invoking *uti possidetis*, but simply by a political axiom of the Contact Group. Should we then join Ivor Jennings, in his celebrated quip, repeated ad nauseam in academic treatments of self-determination, that the idea of self-determination of peoples is 'ridiculous because the people cannot decide until somebody decides who are the people'?[23] Rather than answering this question unequivocally now, it is more important first to revisit the foundational imagery of polity formation that historically gave rise to the principle of self-determination.

3. Hobbes and Rousseau: the ambiguities of self-determination imaginary across the traditional divides

The explicit disclosure of the political role of the great powers in determining the future of Kosovo; negation of the relevance of international law in that process; the tense marriage of self-determination and *uti possidetis*: all these impel us to interrogate whether these tensions are only exemplars of an unprincipled rhetoric, or signs of cracked theoretical foundations of self-determination that continue to reverberate in practice to this day.

One of the seemingly ineradicable dichotomies in debates about self-determination is the question of who counts as 'the people': is it a *demos* – citizenry of a selected unit – or is it an *ethnos* – an ethnic group which derives its identity from shared language, culture, or history. According to Martti Koskenniemi, the civic idea

21 H. S. Johnson, *Self-Determination within the Community of Nations* (1967), 116.
22 J. Crawford, *The Creation of States in International Law* (1979), at 100.
23 Jennings, *supra* note 6, at 56.

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of self-determination corresponds with the political thought of Thomas Hobbes.[24] There, the peoples 'are artificial communities', 'collections of individuals' which exist only by virtue of belonging to the same constitutional order. A rival, romantic, Rousseauian conception of a people – understood as an 'authentic (and not artificial) community' – corresponds, according to Koskenniemi, to an ethnic conception of self-determination.

While the fabric of self-determination includes different intellectual threads,[25] its theoretical stepping stones are theories of the social contract and popular sovereignty.[26] Therefore the thoughts of Hobbes and Rousseau are a good starting point for examining the foundations of self-determination, and the vocabulary of peoplehood generally. Instead of building only on their differences, my purpose in going back to Hobbes and Rousseau is primarily to reveal the shared ambiguities and contradictions in their imageries of polity formation. More specifically, bringing together Hobbes and Rousseau will reveal the range of modalities of external involvement and different degrees of consent implied within the social contract tradition. Although neither author is primarily concerned with boundary drawing, their accounts of state building evoke the themes which continue to reverberate in contemporary theoretical accounts – as well as the political practice – of what we today call self-determination.

Even though Thomas Hobbes can be understood as an indirect,[27] and Jean-Jacques Rousseau as a direct, progenitor of the principle of self-determination,[28] both constructed their theories of polity formation using similar accounts of a state of nature. At first glance, both Hobbes's and Rousseau's accounts of unanimous covenanting suggest that those who want to come together, do so – without external interference. For Hobbes, '*commonwealth* is said to be *instituted* when a *multitude* of men do agree, and covenant, *every one with every one*',[29] and for Rousseau, 'the people' is created when 'each one of us puts [his person] into the community . . . and under the supreme direction of the general will'.[30]

But how can we then realistically perceive that no external commonwealths or peoples will interfere, when we know that there are outside sovereigns existing within the state of nature? And – conversely – how can we think of a global state to which both Hobbes and Rousseau subscribe, knowing that there are areas under sovereign control? For Hobbes, reconciling voluntary unanimity and the existence of external sovereigns betrays a specific mental imagery. When compelled to discuss

24 M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', (1994) 43 ICLQ 241, at 249.

25 For the purposes of this article I am disregarding the line of argument that claims that the principle of self-determination derives from Fichte's and Herder's appropriation of Kant's ideal of individual self-determination. For the most articulate version of that argument see E. Kedourie, *Nationalism* (1998), 12–87. In international law that argument is reproduced in E. Morgan, 'Imagery and Meaning of Self-Determination', (1987–8) 20 *New York University Journal of International Law and Politics* 355.

26 S. Wambaugh, *A Monograph on Plebiscites* (1920), 2. See also T. Woolsey, 'Self-Determination', (1919) 13 AJIL 302, at 304. See also R. Redlsob, *Le Principe des nationalités* (1930), at 5.

27 T. Hobbes, *Leviathan*, ed. J.C.A. Gaskin (1996), 115.

28 J.-J. Rousseau, *The Social Contract*, trans. M. Cranston (1968), 61.

29 Hobbes, *supra* note 27, at 115 (emphasis in original).

30 Rousseau, *supra* note 28, at 61.

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historical instances of the state of nature, Hobbes invokes the imagery of contemporaneous America, geographically delimited by the Atlantic Ocean. More importantly, if our mental image is America, we can easily imagine a small, isolated group of individuals who, because of the size of the group, possess the capacity to covenant 'every one with every one' in the middle of nowhere. Their position would make it difficult for outside actors to affect in any way the process of contracting. Being across the ocean, outside sovereigns would either be too late or too uninterested to intervene in the creation of a commonwealth. In other words, the possibility of outside involvement is obfuscated because of Hobbes's specific geographic imagery of the state of nature.

For Hobbes, unanimous covenanting is not the only way in which commonwealths are instituted. Sovereignty can also be instituted through 'acquisition', where the already existing, established sovereign extracts obedience from the individuals in a state of nature. In this case it similarly does not make sense to speak about constitutive external influence, because the referent of that potential influence – the unincorporated individuals in the state of nature – disappear from the realm of theoretical imagination at the moment of acquisition.

In the first case, outside sovereigns are either inactive, distant, or uninterested. In the second case, the outside influence is overactive, to the extent of destroying the possible or proto-commonwealth, and by implication makes moot any discussion of their role.

Yet Hobbes's account of polity formation leaves the possibility of a modest, if indirect, external constitutive *influence.* In this case, outside powers exist as a figment of the covenanters' imagination; that is, as part of a political calculation that precedes the act of unanimous covenanting. The commonwealth, according to Hobbes, 'is not determined by any certain number, but by comparison with the enemy we fear'.[31] Here, the outside operates at the level of motivation of would-be covenanters, influencing their decision whether to join an existing commonwealth, create one of their own with others of similar inclination, or try to persuade other non-committed individuals in the state of nature to join in the new commonwealth.

While Rousseau's account of the state of nature and unanimity is similar to that of Hobbes, Rousseau openly acknowledges constitutive external influence. That external influence is not ominous and predatory, but rather enlightened and benevolent. The external agent, for Rousseau, is represented by a mythical figure – the benevolent Lawgiver – who helps to institute 'the people'. For Rousseau, the Lawgiver acts as a 'founder of nations' who must 'replace the physical and independent existence we have all received from nature, with a moral and communal existence'.[32] But would a 'founder of the nations' not contradict the idea of voluntary, unanimous social contract?

Indeed, in a section on 'The People' following the section on 'The Lawgiver', Rousseau contemplates criteria which would enable a political community to endure over time. He considers the possibility of the reconstruction of a political

31 Ibid., at 112.
32 Rousseau, *supra note* 28, at 1.

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community – this time obviously outside the state of nature according to reasons for 'expansion' and reasons for 'contraction'.[33] For Rousseau, '[t]here are limits to the size [a state] can have if it is to be neither too large to be well-governed nor too small to maintain itself.'[34] The task of a 'skilled statesman' – the Lawgiver – is to '"hit . . . the mean" between contraction and expansion that is most favorable to the preservation of the State'.[35] In doing so, his political actions are guided by prudence, rather than 'abstract reason'.[36] 'Hitting the mean' would thus suggest that the Lawgiver intervenes not only on the level of institutional organization of an already existing people, but also on the level of delineating boundaries of 'the people', thus effectively determining who 'the people' is.

Rousseau does not explore the apparent tension between external influence in people-building and the territorial implications of voluntary, unanimous contract. While he recognized that the territorial scope of 'the people' may change through the decision of a Lawgiver, his account of territorial delineation features no external influence. In Rousseau's imagery of polity formation, territory is established as an aggregate of covenanters' lands. According to Rousseau, 'lands of private persons when they are united and contiguous become public property'.[37]

This unproblematic vision of polity formation is complicated if we envision the existence of dissenters in the midst of individuals who conclude an initial social contract. In such a case, '[w]hen the State is instituted', 'residence constitutes consent; to dwell within its territory is to submit to the Sovereign'.[38] In other words, if dissenters are encircled, they ought to give in, and incorporate themselves in the larger polity. But this account presupposes that those 'residents' have no political preferences of their own. If they did, Rousseau's account of unanimous covenanting would need to apply to them too; they too would be justified in creating their own territorial unit, if their 'private lands' were 'contiguous'.

Hobbes's account of reconciling political dissent and homogeneous territoriality suffers from the same difficulty. While Hobbes initially insists on unanimity at the beginning of Chapter XVIII of *Leviathan*, he relaxes the demand for unanimity only five paragraphs further on, claiming that

> because the major part hath by consenting voices declared a sovereign, he that dissented must now consent with the rest; that is, be contented to avow all the actions he shall do, or else justly be destroyed by the rest. If he does not follow through, then [he] must . . . be left in the condition of war he was in before.[39]

The tension between the two has not gone unnoticed. In his critique of Hobbes Robert Filmer observed that 'it is not a plurality, but a totality of voices which makes an assembly be one will'. The act of instituting a sovereign by way of 'plurality' is

33 Ibid., at 92.
34 Ibid., at 90.
35 The reference to the 'statesman' who is hitting the mean is not available in Cranston's translation. See J.-J. Rousseau, *The Social Contract and Discourses*, trans. G. D. H. Cole (1973), 221.
36 A. Bloom, 'Rousseau's Critique of Liberal Constitutionalism', in C. Orwin and N. Tarcov (eds.), *The Legacy of Rousseau* (1992), 143, at 161.
37 Rousseau, *supra* note 28, at 67.
38 Ibid., at 153.
39 Hobbes, *supra* note 27, at 117.

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not, as he said, 'a proper speech'.[40] More importantly, the passage lends itself to an interpretation that there is a referent geographical area in which the covenanting occurs. The 'major part' that consented to the establishment of a commonwealth can only be the 'major part' *of* something: a predetermined geographical area.

The purpose of bringing together Hobbes's and Rousseau's accounts of polity formation was to upset the dichotomy between civic and ethnic conceptions of 'the people' and foreshadow the themes of the external constitutive involvement and the role of unanimity in polity formation.

More specifically, their accounts demonstrate that self-determination – a principle of territorial reconstruction for a world fully covered by territorial states – is built on the inadequate conceptual ground of the state of nature. Even that state of nature is not really a state of nature. In Hobbes's and Rousseau's imagery, boundaries are sometimes presupposed and sometimes not, and the role of external actors can range from irrelevant, through spectral and benevolent, to predatory. If the state of nature is actually an 'imaginative reconstruction of a recurrent human possibility',[41] how can we imagine a foundation of a new polity without some interference from the outside? In fact, shouldn't our new, updated foundational imaginary incorporate the inevitable, yet always ambiguous, constitutive role of external actors?

In addition, Hobbes's and Rousseau's accounts show the central place of unanimity in state building. But if unanimity is not achievable in real life, and if it stands in tension with the external interference of outside sovereigns – benevolent or malevolent – should we then portray it as having any import for the purposes of polity formation today? Indeed, some contemporary political theorists, such as Jürgen Habermas or Thomas Nagel, treat unanimity as a counterfactual, regulatory ideal that enters normative reasoning only after the polity has been established.[42] However, it is wrong to portray unanimity only as a regulative ideal that concerns the legitimacy of legislation. Indeed – as my discussion will show – the pursuit of unanimity remains very much alive as a principle of boundary drawing.

Finally, both Hobbes and Rousseau illustrate that the quest for unanimity and boundary drawing are connected, if not necessarily in a straightforward way, and, indeed, that unanimity remains an ideal, even though the existence of dissenters forces both theorists to relax the demand for freely given consent and settle for either tacit consent or consent extracted through force. More importantly, the very possibility of calling somebody a dissenter (a dissenter from what?), presupposes a certain mental image: an already pre-delineated territorial polity. While contemporary international law claims to derive its reliance on presupposed boundaries in state building from the Roman law of *uti possidetis*, my analysis shows that when faced with real-life conditions of diversity and viability, the intellectual precursors

40 R. Filmer, 'Observations on Mr Hobbes's Leviathan: Or, His Artificial Man – A Commonwealth', in G. A. J. Rogers (ed.), *Leviathan: Contemporary Responses to the Political Theory of Thomas Hobbes* (1997), 7.

41 S. Wolin, *Politics and Vision: Continuity and Invention in Western Political Thought: An Expanded Edition* (2004), at 236.

42 See J. Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) *Political Theory* 766, at 776; T. Nagel, *Equality and Partiality* (1995), 33–4.

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of self-determination either smuggle in a pre-existing boundary (Hobbes), or allow the Legislator to redraw them (Rousseau).

4. Self-determination as secession in contemporary normative political theory

Early modern political theorists employed heuristic imagery of the state of nature and the social contract in order both to explain and to prescribe normatively legitimate ways of polity formation. Contemporary political theorists, on the other hand, construct normative arguments that begin from the premise that the world is fully covered by territorial states. Formation of an independent state in such a world can only take place through secession: 'the withdrawal of a territory and its population, where that territory was previously part of an existing state'.[43] Over the last couple of decades,three theories of secession – that is, 'external' self-determination – have crystallized.

The first is one of 'primary rights', or the 'choice theory', which states that a new polity is legitimate if there is a sufficient number of individuals desiring to create their own polity. According to Daniel Philpott, one of its leading advocates,

> One does not have the autonomy to restrict another's autonomy simply because she wants to govern the other. The larger state's citizens [Canadians in the so-called Rest-of-Canada, for example] cannot justly tell the separatists, 'My autonomy has been restricted because, as a member of our common state, I once had a say in how you were governed – in my view, how we were governed – which I no longer enjoy.' A right to decide whether another can enjoy self-determination would make a mockery of the concept . . . I am not [entitled] . . . to decide who will and will not be included.[44]

In practical terms, the goal is to 'redraw the borders . . . in order to circumscribe its residents as tightly as possible'.[45] Applied to Kosovo, the choice theory would allow Kosovo Albanians to extricate themselves from Serbia, not because they were oppressed by the Milošević regime, but because such is their political preference. The implication of this theory would be that the right to secede from Serbia would belong not only to Kosovo Albanians, but also to Albanians from the Preševo valley, in Serbia proper. But what about Kosovo Serbs? According to this theory, they too would have the right to secede recursively from Kosovo and either join Serbia or create their own micro-units. The territory in this case would be – in a way, similar to Rousseau's prescription – an aggregate of individual lands. Unlike Rousseau, who ultimately rejected the logical implication of this argument, namely that such territory would be pockmarked by enclaves of dissenters, choice theory would approve of a non-homogeneous territory.

The second – nationalist, 'ascriptive', theory – is a close cousin of the first. Nationalist theorists also respect the political will of minorities to create a new state, but demand that those minorities consider themselves as belonging to a nation.

43 A. Pavkovic and P. Radan, *Creating New States: Theory and Practice of Secession* (2008), 5.
44 D. Philpott, 'In Defense of Self-Determination', (1995) 105 *Ethics* 352, at 362–3.
45 Ibid., at 360.

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Nationalist theories are concerned with potentially frivolous, criminal, or dangerous side effects of allowing any group of politically mobilized individuals to create their own state. To illustrate the perverse outcomes of the choice theory, Margaret Moore has argued that choice theory would not be in a position to deny a right to secede to a Texan 'right-wing anti-state "Militia" group' settling on a small piece of land in a trailer-park.[46] In the Kosovo context, there would hardly be any difference between the normative prescriptions counselled by the choice and the nationalist theories. Kosovo Albanians would have a right to form their own state (or join Albania), because they clearly comprise a nation. For Moore, such a case would entail that boundaries be drawn 'around groups', in order to enable the collective autonomy of the 'nation' or 'people'.[47] For nationalist theory, unlike choice theory, territory is a site where the right of national self-government takes place, and not an aggregate of habitation rights of smaller communities.[48] The scope of the territorial unit would therefore be determined by the pattern of the occupancy of the national group in question. The status of a national territory delimited in such a way would be determined by the majority vote in a referendum.[49] The preference of a minority of dissenters within the nation would not count in determining the final shape of the boundaries. In the case of Kosovo, theoretical differences between nationalist and choice theories would hardly matter because all Kosovo Albanians likely share the same political preference to sever their political ties with Serbia. However, the possibility of a deep intra-group dissensus would, I suspect, bring Moore's position closer to that of choice theorists. During the war in Bosnia and Herzegovina, for example, the Bosniak adherents of Fikret Abdić in Western Bosnia resisted Alija Izetbegović's central government in Sarajevo and co-operated with Serbs and Croats in establishing the Autonomous Province of Western Bosnia, independent from the Sarajevo authorities. In the light of examples such as this, we may wonder whether the nationality principle, as espoused by Moore, is in fact a proxy for an intense and persistent attachment to an independentist political project. If so, the scope of a territorial unit would be determined by recursive referenda irrespective of the occupancy of the territory by a particular nationality. As a consequence, both variants – choice theory and nationalist theory – would seem to espouse the ideal of maximizing the political allegiance of individuals in a given polity through the tight redrawing of boundaries.

Not surprisingly, both theories share a more or less pronounced aversion to the *uti possidetis* principle or, more generally, to upholding the integrity of administrative boundaries in the process of polity formation. For Moore, invoking *uti possidetis* is often nothing but a part of a hypocritical strategy on the part of majority elites in the seceding territories to augment the territory under their control.[50] She rejects the

46 M. Moore, *Ethics of Nationalism* (2001), 171.
47 Ibid., at 200.
48 For the concept of habitation rights see H. Beran, 'A Democratic Theory of Political Self-Determination for a New World Order', in P. Lehning (ed.), *Theories of Secession* (1998), 36; see also M. Walzer, *Spheres of Justice* (1993), at 43.
49 Moore, *supra* note 45, at 194.
50 Ibid., at 161.

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application of the demos-based conception of self-determination based on the *uti possidetis* principle as 'extremely problematic', in situations where the state is seen as an expression of one nation, where a national majority which controls the state aims to use it as a vehicle to promote its culture and perpetuate its way of life.[51]

The third theory of secession is the so-called 'remedial rights only' theory. According to Allen Buchanan, secession is a remedial – not an unqualified – right against the serious injustices perpetrated by a state against a portion of its population. These injustices range from genocide and discrimination to revocation of intrastate autonomy. While revocation of intrastate autonomy appears to be a good candidate to justify the secession of Kosovo Albanians, Buchanan stops short of advocating the independence of Kosovo, by claiming that it is legitimate to inquire whether the minority exercising autonomy has initially violated the terms of the autonomy agreement. Under such circumstances, it is not irrelevant to ask whether 'the Kosovar Albanians had abused their right of autonomy, by using the Kosovar Communist Party [from 1974 to 1989] as a corrupt patronage system that excluded Serbs and by engaging in violent attacks on Serbs'.[52]

But isn't this question of revocation of autonomy overshadowed by the brutality of the Milošević regime's response to Kosovo Albanian resistance? Part of the argument of Condoleezza Rice, the former US Secretary of State, in supporting the independence of Kosovo was that the Serbian claim to govern Kosovo is lost, given the 'history of ethnic cleansing and crimes against civilians' under the Milošević regime. But why should the present-day, democratic *state* of Serbia be penalized for the crimes of the Milošević *regime*? That question betrays the inner ambiguity of the remedial theory. Is the 'remedy' of secession retrospective, looking back to punish the wider political community, which, arguably, tolerated the sins of its leaders; or is it prospective, aiming to prevent the future recurrence of grave injustices? The theory of remedial secession does not offer an unequivocal answer to this question.[53] Nor does it offer a theory of boundary drawing. While Buchanan claims that the *uti possidetis* principle would become an 'opportunistic tool', a 'rhetorical veil to mask the unrestrained pursuit of narrow self-interest', without an underlying moral theory to back it up, he does not provide such a theory. As a result, the remedial theory remains equivocal about both the future status of Kosovo and its territorial shape.

All three theories of secession understand 'external' self-determination as a collective right, either of a national group, or of any politically mobilized group, or of a group that has suffered gross political injustice. Understanding self-determination as a collective right to create a state – in the context of modern liberal democracy – will end up in a logical conundrum. Sovereignty, in liberal-democratic constitutions, is not vested in the ethnic nation but rather in the 'citizenry', the demos of a constituted state. The group asking for self-determination, 'Kosovo Albanians', will not be

51 Ibid., at 157.

52 A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004), 222.

53 J. Levy, 'National Minorities without Nationalism', in A. Dieckhoff (ed.), *The Politics of Belonging: Nationalism, Liberalism and Pluralism* (2004), 155, at 165. Levy has argued that the 'past injustice' argument often turns on the 'tendency for *future* injustices'. Past injustice, for him, is not a reason in and of itself for the creation of a new state, but rather an indicator of 'a greater than usual propensity for future injustices'.

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the group receiving it – 'the people of Kosovo'. By exercising its right to secession, the collective bearer of self-determination disappears at the end of that process, and a new, qualitatively different collective subject – the territorial people – emerges as a bearer of sovereignty.

5. SELF-DETERMINATION, *UTI POSSIDETIS*, AND THE GLOBAL GOVERNANCE APPROACH

In contrast to normative theories of secession, the global governance approach to self-determination understands self-determination not as a 'collective right', but rather as a 'structural principle' of global constitutional governance, critical in allocating territorial autonomy in global society.[54] In order to explicate this claim, Achilles Skordas's recent contribution to the debate altered the meaning of the conceptual building blocks of self-determination by borrowing from the vocabulary of constitutional theory. The meaning of self-determination, according to Skordas, unfolds through the interplay of *pouvoir constituant* – constituent power, 'people'/'self', and external recognition. The 'self', under this approach, is not the initiator of the process of self-determination, rather it is self-determination's end result. The 'self' of self-determination is a trajectory of two vectors: the pressure exerted from a *pouvoir constituant* (rebel militias, terrorist organizations, radical political parties, masses paralysing the country in a general strike, to name a few), and external recognition that rejects, modifies, qualifies, or, rarely, completely approves the demands of a *pouvoir constituant*.

Uti possidetis, with its 'capacity to reduce complexity', has a critical role in the encounter between *pouvoir constituant* and external recognition.[55] It infuses 'normativity-within-change' into the messy process of creating a new state by 'simplifying the range of choices available to external factors'.[56] In the case of Kosovo, the clash between Serbian and Albanian national political agendas could have generated a number of boundary variants; *uti possidetis* precluded the possibility of their emergence by singling out the boundaries of the former Yugoslav (and Serbian) province of Kosovo as the only relevant ones in the process of determining the status of Kosovo. For Skordas, a more substantive purpose of *uti possidetis* – behind the reduction of complexity – is to act as a 'first "line of defence" in the international community's policies to "tame" the *pouvoir constituant*'.[57] In the Kosovo case – one may argue following Skordas – the decision of the Contact Group to support only the status solutions upholding Kosovo territorial integrity tamed the *pouvoir constituant* of ethnic Albanian militias – the former Kosovo Liberation Army (KLA) in Kosovo, the Albanian National Army (ANA) in Macedonia, or the Liberation Army of Preševo, Medveđa and Bujanovac (UÇPMB) in the Preševo valley – by signalling

54 A. Skordas, 'Self-Determination of Peoples and Transnational Regimes: A Foundational Principle of Global Governance', in N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspective* (2007), 207.
55 Ibid., at 218.
56 Ibid.
57 Ibid.

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to them in advance that their aspirations would be tolerated in Kosovo only, not in Macedonia or in southern Serbia.

Thus the idea of 'taming' rejects two equally extremist positions: that the creation of a new 'self' is a matter of a sovereign decision of *pouvoir constituant*, or that it is a matter of a mechanical imposition of *uti possidetis* on unwilling subjects. Such a constrained role of *pouvoir constituant* in polity formation divorces it from the idea of 'the people'. 'The people' is not *pouvoir constituant*, but rather an intermediary construct that assumes a role akin to a 'political elevator', elevating – through the results of referendum or a vote in a national assembly – the political status of a designated territory. The process which led to the independence of Bosnia and Herzegovina in 1992 shows how it would ideally work. The international community detects a signal coming from a particular territory that there is a desire for independence by taking notice of the declarations of dominant political elites, and then it acknowledges the prima facie legitimacy of such a desire, but demands that it be tested to see if it has sufficient support in a referendum.[58]

This account of 'the people' echoes Crawford's account of self-determination suggesting that 'the people' is nothing more than a *terminus technicus* that international law uses to describe a phase in a process of polity formation. However, while not openly professing any normative affiliation, Skordas – quoting Koskenniemi – celebrates the Hobbesian and rejects the Rousseauian vision of 'the people'.[59] His normative sympathies are also revealed in the description of the role of *uti possidetis* in the context of achieving the independence of Bosnia and Herzegovina, where, according to him, the Badinter Committee built on the ICJ's justification for *uti possidetis*. Skordas celebrates *Burkina Faso* v. *Mali* as an exemplar of the Court's 'civic' reasoning, that 'reject[s] ethno-cultural ontology'.[60]

The smaller, interpretive problem with endorsing the purportedly Hobbesian account of 'the people' is that Skordas's reading of *Burkina Faso* v. *Mali* is not entirely accurate. The civic character of 'the people', in the above case, is not the Court's normative point of departure, but rather an epiphenomenon of the joint struggle of different ethnic groups against colonial masters. This logic of the Court does not sit well with the dynamics of dissolution of the former Yugoslavia. In the former Yugoslavia, ethnic groups within administrative boundaries of component republics – Croatia and Bosnia, for example – did not fight together against the 'colonial' federal centre. Rather, they fought each other about the right to secede or to remain politically connected within the joint federal framework. The larger problems with the global governance approach are that it is complicit in the arbitrary shaming of certain projects as ethno-nationalist, that it hides the fundamental ideal of unanimity, and that it constrains our imagination about other possible ways of imagining a political community.

In order to critique Skordas's global governance approach to self-determination and to respond to these larger problems we must first challenge the implicit

58 See Opinion No. 1. of the Arbitration Commission of the Peace Conference on Yugoslavia – 29 November 1991, in S. Trifunovska, *Yugoslavia through Documents: From Its Creation to Its Dissolution* (1994), at 415, 416.

59 Skordas, *supra* note 53, at 212.

60 Ibid., at 214.

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assumptions and perspective. The global governance approach assumes and remains committed to the idea of the 'international community'. At the time of Bosnian independence, for example, 'perceiving' the international community was rather uncontroversial; the recognition of the seceding Yugoslav republics was swift and overwhelming, based on the legal opinions of the Badinter Committee. Within a couple of months, following their declarations of independence, Croatia, Slovenia, and Bosnia and Herzegovina became members of the United Nations. In contrast, the contested independence of Kosovo – seventeen years later – could not be more different. Of the 192 countries that are members of the United Nations, only fifty-five have so far recognized Kosovo as an independent state. The rest – including India, China, and Russia – affirmed the territorial integrity of Serbia in its pre-NATO intervention boundaries. The only way in which we could continue to speak meaningfully of the 'international community' is to keep our faith that a consensus on Kosovo's status will eventually emerge. Does the vocabulary used in Kosovo's independence, and the fractures it has caused in the 'international community', give us a reason to maintain that faith? If the Western great powers do not use the discourse of legality and self-determination, why should we?

That may be the wrong question if we accept that the presumption of the global governance approach is actually to '*have faith* in the possibility or inevitability of systematization on a global scale'.[61] To put it differently, global governance necessarily starts with a particular image of an international lawyer – a global 'legislator' – who, committed to the project of international law and its development, as a matter of professional ethos interprets political ruptures, juridical inconsistencies, and lacunae as instances of the troubled, but fundamentally progressive, development of public international law. Challenging the global governance approach is only possible if this perspective is challenged as well.

6. Towards a prudential approach to polity formation: a theoretical crypto-epistle to Kosovo Serbs

Instead of assuming the perspective of a global legislator who cannot afford to distance himself from the international legal project, the prudential counsellor is agnostic about the idea of 'international community', and has the 'luxury' to examine hidden assumptions, rhetorical side effects, perils, and opportunities that arise from the vocabulary of peoplehood. In examining those assumptions and side effects, the counsellor, while drawing on different theoretical arguments, does not seek to construct a normative theory or a comprehensive explanatory system. Rather, following James Tully, he 'seeks to redescribe the forms of governance in a way that transforms the self-understanding of those subject to and struggling within it'.[62] The purpose of his prudential counsel – animated by a non-normative approach to political theory – is to 'enabl[e] the participants to become more self-aware of

61 F. Johns, 'The Globe and the Ghetto', in M. Lederer and P. Muller (eds.), *Criticising Global Governance* (2005), 69, at 70 (emphasis added).
62 J. Tully, *Public Philosophy in a New Key*, Vol. 1, *Democracy and Civic Freedom* (2008), 16.

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the conditions of their situation' and, possibly, 'the range of options available to them'.[63]

At a minimum, the theoretical insights that give rise to prudential counsel ought to provide a 'structure of solace' to those unwillingly captured in new territorial polities – in this case these are Kosovo Serbs – by revealing to them side effects of external involvement, and ideals hidden in the process of polity formation, obfuscated by the use of the vocabulary of peoplehood. Unlike Skordas, who phlegmatically tasks international law to 'tame' the obdurate *pouvoir constituant*, the prudential counsellor leaves the decision – of whether to accede to taming or to resist – to those who are affected by it.

6.1. The external constitutive role and the distribution of moral praise and opprobrium

It is the Rousseauian image of the external agent – an essentially benevolent Lawgiver – that echoes in Skordas's account of self-determination and *uti possidetis*. While these external actors are portrayed as seeking to promote international stability and peace, there is no reason to presuppose that external involvement is only benevolent. While the traditional justification of *uti possidetis* may be fuelled by worries that outside power will 'divide and conquer', nothing in principle speaks against the possibility of a strategy to 'unite and conquer' – in the case of Kosovo, Serbs and Albanians – through the application of the *uti possidetis* principle. Bringing together diverse populations provides ample opportunity for external agents to establish a long-term presence, arbitrate in the internal affairs of such a state, and critically influence its role in international affairs. In other words, the political constellation of forces within a set of administrative boundaries need not be neutral towards the interests of a foreign power. For example, several senior US officials have stated that the independent Kosovo (within its administrative boundaries) would serve US interests by showcasing a well-intentioned US foreign policy towards a Muslim population in Europe.[64] Equally, scholars such as Chalmers Johnston see the US role in establishing an independent Kosovo not as a logical response to the brutality of the Milošević regime, but rather as an element in the broader geostrategic repositioning of US military outposts designed to protect US economic and political interests.[65] Such regional geopolitical manoeuvring may indeed tame the local *pouvoir constituant*, but its political side effects may equally contribute to global insecurity and diminish the prospects for international peace.

The good, useful, facilitative Rousseauian external Lawgiver is only unequivocally good and useful from the perspective of the political beneficiaries of a new political community. In *The Social Contract* Rousseau was concerned neither with those who would dissent from the establishment of the new order – calling them simply 'residents' – nor with the wider negative externalities of the Lawgiver's involvement in establishing a new people. In the state of nature, the creation of a

63 Ibid., at 37.
64 See, e.g., J. Biden, 'Opponents of new Kosovo Must Be Stopped', *Financial Times*, 3 January 2007.
65 C. Johnston, *The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic* (2004), 155, 215.

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new people does not chip away population and territory from existing polities. In real life, the external constitutive involvement is Janus-faced. By helping to construct a new political community, external actors simultaneously reconstruct, or deconstruct, an old one. As a result, we should moderate our acknowledgement of the benevolent Legislator with Hobbes's implicit accounts of a menacing, always potentially predatory, external Sovereign.

In addition to raising our suspicions about the motivations of every external constitutive involvement, we ought to take a step further in the direction already indicated by Skordas. While he speaks of 'taming' a *pouvoir constituant* through invoking *uti possidetis* and granting political recognition, it would be more analytically correct to bring those external actors directly into the focus of our theoretical lenses. Not only did the Western states *recognize* Kosovo, they are actively – militarily, politically, diplomatically – *constituting* Kosovo as an independent state. It is not 'the people of Kosovo' which is the *pouvoir constituant*, nor is it its political and military organization, the KLA. Rather, the true *pouvoir constituant* is the assemblage of the most powerful Western states, in conjunction with the political and military organizations of Kosovo Albanians.

At this point I shall not pursue what recasting the fundamental concepts of constitutional theory would entail, or how this suggestion relates to existing theories of recognition in international law. For the purposes of this essay it is more important to draw attention to the fact that this ambivalent external constitutive influence is critical in the creation, and the maintenance, of the civic–ethnic dichotomy that plagues much of the debate about self-determination. Although the civic–ethnic distinction has been extensively criticized on both normative and empirical grounds, highlighting the role of the external actors in enabling this dichotomy has been surprisingly absent.[66] Those who unreflectively label certain political projects as either 'civic' or 'ethno-nationalist' should realize that civic and ethnic nationalisms are not only empirical realities or normative prescriptions. Most importantly, they are contingent rhetorical resources used in order to assume the moral high ground over an opponent, or to induce moral opprobrium. The external decision about what set of boundaries to endorse directly empowers majorities in the units designated for independence to pose as good civic nationalists. The new national majorities in territories designated for independence – such as Croatians in 1992, Kosovo Albanians in 2008, or even the Finns in 1921 – all could invoke the name of a territorial 'people', and win the ear of international publics who equate such a definition of 'the people' with ideals of inclusiveness and solidarity.[67]

On the other hand, new minorities within such territories – Aaland Islanders, Croatian Serbs, anglophone Québécois, James Bay Crees, and other real or potential

66 See, e.g., B. Yack, 'The Myth of the Civic Nation', (1996) 10 (2) *Critical Review* 193, at 196 and *passim*. See also R. Brubaker, 'Myths and Misconceptions in the Study of Nationalism', in M. Moore (ed.), *National Self-Determination and Secession* (1998), 233, at 257 and *passim*.

67 Civic nationalism has been exemplified by consolidated independent Western states such as France. However, sub-state nationalisms such as Scottish or Catalan have also been described as good, civic nationalisms. See S. Tierney, 'We the Peoples: Constituent Power and Constitutionalism in Plurinational States', in M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007), 229, at 232.

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'orphans of secession' – necessarily ended up in a rhetorically disadvantageous position.[68] They are shamed as vicious ethnic nationalists. The working paper published by the United States Institute of Peace in 2005 asserts that 'substantive improvements' based on the 'international community's military and financial investments' would be cancelled if

> talks on Kosovo's status lead to *de facto ethnoterritorial* separation, with Serbs governed on their own territory by Belgrade without reference to Priština. Partition, or something approaching it, could trigger another wave of violence, mass displacement of civilians, and instability in multiethnic states of the region.[69]

From citizens of a territorial polity – Serbia – who want to retain the bonds of citizenship with those who want to live together in a single state, Kosovo Serbs are recoded as vicious ethnic nationalists and factors of instability. Kosovo Serbs in a Serbia *with* Kosovo are the *citizens* of Serbia. In an independent Kosovo, if those Serbs choose to segregate themselves, or pursue their own recursive secession, they are branded as ethnic nationalists.

Granted, a number of members of those trapped minorities display the values of ethnic nationalism, irrespective of any international constellation. However, it is important to recognize that for them there is, rhetorically, little else to do in the absence of the territorial referent – enabled by *uti possidetis* – except to fall back on the idea of 'blood and belonging' as justification for their own counter-project of state building. Imagine a counterfactual: how would Kosovo Albanians justify their claim to autonomy in a parallel universe where the territorial integrity of Serbia was upheld by the West, and Milošević abolished the province of Kosovo altogether? Their only currency in the absence of a territorial referent would be to assert their rights as an ethno-national group.

6.2. Aspiration to unanimity as an ideal implicitly shared by both demos and ethnos

Skordas's account of *uti possidetis* and self-determination highlighted its role in reducing complexity and minimizing violence, and as a result contributed to international peace and stability. In this picture, 'units' of self-determination were given; they 'evolve', 'differentiate their functions', upgrade their political status, but we are never explicitly told that which is glaringly obvious: boundaries actually get redrawn. While Kosovo upgraded its status, the boundaries of Serbia ended up redrawn in the process.

Skordas did not address how exactly such redrawing – when it happens – contributes to the goal of international peace.[70] While Skordas justifiably embraced the role of external actors – theoretically articulated as indispensable by Rousseau – he neglected the recurrent ideal as it appears in classical accounts of state formation:

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68 I borrow the term 'orphans of secession' from J. MacGarry, '"Orphans of Secession": National Pluralism in Secessionist Regions and Post-Secession States', in Moore, *supra* note 65, 215.

69 D. Serwer and Y. Bajraktari, 'Kosovo: Ethnic Nationalism at Its Territorial Worst', Special Report No. 172, August 2006, United States Institute of Peace, available at www.usip.org/pubs/specialreports/sr172.html (emphasis added).

70 Skordas, *supra* note 53, at 221.

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unanimity. By remaining faithful to the concept of 'the people', he ignored the logically antecedent question – articulated clearly in early modern accounts of polity formation – of how such a 'people' comes about. Although his new account of self-determination is housed in a sophisticated overarching theory, the venerable, ever-present ideal of unanimity – either as a goal, or as a never fully achievable effect of boundary drawing – remains surprisingly absent.

We have seen that unanimity in early modern political theory may or may not have direct implications for boundary drawing. However, contemporary normative political theory does echo – albeit imprecisely – the commitment of classical accounts to the principle of unanimity. In modern theories, this ideal is relatively explicit: theorists speak of 'tight redrawing of boundaries', which are 'maximally consistent with constituent preferences'.[71] For contemporary theorists, such as Moore and Philpott, such an ideal is considered contrary to, as well as morally superior to, *uti possidetis*.

However, the most important omission of the contemporary normative theory is simple, but non-trivial. Both means of boundary drawing – *uti possidetis* and 'tight redrawing of boundaries' – are related to the ideal of unanimity. In other words, both solutions share a common normative denominator: improving consent – approaching the ideal of unanimity – over the reconstituted territory, taken in its entirety, in comparison to the *status quo ante*. In other words, any boundary drawing that seeks the input of 'the people' – including those reconfigurations justified by *uti possidetis* – improves consent and approaches the ideal of unanimity.

A simple mental experiment will help to clarify my point. Recall that, for Skordas, 'the people' is an entity that decides on the status of a unit once external actors have designated it as a candidate for independent statehood. Sometimes, as was done in Bosnia in 1992, that decision is made through referendum. The mental experiment would be to ask: what would a referendum mean, if we omitted invoking Skordas's 'people'? If the results of a referendum are not a manifestation of anybody's collective will, how would we then justify the requirement of a majority within a certain unit? In other words, if we choose to bracket the existence of 'the people', how would we then justify the recourse to a majority vote?

In this case, referenda should be seen as a means of testing a wager, made by those powers who support the possibility of independence (based on the proclamations of the domestic political elite), that in a certain unit there exists sufficient support for the politico-legal upgrade of the entity from administrative unit to independent state. Nonetheless, the question remains: what is the meaning of a majority requirement? If a majority in a referendum is sufficient, we can legitimately ask what the ideal majority would be. This sufficient 'majority' should be seen as a compromise between the principles of viability of a unit, and unanimity.[72] Therefore, instead of fine-tuning the amount of allegiance to a particular community, administrative boundaries

71 C. Wellman, *A Theory of Secession: The Case for Political Self-Determination* (2005).

72 For the most influential modern account of the idea that majority vote exemplifies the aspiration to the (unachievable ideal of) unanimity see H. Kelsen, 'On the Essence and Value of Democracy', in A. J. Jacobson and B. Schlink (eds.), *Weimar: A Jurisprudence of Crisis* (2000), 84.

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already presuppose (as a rule of thumb) optimized consent, given the real-world requirements of viability of a political community. In other words, a majority in a referendum should be seen as a fulfilment of a legal requirement crafted as a balance between prudential considerations and the 'ideal' majority: unanimity.

Even when no referendum is required, the same political logic – the more consent the better – finds its way into the discourse of the involved parties. For example, John Sawyers, the political director of the UK Foreign Office at the time of Kosovo status negotiations, stated that '[t]he outcome of the future status will need to be acceptable to the *great* majority of people in Kosovo'.[73] James Dobbins, former senior adviser on the Balkans to President Clinton, made a similar point: 'the United States and its allies have already committed to an outcome that takes account of the wishes of a *vast* majority of Kosovo's population'.[74]

Now let us approach the relationship between *uti possidetis*, unanimity, and the 'tight redrawing of boundaries' from a different vantage point. While *uti possidetis* justifies preserving the territorial integrity of entities aspiring to independent statehood, in so doing it also justifies the boundaries of what are going to become rump entities left behind in the process of creating new, independent units. We need to ask an important, if simple, question, missing from Skordas's account: what is the effect – in terms of satisfaction of individual preferences – of this boundary redrawing? The answer is: the overall improvement of consent, approaching the ideal of unanimity. In the Yugoslav case in 1991–2, the break-up along administrative lines increased overall consent in the respective republics taken together, in comparison with the former Yugoslavia as a whole. The former Yugoslavia, towards its end, was supported only by a plurality of its citizens (mostly Serbs), whereas under the new constellation of independent component republics, only the splinter Serbian, Croatian, Muslim (and now Albanian) minorities were dissatisfied with their new political status.

So far, in the literature, *uti possidetis* and 'tight redrawing of boundaries' have both been understood as serving the opposing conceptions of peoplehood. 'Tight redrawing' – as it was occasionally used in the aftermath of the First World War – was intended to ensure ethnic homogeneity of the emerging nation-states. *Uti possidetis*, on the other hand, continues to be seen as consistent with *demos* – the civic idea of 'the people'. If we realize that the application of *uti possidetis* improves the degree of consent over the whole of the reconstituted territory, we shall understand that the difference between it and the competing principle of the choice theories of secession – 'tight redrawing of the boundaries' – is a matter of degree, not of principle. The analysis above shows that both are actually more closely related than it would appear, and that both serve an overarching democratic value: improvement in the consent of the governed over the reconstituted territory.

If contemporary normative theorists of secession are right to raise the profile of the principle of improvement of consent, understood as a principle which aims to

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73 'Timeline for Independence', Kosovo Notes and Comment, available at www.newkosovo.org/Newsletter_Issue_Six.pdf (emphasis added).

74 J. Dobbins, 'Majority Rule that Respects Minorities', Rand Corporation, 11 June 2005, available at www.rand.org/commentary/061105IHT.html (emphasis added).

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approach unanimity in state building, they have not fully appreciated the dual – both normative and prudential – character of that principle. On the one hand, as we have seen with Philpott, the improvement of consent can be understood in normative terms, as an improvement in accomplishing individual (political) autonomy. On the other hand, the improvement of consent can also be understood in prudential terms. From the vantage point of prudence, we would value the improvement in consent because of the socially beneficial effects of improved loyalty, not because it improves the degree of individual autonomy. Improving loyalty to a particular polity is important for the stability and viability of a polity. The states that enjoy a high degree of consent are generally more stable, use less coercion in attaining their goals, and can devote more political energy to solving the social problems of their citizenry instead of negotiating intractable national conflict.

At this point, unpacking the justification of *uti possidetis* intersects with Skordas's account. *Uti possidetis*, Skordas claims, aims to contribute to peace and stability. But the way it does that – in conjunction with 'self-determination' – is through respecting and accommodating passionate political attachments, about which Skordas says nothing. The decision of the Canadian Supreme Court on the constitutionality and international legality of the unilateral secession of Quebec is a good example of paying due respect to such radical preferences. While Skordas praises this decision as an exemplar of attention to the concerns of political stability, he omits the most powerful claim made by the Supreme Court. 'Canadian constitutional order', the Court stated, 'cannot remain indifferent to the clear expression of a clear majority of Quebecois that they no longer wish to remain part of Canada.'[75] Even though the Court's reasoning is mindful of the demands of stability, the Court is clear that it is consent of the governed that is 'a value that is basic to our understanding of a free and democratic society'.[76] In the Canadian context, this could entail redrawing Quebec's provincial boundaries to exclude as many of those as possible who objected to an independent Quebec. According to Patrick Monahan, such partition should not be seen in ethnic terms because 'some regions with a significant francophone majority would vote to remain a part of Canada if given the option'.[77]

At the moment, the option of partition is rejected by both the West and Serbia, which still sees Kosovo as an integral part of its territory. Kosovo Serbs understand their resistance to Kosovo authorities not as secession from Kosovo, but rather as upholding the remnants of the Serbian legal order in the province. Modern normative theories of secession would probably support their intransigence, but not the Serbian government's claim to the whole of Kosovo. According to the

75 *Reference Re Secession of Quebec*, [1998] 2 SCR 217, (2) *Question 1*, available at http://csc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.html. Interestingly, the Supreme Court did not frame the issue of Quebec's secession as a matter of 'self-determination', but rather as an issue that ought to be governed by the four unwritten principles of Canadian constitutional law. The demand that an order 'cannot remain indifferent' – that it must be responsive – to even radical political agendas, features prominently in Jan Klabbers's recent account of self-determination. J. Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law', (2006) 28 (1) *Human Rights Quarterly* 186.

76 Ibid., at para. 67.

77 P. Monahan et al., 'Coming to Terms with Plan B: Ten Principles Governing Secession', in D. Cameron (ed.), *The Referendum Papers: Essays on Secession and National Unity* (1999), 244, at 292.

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boundary-drawing prescriptions of choice and nationalist theories there is no reason to keep the unwilling subjects – in the territory adjacent to Serbia proper, north of the river Ibar – in independent Kosovo, if the separation can be done peacefully and the new independent Kosovo remains a viable unit.

What about enclaves? While both early modern and contemporary accounts agree, at least in principle, that unanimity is a legitimate ideal in polity formation, they sharply diverge when it comes to the issue of how to deal with the 'dissenters'. Both Hobbes and Rousseau demand that they yield and are incorporated in an emergent polity, disallowing the possibility for them to create their own micro-political units. While Hobbes and Rousseau fear enclaves, the contemporary theorists, as I have argued above, seem more relaxed.[78] While acceptable in theory, the idea of a self-governing micro-territory (which is not a Pacific island) may sound counter-intuitive, even bizarre. However, the European experience shows that enclaves can be functioning political units, and not threatening to their surroundings. In the region of Baarle, for example, there are twenty-two Belgian and seven Dutch counter-enclaves. Irrespective of the problems associated with smuggling and boundary delineation, the citizens of these enclaves and their hinterland have managed to deal with their differences in a constructive way, using their complex boundary delineation as a tourist attraction.[79] In addition to Baarle, the European Union is a home to the enclaves of Buesingen, Jungholz, Vehnbahn, Llivia, and Campione d'Italia.

Rhetorically armed with the European practice of functioning enclaves, as well as the support of normative theory, Kosovo Serbs have a strong case with which to resist the global governance 'taming', and to mount a challenge to Kosovo Albanian authority. That, however, would require not only judgement as to the ultimate feasibility of their claims. As Burke Hendrix argues, '[a]nyone contemplating an attempt at separation by a tiny enclave would be extremely aware of the dangers involved and of the sharply reduced room for [meaningful political autonomy]'.[80] They would do well to heed Hobbes's advice about the right size of the commonwealth, which 'is not determined by any certain number, but by comparison with the enemy we fear'.[81] More importantly, such a strategy would require a U-turn from the official Serbian position that its territorial integrity, Kosovo included, is protected by international law. Equally, such a strategy – in order to be credible – would require recognizing the same right to enclave-forming, and possibly secession, to Albanians in the Preševo valley, in Serbia proper.

6.3. Towards a prudential republicanism: from a republican peoplehood to a community of fate

Although Hashim Thaçi did not invoke the legal principle of self-determination of the people of Kosovo to justify the independence of Kosovo, he used the vocabulary of peoplehood for the same purpose.

78 For a recent argument in favour of allowing micro units to secede from larger states see B. A. Hendrix, *Ownership, Authority and Self-Determination* (2008).

79 E. Vinokurov, *A Theory of Enclaves* (2007), 4.

80 Hendrix, *supra* note 77, at 144.

81 Hobbes, *supra* note 27, at 112.

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The invocation of the territorial 'people' – enabled by *uti possidetis* – hopes to conceal the fact that any territorial reconstruction is a milestone, more or less distant, from the hidden ideal: the aspiration towards unanimity. The invocation of peoplehood does away with the fear of enclave, and the real or imaginary threats to homogeneous territory posed by Hobbesian 'dissenters' and Rousseauian 'residents'. Invoking the name of a territorial people invites the obdurate losers in the process of polity formation to look into the inclusive future, not the past, when their most important preferences were disregarded by a definitional fiat of *uti possidetis*. In other words, the purpose of peoplehood is to unite both 'winners' and 'losers' in the process of polity formation, and orient them towards a future in which everybody sees each other as solidary co-deliberators, co-authors of the common political destiny. Over time, the lens of peoplehood (with or without invocation of self-determination) might strengthen the sense of civic solidarity, the sense of 'being in it together' in a territorial political project that stretches beyond the purportedly sectarian 'ethno-nationalist' group interests. Ideally, this rhetoric would intensify the motivation for sacrificing immediate individual gain for a more distant good of a territorial community. As Craig Calhoun has observed, 'citizens need to be motivated by solidarity, not merely included by law'.[82] Implicit in the promise of peoplehood is a hope that the initial violence involved in herding different populations together, or keeping them apart, will be forgotten, and that the diverse, ethnically mixed populations will experience the political benefits of republican peoplehood. Over time – we may imagine a US State Department official thinking – the inhabitants of Kosovska Mitrovica, Gračanica, and Štrpce will reconcile themselves to the fact that they – as of 17 February 2008 – no longer share the same political destiny as the rest of Serbia, but rather as the rest of Kosovo.

For some, the idea of 'the people' is 'serving as a goal to be sought, never attainable, always receding, but approachable and worth approaching'.[83] While one may think that the vision described above is an attractive ideal, we need to remind ourselves that republican political theory – with its central building block 'the people' – is not the only game in town. Even if we value the process of democratic participation, William Connolly argues that there is no need for a

> wide universal 'we' (a nation, a community, a singular practice of rationality, a particular monotheism) to foster democratic governance of a population. Numerous possibilities of intersection and collaboration between multiple, interdependent constituencies infused by a general ethos of critical responsiveness drawn from several sources [would] suffice[] very nicely.[84]

Questioning the usefulness of the lens of 'the people', we might further ask whether the ideals of vigilant political involvement, implied in the invocation of 'the people', are 'particularly well suited for contemporary societies and temperaments'. In that respect, I share a suspicion with Christopher Morris, who claims that 'it is

82 C. Calhoun, 'Imagining Solidarity: Cosmopolitanism, Constitutional Patriotism, and the Public Sphere', (2002) 14 (1) *Public Culture* 147.
83 E. S. Morgan, *Inventing the People, The Rise of Popular Sovereignty in England and America* (1988), 306.
84 W. Connolly, *Ethos of Pluralization* (1995), xx.

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not clear why political activism must be an aim of all, or even most, adults in any large impersonal societies; in normal times many politically inactive ends maybe more fulfilling for most individuals'.[85]

If the lens of 'the people' is of dubious importance in consolidated Western states 'in normal times', its advantages are even more spurious in a deeply divided society. The idea that Serbs from Kosovska Mitrovica will all of a sudden stop looking across the Merdare customs checkpoint to Belgrade, and instead reorient towards Priština, because they are invited to partake in the political story of a multiethnic Kosovo people, is naive at best and dangerous at worst. Invoking 'people' is always risky; while some international lawyers may of think of self-determination as 'ridiculous', or as a technical name for a principle of territorial reconstruction whose main purpose is to serve peace, the imaginary of the politically mobilized masses is undoubtedly different. The tone of surprise and irritation in the famous Jennings quip makes sense only if he tacitly postulated – I think rightly – a grass-roots understanding of self-determination which does not recognize as legitimate the external imposition of the territorial boundaries in advance of their self-determination. If that is true, it is not hard, to paraphrase Chaim Gans, to see why inviting those who objected to being included in a particular 'people' to take a vote and participate in the decisions of that very people is 'tantamount to humiliating them twice'.[86]

Interestingly, the uneasiness, the ambivalence – about the normative pros and humiliating cons of territorial peoplehood – are betrayed in the discrepancies between the English and Albanian translations, on the one hand, and the Serbian translation, on the other, of Kosovo's constitutive documents.[87] While the English and Albanian translations of the Kosovo Declaration of Independence feature the 'desires', the 'will' of 'the people', in the Serbian translation, 'the will of the people' becomes 'volja naših ljudi'. Instead of translating 'people' as 'narod' – a term with a constitutional and international legal significance – the Serbian translation opted for 'ljudi', a politically inconsequential, almost-synonym: the 'folks'. In a similar vein, the English translation of the Preamble to the Constitution of Kosovo starts with the venerable incantation 'We the People'. The Serbian translation again conspicuously departs from what would be a contextually faithful translation: 'Mi, narod Kosova', and instead reads as 'We the citizens of Kosovo', a term with neither an inbuilt emotional punch nor a normative promise of a '*pouvoir constituant*'. Finally, the English translation reads that 'sovereignty of the state of Kosovo stems from the people', while the Serbian translation of the relevant constitutional provision asserts that 'suverenitet države Kosovo potiče iz stanovništva' '. . . stems from the population'.

'The population', 'citizens', 'folks' – these are the legitimizing code words of neither international law nor constitutional theory. While still paying respect to the idea that the wilfulness of a constitutional subject creates a polity, the Serbian translation relativizes its strength and unity: it portrays the constitutional subject as composite

85 C. W. Morris, 'The Very Idea of Popular Sovereignty: "We the People" Reconsidered', (2000) 17 *Social Philosophy & Policy* 1, at 17.

86 C. Gans, 'National Self-Determination: A Sub- and Inter-state Conception', (2000) 13 (2) *Canadian Journal of Law and Jurisprudence* 185, at 190.

87 Both documents are available in English, Albanian, and Serbian at www.assembly-kosova.org/?cid=2,100.

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(population), atomized (citizens), and docile (folks).[88] The theoretical image that emerges from this interpretation is akin not to a republican, but to what Herman van Gunsteren calls a neo-republican, ideal of a political community. Citizens of such a polity are not asked to cherish 'an overarching claim of allegiance to the republic'.[89] This project respects the fact that 'individuals may have deep differences and deep loyalties to other communities'.[90] Citizens, instead of belonging to 'the people', belong to the community of fate.[91] Such a community is not an aspirational community striving towards ever-greater inclusion. Rather, the community of fate is a more modest ideal. The community of fate exists '[w]hen individuals are so situated that they cannot avoid bumping into each other without giving up their ways of life and work'.[92] In a community of fate, citizens are glued together by 'history, chance, earlier choice, or future prospects', and – we might add – geopolitical fiat of the true *pouvoir constituant*.[93] If the primary task of political theory is to provide us with 'structures of solace',[94] the realistic account of an imposed polity – a community of fate – gives Kosovo Serbs a better choice of grudgingly reconciling themselves, if they so wish, to the political order to which they have not consented.

7. Conclusion: whither 'the people'?

In an early work Lon Fuller likened a legal fiction to an 'awkward patch' grafted onto the fabric of law. Removing the patch would enable us to

> trace out the patterns of tension that tore that fabric and at the same time discern elements in the fabric itself that were previously obscured from view. In all this we may gain a new insight into the problems involved in subjecting the recalcitrant realities of human life to the constraints of a legal order striving toward unity and systematic structure.[95]

Anchored in a discussion of Kosovo's independence, this essay observed that the patch of self-determination has already been removed from 'the fabric of law' by those who were supposed to keep it affixed and who went one step further to remove the remaining patch of a territorial 'people'. The 'recalcitrant reality' that presented itself revealed external *pouvoirs constituants* inevitably engaged in producing the 'civic'/'ethnic' distinction, those political labels of approval and opprobrium. Also, that political reality contains an operative, persistent ideal of polity formation: unacknowledged aspiration to unanimity. In using the concept of 'the people' – fed

88 I am anthropomorphizing 'the Serbian translation' – saying that it 'suggests' and 'portrays' – as I have no evidence of who is its real author – a State Department official, a Kosovo Albanian constitutional scholar, a sloppy Serbian translator, or somebody else. I do not believe, however, that those departures from the conventional translation of 'the people' as 'narod' are accidental.

89 Ibid., at 26.

90 Ibid.

91 Ibid.

92 Ibid.

93 Ibid., at 61.

94 N. Jacobson, *Pride and Solace: The Functions and Limits of Political Theory* (1986), x.

95 L. L. Fuller, *Legal Fictions* (1967), viii.

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by the fear of anarchy and hope of community – we made ourselves insensitive to these truths of polity formation.

I would like to reiterate that this essay stops short of advocating the wholesale abandonment of the ideals of self-determination and peoplehood. There are numerous deserving political movements around the world, which have taken their inspiration from the ideals of self-determination, and have deftly exploited the vocabulary of peoplehood. Indigenous peoples, for example, have made self-determination a keystone of their normative agenda. Strategically, calling oneself 'a people' energizes the movement's base, and compels international publics – at least initially – to take your radical claims more seriously.

The case of Kosovo speaks to these larger concerns by offering two caveats. The vocabulary of peoplehood may be used ultimately to justify the political project of the oppressed subalterns – Kosovo Albanians, the victims of the brutal Milošević regime. However, that same vocabulary is inaccessible; it betrays subalterns' subalterns – Kosovo Serbs. Finally, the example of Kosovo teaches us that invoking self-determination of peoples is not necessary (or desirable?) in order to justify a radical political agenda. In the geopolitical conjuncture of the early twenty-first century, a lukewarm invocation of the 'unusual combination of factors' seems to suffice.

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