

# SECESSION AND NULLIFICATION AS A GLOBAL TREND

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## ABSTRACT

Despite manifestations of constitutional convergence on a global scale, expressions of constitutional resistance or defiance in the form of secessionism and nullification have not subsided, and may in fact be regaining ground worldwide. Whereas at first glance the reemergence of such sentiments appears counterintuitive in an age of apparent globalization, it may actually reflect a predictable reaction to, perhaps even a backlash against, powerful global convergence vectors, the centralization of authority and the decline of the local in an increasingly—constitutionally and otherwise—universalized reality. When understood against the backdrop of formidable centripetal forces of political, cultural, and economic globalization, the rise of a new trans-national constitutional order and judicial class, and the corresponding decrease in the autonomy of “Westphalian” constitutionalism, as well as an ever-increasing deficit of democratic legitimacy, counter pressures for preserving a given sub-national unit’s, region’s, or community’s unique constitutional legacy, cultural-linguistic heritage, and political voice seem destined to intensify, not to decline.

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MUCH HAS BEEN WRITTEN about the global convergence on constitutional supremacy, perhaps even the emergence of a global constitutional order, and the corresponding rise of an Esperanto-like universal constitutional discourse, primarily visible in the context of rights (*e.g.*, Law 2005; Möller 2012). The ever-accelerating advance of these trends may be linked to broader trends of universalism, globalization, post-nationalism and the corresponding erosion of the local and the particular. Yet, a closer look suggests that while these convergence trends are undoubtedly extensive and readily visible, expressions of constitutional resistance or defiance in the form of secessionism and nullification may in fact be regaining ground worldwide.<sup>2</sup>

From the so-called “Brexit” referendum in Britain to all-out secessionist movements in Scotland, Catalonia, or Kurdistan, separatist sentiments are enjoying something of a heyday, rather than a decline, worldwide. And from Russia to Canada to the European Union (EU), the notion of an issue-based withdrawal from the overarching federal pact—what is often referred to in American constitutional thought as nullification—is commonly invoked. In fact, core elements of the “Quebec vs. Canada” constitutional saga, the struggle over the place of Chechnya in the Russian Federation, or the landmark German Federal Constitutional Court rulings on the constitutional status of Germany in relation to the Treaty of Maastricht or the Lisbon Treaty address the question of sub-national (or sub-supranational) constitutional sovereignty and the right to override centralizing legislative and regulatory authority.

Whereas at first glance the reemergence of such sentiments appears counter-intuitive in an age of apparent globalization, it may actually reflect a predictable reaction to, perhaps even a backlash against, powerful global convergence vectors. When understood against the backdrop of formidable centripetal forces of political, cultural, and economic globalization, the rise of a new trans-national constitutional order and judicial class and the corresponding decrease in the autonomy of “Westphalian” constitutionalism, as well as an ever-increasing deficit of democratic legitimacy, counter pressures for preserving a given sub-national unit’s, region’s, or community’s unique constitutional legacy, cultural-linguistic heritage, and political voice seem destined to intensify, not to decline. Secession and nullification may thus

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2. For an overview, see Doyle (2010), Levinson (2016).

be viewed as a reaction against the centralization of authority and the decline of the local in an increasingly—constitutionally and otherwise—universalized reality.

## SEPARATIST AND SECESSIONIST SENTIMENTS WORLDWIDE

Contrary to what many globalists and post-nationalists predicted or wished, not only have separatist impulses and aspirations failed to vanish, but have instead gained renewed momentum worldwide. Within barely a few weeks during the autumn of 2014, nearly half of Scottish voters expressed their desire for independence in a widely publicized referendum while Ukraine’s leadership acknowledged the de-facto separation of the Donbas region. The Minsk Accord (2015) facilitated the granting of a special autonomous status to that region. Meanwhile, protestors in Hong Kong took to the streets demanding more political autonomy for the territory, just as opposition groups in Malaysia’s Sabah and Sarawak region (formerly East Malaysia) resurrected partition claims. A Walloon-led coalition government was finally formed in Belgium after the country had functioned five months (and for the second time in several years) without an elected government, during which time the Flemish nationalist N-VA party headed the Flanders regional government. After government officials in Madrid turned to the Spanish Constitutional Court to successfully prevent a plebiscite on separation in Catalonia from taking place, in an explicit act of defiance—some might call it “nullification”—the government of Catalonia proceeded with a non-binding referendum. In September 2015, the separatist “Together for Yes” (JxSi) coalition won the Catalan regional elections, garnering approximately 40% of the popular vote. In short, secessionist movements are many, and spread in literally four corners of the world; the quest for sub-national political autonomy is very much alive. In fact, it is hard to identify more than a handful of countries that have not witnessed secessionist upheaval of one sort or another during their history as independent polities.

Take Canada. Since the “Quiet Revolution” and the rise of Quebec nationalism in the early 1960s, Canada has seen its fair share of secessionist challenges. There have been five major attempts to overhaul the constitution to address Québec’s “distinct society,” “two founding peoples,” and “special veto power” claims. All of these attempts were given added impetus and sense of urgency by the rise of the secessionist Parti Québécois (PQ) as a key actor in Québec politics. The PQ captured the provincial leadership in 1976 and Québec’s constitutional battle with the rest of Canada began. In the first Quebec referendum (May 1980), the PQ government sought a mandate to negotiate with the federal government about retaining limited sovereignty for the province. Approximately 60% of Québécois

casting ballots voted against the proposed negotiations. In the *Quebec Veto Reference* (1982), the Supreme Court of Canada (SCC) held that there was no constitutional convention awarding Quebec a special veto power; and that Québec’s claim for a special veto power based on the “distinct society” and the “two founding peoples” arguments is not supported by any constitutional document or convention.<sup>3</sup> Despite this ruling, Québec continued to assert that its legislature could exercise the right to veto constitutional provisions. In other words: nullification, Québec style.

The constitutional battle over Québec reached its zenith in 1998 with the *Quebec Secession Reference*—the first time a democratic country had ever preemptively tested the legal terms of its own dissolution.<sup>4</sup> The case was launched at the request of the federal government following the slim 50.6% to 49.4% loss by the Québécois secessionist movement in the 1995 referendum. (A shift of approximately 50,000 votes would have pushed the pendulum in the separatist direction.) In a widely publicized ruling in August 1998, the SCC unanimously held that unilateral secession would be an unconstitutional act under domestic law and illegitimate under international law, and that a majority vote in Quebec was not sufficient to allow Quebec to legally separate from the rest of Canada. However, the Court also noted that if and when secession was approved by a clear majority of people in Québec voting in a referendum on a clear question, the parties should then negotiate the terms of the subsequent breakup in good faith. As for the question of unilateral secession under Canadian law, the Court’s answer provided both federalists and separatists with congenial answers.

The government of Quebec responded to the judgment by arguing that if a majority of “50 percent plus one” of those Québécois who cast ballots in a provincial referendum on the future of Quebec supported the idea of secession, then this would satisfy the requirement for “a clear majority” set by the Court decision. For its part, the federal government (then led by the Liberal Party’s PM Chrétien) responded by proposing the Clarity Bill (which was formally confirmed by parliament in summer 2000). In a nutshell, the bill states that only “a clear majority on a clear question” would require the federal government to negotiate the terms of separation with Quebec; that given the nature of the question at stake, the term “clear majority” should mean more than “50 percent plus one”; and that in any event the federal government reserves the right to determine whether the question posed by the Quebec government in a future referendum meets the “clear question” criterion.

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3. *Reference re Amendment to the Canadian Constitution* [1982] 2 S.C.R. 793 [Canada].

4. *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 [Canada].

Québec countered with Bill 99, emphasizing the right to self-determination according to international law. It states, “No other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Québec people to determine its own future.”

Secessionist impulses have also been central in political debates in Northern Ireland, Scotland, and Wales. (International sports fans will note that each of these polities has long maintained its fully independent status with national teams for soccer, rugby, cricket, and an array of other sports, as is true, incidentally, of Puerto Rico, ostensibly a “commonwealth” under the sovereignty of the United States.) Meanwhile, in the EU, member states’ secessionist voices abound. The 2016 Brexit referendum is a prime example, but nationalist opposition groups in other EU member-states, from the Nordic countries to Greece, have voiced grave concerns about the threat to national sovereignty posed by the pan-European constitutional project. The financial crisis of 2008, in particular, boosted public support for separatist parties that questioned the logic and future of the “ever closer union” project. As the voting patterns in the Brexit referendum indicate, material considerations alongside “periphery vs. center” or “the people versus the elites” sentiments play an important role in fueling these secessionist movements. In short, rumors of secession’s demise in the age of global convergence have been greatly exaggerated; the list of secessionist movements and autonomy-aspiring regions and movements is as long today as it has ever been.

Around the world, separatist campaigns vary considerably in their outcomes. Whereas Belgium and Lebanon have remained formally undivided despite powerful secessionist pressures and fractured national identity, Czechoslovakia broke apart and Yugoslavia succumbed to “Balkanization.” In the Russian Federation, there are secessionist movements that take up arms against the central government (*e.g.*, in Chechnya, Dagestan) and those outside the country that are supported by the same central government (*e.g.*, Georgia’s Abkhazia and South Ossetia, Ukraine’s Crimea). Approximately half of Bosnia & Herzegovina’s territory is recognized as the semi-autonomous Republika Srpska (“Serb Republic”) with secessionist aspirations, its own national meta-narrative, anthem, diplomatic posts overseas, and an outspoken pro-independence leadership. The Bosniaks and Croats that make up the rest of the country are not the closest of allies either. The result has been a very weak federal state where “the constituent units defiantly refuse to surrender their powers and competences to anemic and fragile central authority” (Woelk 2012, 109).

There are differences in the natures and levels of conflict as well. Not all tensions lead to violence: residents of the autonomous province of South Tyrol, Italy’s richest province, continue to quietly harbor hopes for secession from Italy and

reunification with neighboring Austria. Whereas secessionist impulses in Corsica (France) have been crushed, in the Philippines' Bangsamoro region or Indonesia's Aceh, violent separatist struggle concluded with comprehensive agreement for certain regional legislative autonomy (in the case of Aceh, enhanced local control over mineral resources) as well as accommodation of a Sharia-friendly regime. Euskadi Ta Askatasuna's permanent ceasefire in 2011 brought political stability and economic prosperity in the Basque Country (Euskadi), an autonomous region in northern Spain. Meanwhile, the status of Kosovo's (ethnic Albanian population) self-professed independence and breakaway from Serbia remains unclear; the Brussels Agreement (2013) grants limited autonomous powers for Kosovo's Serb north, in exchange for Serb recognition of Kosovo's sovereignty.

India and Pakistan—themselves byproducts of political partition—are locked in a dispute over the political future of the Kashmir and Ladakh regions; autonomy-driven insurgency in Jammu and Kashmir (Muslim majority; granted certain autonomy under article 370 of the Indian constitution) has been taking place for decades, all while Pakistan's own North West Frontier province has advanced a call for greater jurisdictional autonomy under Islamic law precepts. A 25-year-long independence campaign in Sri Lanka's Tamil-populated Northern Province came to a sudden end in 2009 with the defeat of the Liberation Tigers of Tamil Eelam. A reconciliation process resulted in notable economic growth. Meanwhile, an equally vicious civil war in Sudan brought about a political split and the creation of South Sudan—the world's youngest independent country.

Some Kurdish nationalist organizations seek to create an independent Kurdistan, consisting of some or all of the areas with Kurdish majority across the Iraq/Turkey border, while others campaign for greater Kurdish autonomy within the existing Iraqi national borders. Radical Islamic forces have been pushing for political separation in Azawad (northeast Mali), Zanzibar (formed Tanzania with Tanganyika), the four southernmost provinces of Thailand, in the neighboring Malaysian state of Kelantan, and increasingly in several Northern Nigerian states. A fragile non-decision status quo is maintained through international diplomacy in the Nagorno-Karabakh region (within Azerbaijan; claimed by Armenia) and in the Cabinda region (which, while within the Democratic Republic of Congo, in fact, belongs to Angola; the region itself claims independence from both).

Whereas residents of Gibraltar and the Falkland Islands are adamant in their wish to stay under British rule, in Western Sahara and in Palestine ongoing struggles for independence have been taking place for decades. Massive secessionist protests have occurred in oil-rich provinces of Venezuela (Zulia) and Bolivia (Pando, Santa Cruz, Tarija). Indigenous rights movements—think of the Zapatista

Movement in the Mexican state of Chiapas—continue to actively resist federal authority. Amicable cooperation has led to the creation of Nunavut in arctic Canada, and to a friendly pact of joint governance between Greenland (*Kalaallit Nunaat*) and “mainland” Denmark; as of 2008 the former is “a constituent country within the Kingdom of Denmark.”

In a different setting, the Holy See reformed its legal system so that, with effect from January 1, 2009, Italian laws no longer automatically apply to the Vatican state, thereby reversing the Lateran Pacts of 1929 and the revised concordat of 1984. Instead, pertinent Italian laws will be examined by Vatican clerics to determine their compatibility with canon law and Catholic moral principles. This historic departure was at least in part a reaction to a controversial 2008 ruling of the Milan Court of Appeal and later Italy’s Court of Cassation (upheld by the Constitutional Court) in the *Eluana Englaro* case, resulting in the discontinuation of life-support to a young woman in a permanent vegetative state following a vicious car accident.<sup>5</sup> The Vatican reaction, alongside the radical right resistance to the *Obergefell v. Hodges* ruling in the United States, illustrates how the rise of liberal constitutional jurisprudence and rights discourse may itself trigger secession—or nullification-like reactions. Meanwhile, from the other end of the political spectrum, anti-globalization activists oppose what they term the “new constitutionalism” (see, e.g., Gill and Cutler 2014)—the largely pernicious spread of a set of quasi-constitutional supranational treaties and institutions that place global economic governance beyond democratic reach and promote uneven development by privileging transnational corporations at the expense of the world’s economic hinterlands. Withdrawal threats and constitutional court challenges abound.<sup>6</sup>

## THE “NULLIFICATION” ALTERNATIVE

Nullification—the idea that sub-national units can, and perhaps even ought to, refuse to enforce federal laws that they deem unconstitutional—is a somewhat different impulse within the broad class of separatist political voices. It lies in the fuzzy

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5. See, Italian Court of Cassation, Decree no. 21748 of 16 October 2007; Italian Constitutional Court, Ordinance no. 334 of 8 October 2008. In the Vatican’s view, Italian laws often conflict with the moral teachings of the Catholic Church. In 2016, to take one example, Italy recognized same-sex civil unions.

6. See, e.g., recent challenge to the Canada-EU Comprehensive Economic and Trade Agreement (CETA) before the German Federal Constitutional Court, *CETA Case*, 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvE 3/16 (decision released October 13, 2016) [Germany].

conceptual area between calls for all-out secession on the one hand and common displeasure expressed by sub-national units against unwelcome federal policies, laws and regulations on the other. It is a recalcitrant gesture against central political authority by people who nevertheless do not want to slam the door shut on a political union or entity. Nullification, at least in its “classical” meaning, is the argument that a sub-national unit can declare legislation or a judicial decision from the central authority “null and void” because, according to the unit, such a decision violates the constitution regardless of whether or not the legitimate federal legislature and apex court of that polity consider it valid. It reflects a strong belief in subsidiarity (or its relatives: “states’ rights” or “the states preceded the Union,” “compound theory” and “dual federalism”) as a core principle of political confederations and the source of constitutional sovereignty and authority more broadly. Nullification also bodes well with sentiments of “distinct society,” authentic “local traditions” or “community values” that are dear to the unit’s heart, and an overarching disdain for the supposedly elitist, inattentive, and detached central government. Nullification arguments are not invoked with respect to every disagreement between a sub-unit and a central authority; they are reserved for situations where a given sub-unit objects to a supposedly intrusive, centrally-imposed regulatory measure that is perceived to illegitimately infringe on an inviolable constitutional principle or belief indispensable to the sub-unit’s fundamental identity.

Nullificationist voices have staged a certain comeback in American constitutional discourse.<sup>7</sup> But the nullification yen is not an exclusively American response; it has been repeatedly advanced, drawn upon and debated in numerous other polities, near and far. One of the clearest examples outside of the United States for an interchangeable separatist-nullificationist discourse is Western Australia—Australia’s western-most state, covering a third of the country’s area. Western Australia (capital: Perth) was reluctant to enter the Commonwealth of Australia in the first place, and had been toying with secession since the moment of federation (1901).

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7. In October 2015, to pick one example, a group named *The American Principles Project* <http://americanprinciplesproject.org/> reacted to the United States Supreme Court pro same-sex marriage ruling in *Obergefell v. Hodges* by publishing an online manifesto, “Calling for Constitutional Resistance to *Obergefell v. Hodges*.” The statement, signed by dozens of academics, stated, *inter alia*, that: “We stand with James Madison and Abraham Lincoln in recognizing that the Constitution is not whatever a majority of Supreme Court justices say it is. We remind all officeholders in the United States that they are pledged to uphold the Constitution of the United States, not the will of the five members of the Supreme Court. We call on all federal and state officeholders to refuse to accept *Obergefell* as binding precedent for all but the specific plaintiffs in that case [and] to recognize the authority of states to define marriage, and the right of federal and state officeholders to act in accordance with those definitions.”

The Great Depression and the economic misery that followed pushed Western Australia toward secession. Two-thirds of the ballots cast in a 1933 referendum favored separation. A delegation was sent to the United Kingdom's Privy Council to request permission for withdrawal from the Commonwealth. However, the British government refused to grant Western Australia's request to rejoin the British Empire as an autonomous territory. Instead, it accepted the Commonwealth of Australia's argument that the Imperial Parliament in London could not assent to Western Australia's petition without the express consent of the dominion as whole, since agreeing to the separation request would alter the nature of the entire federation. More than eight decades later, Western Australia's separatist sentiment has not diminished. Claims of structural fiscal imbalance, unfair distribution of grants, loss of autonomy in key policy areas and systematic political marginalization abound. Reference to United States arguments in favor of "state rights," the so-called "compact theory" of constitutional authority (*e.g.*, as expressed in Thomas Jefferson's *Kentucky Resolutions* of 1798 or James Madison's notion that states were "duty bound to resist" what they viewed as the federal government's violation of the constitution), and nullification are common. Before resorting to an all-out secession, argues a recent pro-separation account, Western Australia "should first exhaust other potential options—most obviously nullification" (Sabhlok 2013, 29).

Oftentimes, nullification-like sentiments arise in certain sub-national units as a reaction to controversial high court rulings that are perceived by the sub-national unit as unacceptable. In its historic ruling *Mabo v. Queensland II* (1992), the High Court of Australia abandoned the legal concept of *terra nullius* ("vacant land") that had served for centuries as the basis for the institutional denial of Aboriginal title. The Court established native title as a basis for proprietary rights in land, and held that Aboriginal title was not extinguished by the change in sovereignty.<sup>8</sup> In *Wik Peoples v. Queensland* (1996), the High Court went on to hold that leases of pastoral land by the government to private third parties did not necessarily extinguish native title. Such extinguishment would depend on the specific terms of the pastoral lease and the legislation under which it was granted. The potentially far-reaching redistributive implications of *Mabo II* and *Wik* prompted an immediate popular backlash; the powerful agricultural and mining sectors, backed by the governments of Queensland, Western Australia, and the Northern Territory, demanded an across-the-board statutory extinguishment of native title. One Nation—a populist, far right, anti-immigration and anti-Aboriginal people political party led by the

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8. *Mabo v. Queensland II* (1992) 175 C.L.R. 1 [Australia]; *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1 [Australia].

colorful Pauline Hanson—was formed in Queensland in 1997, and gained instant support nationwide. The conservative government under John Howard willingly bowed to the counter-court political backlash by introducing amendments to the Native Title Act that, for all intents and purposes, overrode *Wik*.

Nullificationist sentiments are often tied to a given political or territorial sub-unit, but may also take the form of struggles over maintaining jurisdictional boundaries within pluri-legal regimes. In dozens of countries around the world (*e.g.*, India, Indonesia, Israel) certain religious groups are granted varied measures of jurisdictional autonomy in matters of family and personal status law as well as in matters of denominational education. Attempts by central governments or national high courts to tamper with the jurisdictional autonomy of such groups have often been met with stern resistance, at times even sectarian violence and blatant non-compliance, by the affected minority religious groups. The oft-cited *Shah Bano* saga (triggered by the Supreme Court of India’s scrutiny of India’s longstanding practice of Muslim self-jurisdiction in personal status matters) is a good illustration of such nullification-like reaction advanced through “legal pluralism” discourse.<sup>9</sup>

## THE EUROPEAN ANGLE

Separation and nullification debates within federal or “pluri-national” states have interesting equivalents at the supra-national level of governance. In fact, precisely because the units in supra-national political associations preceded the association, and because such associations allow for multiple and parallel projects of national identity promotion, they are more likely than other political formations to experience secessionist or nullificationist pressures (Shorten 2014). The heated debate among EU law experts concerning the implications of the putative secessions of Catalonia and Scotland—potential sub-national unit exit from member states—confirms the prevalence of constitutional discourse of sub-unit emancipation within supra-national entities (Weiler 2014).

Since the 1950s, Europe has been witnessing what is arguably the largest experiment with multi-level governance in modern history. The quest for, and accompanying opposition to, the political and constitutional unification of Europe has been among the perennial sources of contention in virtually every member state of the now 28-country-strong European Union, in several EU aspirants, as well as in the 47-member Council of Europe with its comprehensive pan-European human rights regime—the European Convention of Human Rights (ECHR).

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9. *Mohammed Ahmed Khan v. Shah Bano Begum*, A.I.R. 1985 S.C. 945 [India].

As many observers (*e.g.*, Weiler 1991) have noted, trans-national constitutionalism has been a key concept in the quest for a unified Europe. In its case-law starting with the landmark *Van Gend and Loos* ruling (1963), the European Court of Justice (ECJ, the highest court of the EU) introduced the principle of the direct effect of Community law on the Member States, which now enables European citizens to rely directly on rules of European Union law in their national courts.<sup>10</sup> In its 1964 ruling in the *Costa* case, the ECJ went on to establish the primacy of Community law over domestic law.<sup>11</sup> In 1991, (*Francovich, Bonifaci and others v Italy*), the ECJ established the liability of a Member State to individuals for damage caused to them by a breach of Community law by that State.<sup>12</sup> Since 1991, European citizens have been able to bring an action for damages against a Member State that infringes a Community rule. The unification-through-constitutionalization project gained further momentum with the signings of the Maastricht Treaty (1992) and the Lisbon Treaty (2009) that effectively establish a trans-national quasi-constitutional regime in the EU. Meanwhile, the European Court of Human Rights (ECtHR, the apex forum for deciding ECHR-based claims made by residents of the Council of Europe countries) has become one of the busiest apex courts on the planet. This enormous unification-through-constitutionalization project now directly affects the lives of over 800 million people and indirectly impacts the lives of hundreds of millions more. In light of this, it is hardly surprising that strong resentment has fomented throughout Europe; a quick survey would yield a list of several hundred active separatist movements in Europe, stretching from Moravia and the Republic of Crimea to Schleswig-Holstein and the Faroe Islands.

From a comparative constitutional law standpoint, the emerging European constitutional order adds at least two interesting twists to the American nullification storyline. First, national high court rulings in Europe seem to reject the notion of unconditional subjection of Member State law to European trans-national law. Instead, a notion of duality of constitutional authority (national and supra-national) first introduced by the German Federal Constitutional Court (FCC) in its landmark *Maastricht Case* ruling (1993) has become the mainstream vision of national/supra-national constitutional relations in the EU.<sup>13</sup> In its judgment, the FCC advanced a

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10. *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) [ECJ Case 26/62].

11. *Flaminio Costa v ENEL* (1964) [ECJ Case 6/64].

12. *Francovich, Bonifaci and others v Italy* (1990) [ECJ Case 6/90].

13. See, *e.g.*, *Hanne Norup Carlsen et al. v Prime Minister of Denmark*, “Maastricht Decision” of 6 April 1998, Ugeskrift for Retsvaesen H 800 [1999] 3 CMLR 854 [Denmark]; *Décision 92-308 DC of*

statist conception of the EU in which each member state is an autonomous unit that retains its self-determination and sovereignty, including the ability to revoke its consent to participate in international organizations (Halberstam and Möllers 2009, 1247). The FCC is clear that “[i]n contrast to the federal parliament, the ‘European Community legislator’ does not possess any direct democratic legitimation” (Id.). Adamant that member state sovereignty be maintained, the FCC warns that “[i]f sovereign rights are granted to supra-national organizations, then the representative body elected by the people, *i.e.*, the German Federal Parliament . . . necessarily lose[s] some of their influence upon the processes of decision-making and the formation of political will” (Id.). En route, the FCC confirmed the principle of subsidiarity as a core element of EU law; the EU may only act or legislate where action of individual member states is insufficient.

The ruling’s “bottom-line” is that the FCC affirmed the legitimacy and constitutionality (with respect to German law) of the Maastricht Treaty, yet reserved to itself the right to “examine whether legal acts of the European institutions and organs are within or exceed the sovereign powers transferred to them” (Boom 1995, 177). In other words, the FCC, not the European Court of Justice, will decide where the limits to European power lie, at least with respect to Germany. Furthermore, the Court stated that legal acts of the Union determined by the German Court to lie outside the competences delineated in the Treaty, will not be legally binding in Germany. In so deciding, the FCC maintained the authority to examine the applicability of EU law in Germany, thus posing a permanent Member State-based challenge to the overarching competence of EU laws and institutions. Implicit in the FCC’s ruling, though not fully endorsed, is the notion that member states are to be pardoned for not enforcing what they regard an imposed supplementary condition in a sphere not explicitly transferred from the sub-units to the central EU authority. As one observer has noted, a comparison to the Virginia situation of 1798 is not an implausible one (Id.).

In its subsequent decision in the *Lisbon Treaty Case* (2009),<sup>14</sup> arguably one of the most significant political rulings in its history, the FCC held that Germany must maintain its constitutional sovereignty within the emerging European constitution. The case involved a claim by German nationals that an unconditional ratification of the Lisbon Treaty would jeopardize and unreasonably limit German constitutional autonomy and self-determination. The Court agreed that European con-

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9 April 1992, “Maastricht I,” Recueil des Décisions du Conseil Constitutionnel 55, [1992] RJC I-496, [1993] 3 CMLR 345 [France].

14. *Lisbon Treaty Case*, BVerfG, 2 BvE/08 (30 June 2009) [Germany].

stitutional integration is not an automatic and inescapable process; under certain circumstances, the Court may review the implications of such integration on German constitutional sovereignty, and, when needed, opt out on an issue-by-issue basis. The judges wrote that “if obvious transgressions of boundaries take place when the European Union claims competences,” then they will call for a review to “preserve the inviolable core content of the [German] Basic Law’s constitutional identity” (Tomuschat 2009, 1260). Moreover, EU institutions must respect the non-transferable identity of member states’ constitutions and the principles they enshrine, as well as a minimum core of sovereignty vested in national political institutions. Specifically, the FCC identified five areas of competence where full subjection of national power to EU authorities could seriously erode German sovereignty: armed forces’ monopoly of the use of force; criminal law; fundamental fiscal policy decisions, and state budgetary autonomy more generally; substantive understanding of what constitutes a just social order; and most importantly, the preservation of national identity, especially through state control over the education system. When it comes to these areas, held the FCC, legitimate and accountable national political institutions must retain the ability to effectively determine policy and maintain state autonomy. At the more abstract level, the Court held that “a will aiming at founding a [federal] state in Europe could not be ascertained,” and that, as Kommers and Miller point out, “the civil society, or demos, essential to democracy . . . still is centered on the nation-state, framed by a common language, culture, and history” (Kommers and Miller 2012, 349).

To be sure, the FCC’s judgment may easily be interpreted as suggesting both solid German constitutional sovereignty vis-à-vis the emerging European constitutional order, as well as provisional subjection of the former to the latter. Either way, for the purposes of our comparative discussion, it is evident that that the FCC did not endorse the Euro-centric view of unconditional subjection of any given Member State’s constitutional order and identity to the emerging trans-national European constitution. We may call it nullification, or perhaps German-style nullification, *in potentia*.

The multi-layered, fragmented structure of the emerging pan-European constitutional framework and the corresponding eminence of the pan-European rights regime have given rise to a second uniquely European addition to the American nullification narrative—the theoretical posture known as *constitutional pluralism*. Building on the German Federal Constitutional Court’s *Maastricht Case* articulation of dual (EU and German) constitutional authority, proponents of this view describe a reality of, and provide normative justification for, a post-national, multi-focal constitutional order (at least with respect to the distribution of constitutional

authority in Europe) in which there is no single legal center or hierarchy, and “where there is a plurality of institutional normative orders, each with its functioning constitution” (MacCormick 1999, 104; Krisch 2010; but see Weiler 2011; Loughlin 2014).

This stance is reflected in the jurisprudence of the ECtHR, as it walks a fine line between fostering a robust pan-European human rights regime while at the same time averting “backlashes” against its rulings, when these are perceived as encroaching too heavily on established local traditions. *Lautsi v. Italy* (2011) offers a textbook example to illustrate the tension between cosmopolitan theory and local traditions in contemporary European rights jurisprudence. In the earlier decision of the ECtHR’s 7-judge Chamber (*Lautsi I*), it was held that the mandatory display of the crucifix in Italian public school classrooms breached Italy’s obligations under the ECHR. This ruling was portrayed in Italy as an all-out war against Italy’s national meta-narrative and religious heritage, and provoked widespread nullification-like outrage. The Italian Prime Minister, for example, stated that “[T]his decision is not acceptable for us Italians. It is one of those decisions that make us doubt Europe’s common sense” (Mancini 2010, 6). The Vatican accused the Court of having delivered a “short sighted and ideological” decision. As Susanna Mancini colorfully chronicles, the backlash spread to the Italian political sphere. The populist right-wing Northern League distributed crucifixes in backcountry towns and villages, and bylaws were enacted to oblige shopkeepers to display the crucifix. The judges who wrote the decision were subject to unforgiving personal attacks (Id.).

In *Lautsi II*, the ECtHR’s 17-member Grand Chamber overturned the Chamber’s ruling in *Lautsi I*. It rejected the human rights claim of a Finnish-born mother residing in Italy who objected to the display of religious symbols (crucifixes) in her sons’ public school.<sup>15</sup> Rather than requiring state schools to observe confessional neutrality, the Court upheld the right of Italy to display the crucifix, an identity-laden symbol of the country’s majority community, in the classrooms of public schools. Using the margin-of-appreciation concept, Europe’s highest human rights court held that it is up to each signatory state to determine whether to perpetuate this (majority) tradition. The crucifix was taken to be so central to Italian collective identity that it was up to Italians themselves to decide on its status. The ECtHR’s ruling in *Lautsi v. Italy* gave precedent to the particular over the universal, in part

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15. *Lautsi and Others v. Italy*, Application No. 30814/06 (ECtHR, Grand Chamber, judgment of Mar. 18, 2011) [Council of Europe].

by ruling that in the EU context there was no “universal” posture on the subject. In the face of such multiplicity, the ECtHR elected to avoid imposing a one-rule-fits-all policy on all Council of Europe member states (with their combined 800 million strong population), and instead deferred to local values. In other words, the default in no-consensus situations should be a preference for national (in the European context, sub-unit) constitutional sovereignty vis-à-vis a largely fictitious supra-national consensus.

A key concept that guides such rulings is the “margin of appreciation.” The Council of Europe defines “margin of appreciation” as the space for maneuver that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights (Legg 2012). From a jurisprudential standpoint, the margin of appreciation is a judicial doctrine whereby supra-national courts allow states to have a measure of diversity in their interpretation of human rights treaty obligations, based on local traditions, heritage, and context. Essentially a concept of qualified and reasoned deference, margin of appreciation is at the core of some of the most important rulings of the European Court of Human Rights.

Let us consider another illustrative example. In *Leyla Şahin v. Turkey* (2005), one of the most significant European cases to date dealing with the issue of religious attire in the education system, the ECtHR was asked to determine whether restrictions on wearing Islamic headscarves in institutions of higher education in Turkey violated religious freedoms guaranteed under Article 9(2) of the European Convention on Human Rights (ECHR), as well as under Article 2 of Protocol No. 1 regarding the right to education.<sup>16</sup> In order to determine whether there is an emerging pan-European consensus on the use of religious attire by students at higher learning institutions, the ECtHR surveyed constitutional practices across the continent.<sup>17</sup> The Court examined the relevant state of affairs in no less than twenty member states of the Council of Europe (in the order of their treatment in the judgment: Turkey, Azerbaijan, Albania, France, Belgium, Austria, Germany, the Netherlands, Spain, Finland, Sweden, Switzerland, the United Kingdom, Russia, Romania, Hungary, Greece, the Czech Republic, Slovakia, and Poland). Having determined that no consensus exists on the matter, the Court applied a generous “margin of appreciation” approach, essentially adopting the argument of

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16. *Şahin v. Turkey*, Application No. 44774/98 (ECtHR, Grand Chamber, judgment of Nov. 10, 2005) [Council of Europe].

17. *Id.*, paras. 55–65.

(pre-AKP) Turkey that its situation was sufficiently unique to justify deference to its national authorities (again, sub-national in the European context) when it comes to regulating religious attire in Turkish institutions of higher learning.<sup>18</sup>

In summary, the evolving pan-European constitutional order is a living laboratory for studying nullification-like ideas (and creative legal and institutional responses to them) from a comparative perspective. The political project of a unified Europe and the corresponding eminence of the pan-European rights regime have generated renewed interest in comparative constitutional inquiry among European jurists. Landmark constitutional court decisions such as the FCC’s Maastricht or Lisbon rulings, and concepts such as “constitutional pluralism” or the “margin of appreciation,” quickly evolved to help reconcile the centripetal forces of constitutional convergence with the unabating centrifugal forces of constitutional divergence, and to help make sense of the multiplicity of constitutional authority and traditions in Europe.

## CONCLUSION

While Texas and Arizona make very “photogenic” settings for American constitutional discourse, equally if not more scintillating separatist skirmishes can be found in Quebec, Western Australia, Republika Srpska, Chechnya, or Jammu and Kashmir, to name but a few examples. A comparable, if admittedly more subtle nullificationist discourse, is common within the emerging pan-European constitutional order. As these examples illustrate, secession and nullification impulses have not vanished in the age of constitutional globalization. In fact, evidence may suggest that powerful centripetal forces of political, economic, and cultural convergence have triggered more, not less, separatist talk (and, oftentimes, actual walk) in national and supra-national sub-units worldwide.

This general trend is driven by different impulses in different times and places. Some secessionist and nullificationist inclinations are guided by ethnic, cultural, linguistic, or religious difference sentiments that draw on some historical records of sub-national unit sovereignty marked along these ascriptive lines; other separatist sentiments are driven by ideological resentment of “big government,” elite-rule or a “corrupt center” as opposed to supposedly authentic localism, or are powered by clashes over material interests (*e.g.*, revenue or resource allocation, access to and

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18. As is well-known, the moderately-religious Adalet ve Kalkınma Partisi (AKP) or, as translated in English, the “Justice and Development Party,” has won the five most recent national elections in Turkey.

position within the labor market); and yet others pit liberal or neoliberal, self-professed cosmopolitan elites (often perceived as occupying a given polity's political or symbolic "center") against less liberal, localist voices (often perceived as occupying or representing that polity's socio-political "hinterlands" or cultural "periphery").<sup>19</sup> Obviously, there is much more at stake in any of these debates than whether the local, the national, or the global is the proper locus of sovereignty.

And to be sure, there are differences between a scenario whereby anti-centrist sentiment is advanced in a longstanding nation-state (*e.g.*, France) that has just recently signed up for a larger, supra-national entity (the EU), in an occupied or annexed territory (*e.g.*, Western Sahara), or in a region that has never previously had full sovereignty or a distinct identity. And there are other pertinent differences of scale and scope: in the United States, secession and nullification claims are raised by fringe movements or appear occasionally in law review articles. In other instances (*e.g.*, Québec, Scotland, Catalonia), full-blown secessionist claims were put forth by mainstream, widely popular political actors within the sub-national unit, and have attracted attention worldwide. But these differences notwithstanding, the general trend towards political convergence, globalism and supra-nationalism have spawned an array of localist counter-movements that profess to represent a given polity's, region's or community's "genuine" identity.<sup>20</sup>

Finally, we may speculate that, as internationalization and global convergence processes march on, it may be the case that debates over nullification-like constitutional devices become even more prevalent, as well thought-out, "selective" invalidation and repudiation mechanisms offer a more realistic means to enhancing unit autonomy in a globalized world than the bolder, yet ultimately impracticable, notion of full-blooded secession.

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19. These sentiments are also evident in other socio-political struggles over the construction of a given polity's collective identity, constitutional commitments, or over the scope and nature of judicial review. See, *e.g.*, Hirschl (2004, 2010); Jacobsohn (2010).

20. A similar trend may be seen in the rise of extended "local news" sections in numerous national and international media outlets. The more "global," "cosmopolitan," and "international" things get, the more interested people become in their immediate surroundings, from communities and neighborhoods to cities, sub-national units, or regions.

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