Taking the Measure of Nations: Testing the Global Norm of Territorial Integrity

Timothy W. Waters

Indiana University Maurer School of Law, tiwaters@indiana.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the International Law Commons, and the Military, War, and Peace Commons

Recommended Citation


https://www.repository.law.indiana.edu/facpub/2605
TAKING THE MEASURE OF NATIONS: TESTING THE GLOBAL NORM OF TERRITORIAL INTEGRITY

TIMOTHY WILLIAM WATERS*

Introduction .......................................................................................................................... 563
I. The Contours of the Present Rule .................................................................................. 566
II. Something We Can’t Know: The Problem of Testing a Global Norm ................................................. 568
III. The Little We Do Know: Assumptions about the Current Rule ...................................... 571
A. Assumptions About Stability and Violence .............................................................. 573
B. Assumptions About Effects on Internal Politics .................................................... 579
C. Assumptions About the Kinds of States Produced ................................................. 580
D. A Fourth Assumption—that This is the Best Possible Rule .............................................. 583
IV. Constructing an Unsatisfactory Alternative to an Impossible Test ....................................... 584

He had hit upon the paradox of excessive order, the perfection of which inevitably brought inaction in its train. . . . For some indefinable reason, order seems to bring on bloodshed!

—Robert Musil, The Man Without Qualities1

INTRODUCTION

Globalization is commonly thought to constitute a challenge to the state—a common trope of the discipline is to speak of post-

* Professor of Law and Associate Director, Center for Constitutional Democracy, Indiana University Maurer School of Law. Thanks to the Alexander von Humboldt Foundation and the Max Planck Institute for Comparative Public Law and International Law for a fellowship and visiting position supporting this research, to participants at the Framing the Global conference at Indiana University and at the Wisconsin International Law Journal’s Annual Symposium “International Law Walks the Line: Border Disputes and Resolution for the 21st Century,” at the University of Wisconsin Law School, and Prof. Brian Broughman for comments on drafts of this paper. Further comments welcome: tiwaters@indiana.edu.

Westphalianism (whatever that is) and of sovereignty under siege.\(^2\) But whatever the effects of the global on states' internal processes and interactions,\(^3\) the formal bordering of states—their territorial delimitation—remains extraordinarily rigid, with other shifts in legal authority, social and economic power, and the distribution of rights playing out within this largely unchanging frame. If borders matter—and of course they do, in new ways and ways they long have\(^4\)—then states matter.

This rigidity is two-fold: one part, a conceptual and doctrinal stasis—since the Second World War, legal norms have consistently

---


reinforced a regime of inviolable frontiers—and the other, perhaps in consequence, an unchanging list of states. It might not seem that way, given the explosion in the number of states since the Second World War; after all, the original membership of the United Nations was fifty-one, and now is up to 193. But most of these new states were former colonies, and are conventionally understood as a special case, a kind of one-off; and after independence these new states followed the general rule, keeping their colonial borders. Meanwhile, when truly new units have appeared—mostly from the post-Cold War dissolutions of the Soviet Union and Yugoslavia—politics and scholarship have emphasized internal legal provisions allowing secession and promoted existing internal boundaries as defaults for new frontiers. The result has been, in historical perspective, an era of minimal border changes, with doctrines to back that up.

There has also been, on some accounts, a decline in violent conflict, which was the point. The express purpose of the legal regime put in place at the end of the Second World War—territorial integrity, self-determination, and the prohibition of aggressive war and conquest—was to stabilize global politics and reduce the resort to war.

But has that been the result? Have fixed borders produced a more peaceful world? How are territorial inviolability’s effects to be measured? Even if we accept that on historical trends, borders have been unusually stable and that violence has declined—which is far from clear—to what should we ascribe these effects? What is the proper framework for measuring the relative or absolute performance of this

---


central tenet of the global order? This paper is part of a broader project on territorial integrity and self-determination, but focuses on the epistemological problem: How do we know if the current rule is working or not?

1. THE CONTOURS OF THE PRESENT RULE

To begin, we ought to know what the rule is whose effects we wish to test. Space is short, so I will not discuss the quite fascinating question of how we arrived at the present global rule—the changing norms about states’ territorial sovereignty and their right to use force; the history of self-determination as a philosophical ideal for individuals and then a political ideal for nations; Woodrow Wilson’s proposals, which described a model to change rather than preserve borders; the absorption of that norm, in radically altered form, into the new global regime after the Second World War\(^8\)—but instead describe the rule we have, and the point we have long been at.

The Present Rule—A Regime of Fixed Borders

1. The international system is structured around norms of territorial integrity. These norms are expressed as formal, legal rules, but also closely reflect political practice.

2. Existing states may alter their own borders voluntarily—through cession of territory, merger, or secession.
   a. In so doing they may have to take into account the interests of the affected population.

3. But existing states have a nearly ironclad guarantee of their territorial integrity—their borders are protected against unwanted alteration, from without or within, in almost all circumstances.
   a. Unilateral secession is not prohibited, but is strongly disfavored in practice.

4. Self-determination gives the populations of existing territories a right to self-governance: non-self-governing territories can become independent, at which point they have the same protections as existing states.

5. Increasingly, self-determination includes a right to internal democratic governance, but only for the totality of the existing unit. Sub-groups enjoy self-determination as part of the whole population.

6. The only bases for creating a new state against the will of the existing state are:
   a. remedial secession, on two possible grounds:
      i. gross violations of a minority’s human rights; such as genocide;
      ii. systematic exclusion of some group on invidious grounds from participation in the whole territory’s self-governance;
   b. or, total dissolution of the state:
      i. but the successor states will, if at all possible, be drawn from existing territorial sub-units, rather than newly identified peoples as such.

7. Law and politics tend to analyze the division of a state as voluntary or the product of dissolution, rather than unilateral secession.

8. Groups as such have no right to form new states; law and politics are markedly suspicious of ethnically based claims to create new states.

That is the present rule, without the footnotes, of course, but a description with which most observers might plausibly agree. To which we could add, as mentioned above, that the purpose of the rule—the thing we believe, or rather assume, that it does—is to stabilize politics and reduce violence. We ought to test this proposition. The question is, how?

---

II. SOMETHING WE CAN'T KNOW: THE PROBLEM OF TESTING A
GLOBAL NORM

Claims about the effects of our territorial ordering rules—whether in relation to violent conflict or more generally—are empirical claims, though they don’t get far before giving away, and tripping over their normative underpinnings. But even if we try to stick resolutely to the empirical basis for the claim that, say, territorial integrity stabilizes global politics and limits violence, problems arise. How is this claim to be measured? The regime of territorial integrity is a global rule, and global rules, by their nature, are not readily amenable to empirical testing.

The challenges of designing rigorous social scientific experiments are always considerable—the endemic problems with incomplete data, with selecting and coding variables and the like. But empirical analysis confronts special problems in the realms of international law, international relations, and comparative international politics quite simply because the available data is so thin. Even the most comprehensive studies have an n that would be disturbingly small in many harder sciences, because the N of all states is very small (the population of states is approximately 193). And the data points in that population—which include Russia and San Marino, Indonesia and Paraguay, Norway and Somalia—are shockingly dissimilar when compared to the white mice of scientific lore, or even the subjects of

---

10 John J. Mearsheimer & Stephen M. Walt, Leaving theory behind: Why simplistic hypothesis testing is bad for International Relations, 19 EUR. J. INT’L REL. 427, 429 (2013) (critiquing the use in international relations of (in particular) quantitative analysis without adequate theory, and noting the “inherent complexity and diversity of the international system and the problematic nature of much of the available data.”); id. at 442 (“Lastly, hypothesis testing in IR is constrained when dealing with phenomena where the universe of cases is small or even non-existent, as in the case of social revolution or nuclear war. Standard statistical methods will not work in these situations... forcing scholars to rely on theory, qualitative methods, or other techniques for studying rare events. ... Trying to solve this problem by simply increasing the number of observations... may push scholars to compare cases that are not analytically equivalent” (citing RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS 11 (H.E. Brady & D. Collier, eds., 2004)).

11 This can create the apparently happy circumstance that state-level studies can have a relatively large n (sample size)—relative to the N of all states, that is. Even a sample equal to the entire population is so small that a considerable amount of random variation would be expected, of the kind that smoothes out in samples from much larger populations. See, e.g., Concept Stew, Statistics for the Terrified: The importance of n (sample size) in statistics, http://www.conceptstew.co.uk/pages/nsamplesize.html (last visited Nov. 16, 2015).

social scientific studies focused on human, rather than international, interactions. Cross-state comparisons can be particularly fraught—many a graduate student (and professor) has produced a multi-country case study or a two-by-two graph of questionable value—because the problem of controlling for variation between the cases consumes the entire enterprise, or should.

Still, unless one is ultimately skeptical about empirical techniques (as I am not), one must admit that they are or can be useful for international relations and law—and to be sure, there are many aspects of the international system, the differing effects of which one might profitably study in a rigorous, empirical manner. Indeed, international relations as a field has moved decisively in the direction of empirical, specifically quantitative and statistical, analysis, and law has

use-mice.html (noting “Most of the mice and rats used in medical trials are inbred so that, other than sex differences, they are almost identical genetically. This helps make the results of medical trials more uniform. . . .”); Find and Order Mice, THE JACKSON LABORATORY, https://www.jax.org/jax-mice-and-services/find-and-order-jax-mice and subordinate pages (last visited Nov. 16, 2015) (describing strains of mice available for research).

What counts as a large-N or large-n study in international relations would be quite small in other disciplines. By comparison, the original iteration of the famous and enormously productive Nurses’ Health Studies surveyed 121,000 participants—all female, married, between the ages of 30 and 55, and living in 11 U.S. states. Cf. The Nurses’ Health Study: History – Nurses’ Health Study (original cohort), http://www.channing.harvard.edu/nhs/?page_id=70 (last visited Oct. 30, 2015).

Cf. Mearsheimer & Walt, supra note 10, at 446–47 (“Generating novel results is easy, however, when the relevant variables are defined in different ways, data quality is poor, and the hypotheses being tested are loosely tied to theory. . . . [T]hese problems typify much of the hypothesis testing that takes place in IR. Under these conditions, regression coefficients ‘can bounce around like a box of gerbils on methamphetamines. This is great for generating large bodies of statistical literature . . . but not so great at ever coming to a conclusion.’”) (ellipsis in internal citation original, citing Philip A. Schrodt, Beyond the Linear Frequentist Orthodoxy, 14 POL. ANALYSIS 335, 337 (2006)).


Mearsheimer & Walt, supra note 10 (discussing and criticizing this development).
increasingly embraced empirical, social scientific approaches, yielding insights of great value.

So in despairing of the testability of the current territorial integrity rule, I am not proposing Luddite resistance to statistics, nor sophomoric insistence on levels of certainty about causality that even the most rigorous sciences do not technically achieve. An experiment replicated 10,000 times with the whitest of mice does not actually guarantee the result of the 10,001st, but we understand that, within that philosophical limit on our certainty, we can speak with pragmatic confidence about predictable relationships. Causality is a deep philosophical problem, and proving it is an epistemological challenge, but we can and should accept the practical value of thinking about it and embracing our best approximations: Tomorrow morning you will intuitively glance eastward to find the rising sun, and you will not be disappointed.

But here we deal with something different: a special objection to the possibility that we might achieve even the usual level of pragmatic confidence. Territorial integrity is not the type of rule we can subject to a scientific experiment in which we may replicate results and control the environment, because the rule encompasses the operations of the entire system. The territorial integrity regime is not a rare event about which we have only a little data; it is an all-pervasive factor, whose omnipresence makes it difficult to construct conditions in which it varies. It is an invariable: a global condition for which we lack an adequate control.

Even here, we require a qualification: certain types of global rule may be amenable to measurement. A rule, say, that introduces a very discrete change into the system at a specific time, leaving other elements of the system in place, might allow one to conduct a longitudinal analysis, with the prior conditions as a quasi-control and the change a treatment whose effect we can measure. But while territorial integrity fulfills part of this scenario—its origins can be traced to a quite discrete date in history—it doesn't match other critical elements. After all, that date, 1945, was quite a year, with all kinds of things going on: the end of an unprecedentedly large, violent, all-encompassing conflict; the comprehensive realignment of global politics in the crystallizing Cold War; the introduction of atomic weapons; the creation of the UN; the beginning of the colonial system's collapse. These many moving parts—some closely linked to the new territorial norms, others not—make it quite difficult to design some longitudinal study with "pre-1945 levels of
violence" as a baseline, territorial integrity as an independent variable, and "post-1945 levels of violence" as the dependent variable. I don’t think the regression exists that could hold the other factors constant.

Similarly, we might imagine testable claims about a global norm gradually or partially applied—the spread of democracy, say, with a corollary empirical claim about a democratic peace. But this too is different: however universal that norm, precisely because its application has been piecemeal and partial, we might be able to test its differing effects. By contrast, the territorial integrity norm has operated at all times and places since its introduction; it has operated in conditions of peace and war; even in places where borders have changed, the norm has been extant, either shaping behavior or not.

All of this makes it difficult (let us admit it, impossible) to say what in fact the rule has done. We have experienced the border changes we have, and suffered the wars we have suffered, either despite this rule or because of it. Or something else: so far as I have been able to find, despite decades of productive research in international relations and political science, the current rule turns out to be entirely untested—unsurprisingly, since we have no second earth on which to try out an alternative.

So a preliminary consideration, if these observations about the limits of empirical inquiry into the effects of the territorial integrity regime are roughly right: if there is in fact some way to measure a global rule of this kind, it would be good to know what it is. And if not, what proxies or approximations might we examine? What aspects or incidents of the present rule, or correlates of it, might we test, if not the rule itself?

III. THE LITTLE WE DO KNOW: ASSUMPTIONS ABOUT THE CURRENT RULE

Untestable does not mean inscrutable, and there are aspects of the current rule we can describe, which may help us consider alternative,
indirect ways to evaluate its effects. In particular, if we consider why we have this rule—what we think it does—we see three groups of assumptions or predictions:¹⁹

1. First, an assumption that fixed borders are stabilizing—
   a. and therefore a prediction that a more relaxed regime would lead to violence and endless fracturing into small, unviable states.

2. Second, an assumption that the present rule improves politics and discourse within states—
   a. and therefore a prediction that an option of exit would lower minorities' incentives for cooperation.

3. And third, an assumption that the present rule provides support, at least on the margins, for liberal or cosmopolitan forms of society—
   a. and therefore a prediction that a more relaxed rule of secession would lead to the creation of illiberal and nationalist states.

These assumptions might be summarized under three headings:

1. That territorial integrity promotes stability;

2. that it effectively promotes political processes for reconciling differences among diverse communities; and

3. that it reflects the value commitments of liberal international society better than any alternative.

These assumptions include both empirical predictions about how the rule operates and normative beliefs about how the world properly ought to be. Within each of these three areas, we might also identify related, more specific assumptions. So, let us examine each—not to provide definitive answers, of course, but merely to identify areas in which more rigorous examination might be profitable, or not.

¹⁹Id. at 442 (“As the well-known example of the democratic peace hypothesis illustrates, even well-confirmed empirical regularities do not provide an explanation for why they occur. A robust correlation still leaves us puzzled if we do not know why it happens and we tend to be skeptical of such findings until a convincing explanation—in other words, a theory—is given.”); id. at 446 (noting that “this literature may be a poor model for the field as a whole, because relationships as robust as the democratic peace are rare”).
A. ASSUMPTIONS ABOUT STABILITY AND VIOLENCE

Fracture: First, it is supposed that relaxing the rigid commitment to territorial integrity would lead to destabilizing competition among communities for control of territory and to cycles of fracturing as each community carved out its own majority territory, in the course of which large populations would be displaced in campaigns of ethnic cleansing. As Woodrow Wilson's own Secretary of State worried, after Wilson proclaimed his commitment to self-determination:

[the] fixity of national boundaries and of national allegiance, and political stability would disappear if this principle was uniformly applied... What effect will it have on the Irish, the Indians, the Egyptians, and the nationalists among the Boers? Will it not breed discontent, disorder and rebellion? Will not the Mohammedans of Syria and Palestine and possibly of Morocco and Tripoli rely on it? Implicit is the assumption that, absent such a rule, this process might have no end, leading to literally thousands of states—especially as each of the world's thousands of potential nations might seek its own state. The current rule clearly guards against such fracture by giving each state a veto on changes to its territory and enforcing a default regime of rigid frontiers.

But how great is the risk of fracture? There are in fact many incentives for human communities to voluntarily surrender sovereignty and integrate. These incentives—seen in things like customs unions, military alliances, the European Union—don't disappear just because secession is an option. It is not at all clear that all communities would abandon the benefits of economies of scale and mutual protection for the brass ring of sovereignty. Indeed, it is certain that many would not,

---

21 Cassese, supra note 8, at 316 (citing Robert Lansing, The Peace Negotiations—A Personal Narrative 96 (1920)).
22 A broader right to self-determination might unleash "a Frankenstein of unrestrained proliferation and fragmentation." Elmer Plischke, Self-Determination: Reflections on a Legacy, 140 WORLD AFF. 52 (1977–78). One common basis for nation-formation is language; there are over 7,000 languages, although half of them are spoken by very small numbers of people. See ETHNOLOGUE, http://www.ethnologue.com/world (last visited Oct. 30, 2015).
23 Cf. G. Majone, Presentation of Cultural Diversity in a Federal System: The Role of the Regions, in COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA (Mark Tushnet, ed., 1990). The more accurate formulation would be to ask if elites would grab the ring, because in practice it will not necessarily be a popular, but elite decision (just as the continuation of an existing state can be an elite, rather than popular choice). Even so, the question, and calculus, is
because we actually have some empirical evidence: there are still a number of non-self-governing territories—almost all small, almost all islands—that have chosen to remain in that status rather than become fully independent, because their populations (or elites) perceive the concrete benefits of not being states.  

What has proved true for colonial populations with an unimpeachable right to independence would also logically affect the thinking of other groups. So, does it follow that a more liberal territorial integrity norm would actually lead to secession? Certainly in some cases it would—the option of exit built into the peace deal between Sudan and the Sudan People’s Liberation Army yielded an almost unanimous vote for the independence of South Sudan, for example—but as the recent case of Scotland demonstrates, populations do not necessarily choose to exit even when they can. And, as the experience of Quebec suggests, acknowledging the possibility of secession can actually mitigate secessionist sentiment.

Presumably a more flexible regime would lead to at least some level of fracturing greater than we currently have. But a concern with fracture just begs the question: What is wrong with that? Assuming it effectively the same: Will it benefit elites and their patronage networks to seize independence in a dangerous world? The answer will not necessarily be yes.


were peaceful, why would fracturing necessarily be a problem? What is the right number of states? There is, in other words, a normative aspect embedded within this notionally empirical assumption about fracture: even if the assumption that fracture would result is right, it is an entirely separate question how we should feel about that. Perhaps having more states is a problem: it certainly creates a more complex network of interactions among states, for example, which increase the challenges of coordination. But that intuition sits uncomfortably with the nearly threefold increase in the number of states since the Second World War: Was that also a troubling proliferation, a fracturing? We typically think decolonization was a great thing, so which ones should have remained colonies? It is an awkward question, and the only answer which avoids awkwardness requires a Panglossian belief that we have just the right number of states today—that, by the most amazing chance, we created just the right number of colonies, and then freed them.

We should note another value judgment implicit in this assumption—though running opposite of the way one might expect. Endless fracturing would only happen if populations (or elites) thought having smaller states was in their interest, even if not in the whole world’s interest. If so, it means that given a chance, human beings would make more states, not fewer. In deciding that this is a bad, even dangerous idea, we constrain their preferences and their choices, and we should be clear about that. We are tying our fellow human beings, and ourselves, to the mast on one of the 193 ships we have already constructed for sailing past the hazards of this world. And God help those passengers for whom the ship itself is the danger.

Non-viability: In a related way, we can observe consistent bias towards the belief that new states may not be viable, which if true obviously would contribute to general instability. States must be capable of ensuring their own security and prosperity, as well as

---


contributing to general security and welfare; smaller units may find this more difficult; some will find it impossible. So perhaps fracturing is not only a problem for coordination among units, but for the new units themselves, which will prove economically and politically incapable of functioning.

But it is not clear this risk is real, as there are many small states today, including breakaway territories (such as the Baltics and Slovenia), which have done quite well economically. Considering that the average population of a state is about 36 million but the median about 7.6 million, that there are thirty-eight states with populations under 500,000, that twelve have populations below 100,000 and the very smallest a population below 1,000,30 it is hard to argue that any given population is too small to form a state. Indeed it is as often the case that large units themselves are dysfunctional—not Slovenia but Yugoslavia, not Katanga but the Congo.

In addition, there presumably would be some kind of self-regulating effect, as populations or elites are not likely to attempt secession unless it was plausibly in their interest to do so. Interestingly, a common objection to secession is the concern that wealthy regions will withdraw from the state, which hardly fits with the assumption that the new units will be unviable.31 Moreover, integrative forces not only limit the likelihood of fracture, but also its attendant harms: smaller units may indeed be more viable when they are embedded in larger economic and security blocs, as the experience of the European Union—which has seen a resurgence of secessionist sentiment—suggests.32

The value of being embedded in larger structures suggests that another part of the viability assumption is wrong too: the objection that globalization makes small states less viable probably has the effect entirely backwards. In a globalized, interconnected world, it is all the more possible for small units to prosper—so long as they do not imagine independence to be autarky, which in historical memory, it almost never has been anyway. Globalization may make a mockery of any state’s

---

31 Indeed, if anything, the more serious concern would be that the remainder state might be.
pretentions to true independence, but also provides a larger framework of cooperation in which small units can maintain the kind of qualified, interdependent sovereignty that has always, in fact, constituted statehood. If anything, the conditions of the contemporary world make small states more, not less, viable.

In short, concerns about viability probably are greatly exaggerated—and may indeed be principally a fiction predicated upon the all-too-human tendency to overvalue present conditions and treat them as necessary or normative.\(^3\)

**Violence:** But perhaps the real concern is with change itself, and the risks of violence that change creates. We assume, in other words, that a more flexible rule would promote great violence—really greater violence, because there is a great deal of violence under the present rule, so we should make a relative evaluation. Measurement is difficult and the evidence complex: while the number of international conflicts has declined since 1945, the number of internal conflicts has increased—and indeed at all points in the postwar era, there have been many more internal than international conflicts.\(^3^4\) It might be, in other words, that even if the present rule has had an effect, it might not have reduced violence so much as redirected it from cross-border conflicts to internal conflicts. It is even possible—though just as hard to prove as the prevailing assumption—that the current rule has increased violence, by creating the conditions for groups locked inside the modern state to engage in all-or-nothing struggles for the control of states from which there is no effective exit.

---

\(^3\) Indeed, claims about viability of new units themselves exhibit assumptions about the feasibility of development and sustainability within existing frontiers. See, e.g., Jeffrey Herbst, *Is Nigeria a Viable State?*, 19 WASH. Q. 151, 151 (1996) ("The outstanding assumption about the developing world since World War II has been that countries can develop within their existing boundaries . . . . Yet the view that development can occur without changes in boundaries is relatively recent. Before World War II, boundaries across the world changed with some frequency and it was certainly not assumed that all countries, irrespective of their internal capacities, would inevitably prosper.").

\(^3^4\) Lotta Themnér & Peter Wallensteen, *Armed Conflicts, 1946–2013*, 51 J. PEACE RES. 541, 544, Fig.1 (2014) (showing numbers of internal, international and other forms of conflict since 1946). See also UCPD/PRIOR Armed Conflict Dataset, PRIO, http://www.pcr.uu.se/research/ucdp/datasets/ucdp_prio_armed_conflict_dataset/ (last visited Oct. 30, 2015) (noting that in 2013, there were 24 interstate conflicts, no interstate conflicts, and nine internationalized intrastate conflicts). It can actually be quite complex to determine if a given conflict ought to be considered international or internal. *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, INT’L COMM. OF THE RED CROSS (Mar. 2008), https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf.
In addition, we must recall that, logically, violence is not only or even typically caused by secession as such, but by resistance to secession—a perspective that might alter one’s normative evaluation, even if empirical predictions about the violence accompanying the formation of new states are accurate. Under the present rule, states have no obligation to create peaceful pathways to secession, and public order principles give them considerable leeway to use coercive measures and actual violence to constrain calls for secession. It is quite plausible, therefore, that separatist groups resorting to violence often do so either because they have exhausted peaceful options or reasonably believe it would be pointless, even dangerous, to seek secession through peaceful means.

If the present rule actually ensured stability and reduced violence, there might be little point in proposing a radical alternative. Yet the evidence of the post-war period shows that, despite the near-total ban on external self-determination, existing states do not feel sufficient confidence in the current rule to relax about the minorities in their midst: around the world regimes suppress minorities, evidently fearing the claims they might make. So the present rule, despite handing so many cards to states, has not handed them enough to quiet their fears and ensure peace.

35 There are numerous examples of state formation and significant border correction that were not accompanied by violence: the many peaceful decolonizations; several of the territorial plebiscites after the First World War; the division of Czechoslovakia; as well as the failed efforts in Quebec and Scotland. And while in some cases it may be that secessionists are the first to resort to violence, logically those are cases in which the normal pathways for political change make peaceful secession improbable. Yet the assumption that somehow secession itself is responsible for violence seems deeply entrenched in political and scholarly thinking. See, e.g., MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 23 (2001) ("States in the age of human rights have to reconcile human rights observance with containing a dissident or oppressed opposition or an ethnic minority seeking self-determination. These secessionist challenges, often backed up by terrorism, sometimes jeopardize the unity of the state... ").

36 Violence And the Use of Force, INT’L COMM. OF THE RED CROSS 6 (July 2011), https://www.icrc.org/eng/assets/files/other/icrc_002_0943.pdf ("Maintaining law and order is the responsibility of civil authorities... armed forces may be required to come to the assistance of civil authorities to deal with much lower levels of violence [than armed conflicts] that may be characterized as internal disturbances and tensions."). Many states constitutionally prohibit their territorial dismemberment, and some states criminalize the advocacy of secession. See, e.g., Damian Grammaticas, China Jails Prominent Uighur Academic Ilham Tohti for Life, BBC (Sept. 23, 2014), http://www.bbc.com/news/world-asia-29321701.

But this is not because there are other cards to give; it is because political, ethnic and regional groups persist in making claims even when playing against a stacked deck. Even though the present rule almost absolutely rejects involuntary separation of territory, states nonetheless engage in suppressive behavior towards ethnic groups, which do often pursue secessionist or autonomist claims despite only rarely prosecuting those claims successfully.

What this shows us is that the current rule of territorial integrity is not self-enforcing; the continuity of existing states' territory—even of states' existence—is often accompanied by and accomplished with great violence, even in the absence of any movement for secession. In weighing the relative costs of different rules, we must weigh all the sources of violence to arrive at a moral accounting. The current rule of territorial integrity has not in fact created a peaceful world—and whether it has produced a more peaceful world than any of the alternatives is precisely the question we need to answer.

B. ASSUMPTIONS ABOUT EFFECTS ON INTERNAL POLITICS

Lowered incentives to cooperate: The current rule assumes that relaxing the rigid commitment to territorial integrity—relaxing the "locked-in" quality of the modern state—would lower the incentives of non-majority communities to cooperate, as they would have an attractive opt-out. This would lead to less effective processes for negotiating governance in modern, diverse societies. Thus populations entitled to self-determination will lean towards rigidity and intransigence; convinced that the right to self-determination entitles them to absolute independence, they will be reticent to negotiate if sovereignty does not immediately appear in the offing. All too often, invoking a legal right renders the right holder less flexible and receptive to compromise.

38 See Yuval Shany, Redrawing Maps, Manipulating Demographics: On Exchange of Populated Territories and Self-Determination, 2 L. & ETHICS HUM. RTS 286, 297 (2008) ("[t]he 'locking in' of different groups within a single polity provides the State with relative permanence and stability and conveys to the different ethnic groups within the State the idea that, from an international perspective, they share a single national identity and, perhaps, a common destiny.").


40 Cf. CASSESE, supra note 8, at 350 (speaking about minorities).
In fact, this is probably true—the tendency for rights talk to become rigid is often criticized—\textsuperscript{41}—but not only for minorities. Whatever its effects on the willingness of minorities to cooperate, a rigid rule of territorial integrity clearly lowers incentives for majorities to cooperate in governing their minorities.\textsuperscript{42} Under the current rule, majorities effectively have an absolute right to preserve the existing state; they don’t need to give minorities almost anything. Locked borders and no possibility of exit mean that, even in a democratic society, the majority knows it need give only some minimum to the minority to avoid either the extremely high and doctrinally controversial thresholds for remedial secession claims, or the risk of radicalizing marginalized minorities.\textsuperscript{43} So majorities too will “lean towards rigidity and intransigence . . . be reticent to negotiate . . . [and] less flexible and receptive to compromise.” And, of course, they control the army.

Indeed, what the assumption about rigid politics hides from our gaze is that the current rule creates and naturalizes an entire system of rigidity, taking off the table a wide range of possible solutions to social tensions arising out of the factual diversity of existing states. There is simply no reason to believe that, on balance, the relationship between majority and minority is made more moderate by locking the borders of the state.

C. ASSUMPTIONS ABOUT THE KINDS OF STATES PRODUCED\textsuperscript{45}

\textit{Illiberalism:} One objection to a more flexible rule rests upon an assumption about the kinds of states that would be likely to arise: secession, it is thought, uniquely tends towards the production of illiberal polities. Thus, rigid territorial rules act as a brake against illiberal

\textsuperscript{42} Cf. Monica Duffy Toft, \textit{Indivisible Territory and Ethnic War}, 12 Sec. Stud. 82 (2002); Ignatieff, \textit{supra} note 35, at 22 (“Even when secessionist challenges are not explicit, repressive regimes raise the specter of their threat to justify authoritarian rule.”).
\textsuperscript{43} Basic game theory suggests that when one side controls the distribution of a good and the other side has no option to exit the game, distributive outcomes will strongly favor the dominant side. See \textit{Bargaining with Outside Options}, \textit{Game Theory} 101, http://gametheory101.com/Outside_Options.html (last visited Oct. 30, 2015).
\textsuperscript{44} Cassese, \textit{supra} note 8, at 350.
\textsuperscript{45} These are closely linked to the first two categories: As debates such as the democratic peace thesis suggest, levels of violence and regime type can be related, and the assumptions about the effects on internal politics inform assumptions about what would result after secession.
tendencies by locking unreliable communities into larger and more liberal units.

Obviously a preference for liberal states is normative, but there is an empirical question embedded here as well: When secessions do occur, are they in fact illiberal? Do seceding states tend to be less liberal than their predecessors? There is actually no evidence of this—the few non-colonial cases we have are plausibly seen as efforts by a relatively more liberal community to escape a repressive state, as with the Baltics from the Soviet Union or Slovenia from late, Serbian-dominated Yugoslavia.\footnote{Chris Behan, 
*Estonia, Latvia, and Lithuania: Western Countries Eyeing More Western Integration*, in *ARMS ON THE MARKET: REDUCING THE RISK OF PROLIFERATION IN THE FORMER SOVIET UNION* 150 (Gary K. Bertsch & Suzette R. Grillot, eds., 1998); Paul Shoup, *Titoism and the National Question: A Reassessment*, in *THE DISINTEGRATION OF YUGOSLAVIA*, *YEARBOOK OF EUROPEAN STUDIES* 5, 64 (Martin van den Heuvel & Jan G. Siccama, eds., 1992).} And of course it is quite difficult to assign a clear empirical value to the “before” and “after” conditions of liberated colonies: even though in many of them conditions quite clearly got far worse after independence, the bare fact of colonialism—the condition of not governing oneself—seems an example of illiberalism *non pareil*.

Logically, the only valence secessions necessarily have is towards smaller units—and perhaps, one might add, towards a world view in which integration and “ever greater union” are not reflexively predominant values. But that is not the same thing as an illiberal (or more illiberal) orientation; after all, the greater unions called imperialism were not obviously more liberal. Of course, there is no reason to believe secessions are necessarily more liberal either. The objection really rests on an unfounded assumption that larger or pre-existing political units necessarily exhibit greater liberality—a proposition that many residents of the former Soviet Union, or Russia today, or China would find dubious, even if they are lucky enough to be ethnic Russian or Han.

But it is also objected that secessions, because they are principally undertaken by ethno-national groups, tend to produce nationalist-oriented states, which are either definitionally illiberal (on modern understandings of the term)\footnote{In the 19th century, there would not have been any perceived incompatibility between liberalism and nationalism.} or simply undesirable.\footnote{Cf. Joseph Weiler, *Catalonia’s Independence and the European Union*, *EJIL TALK!* (Dec. 20, 2012), http://www.ejiltalk.org/catalonian-independence-and-the-european-union/ (referring to a “frenzy for secession and independence[,]” and associating Catalan independence with the “mindset” of the “poisonous logic of national purity and ethnic cleansing[,]” and calling secession “irredentist Euro-tribalism which contradicts the deep values and needs of the Union.”).} Here too,
however, we find the empirical and normative problematically mixed. It is true that, outside the colonial context, secessions have tended to produce more ethnically homogenous units,⁴⁹ but this is not the same thing as a nationalist orientation of the state and society as such—it is simply a description of demography, of the qualities shared by a population within, indeed defined by, a given territory.

To describe such bounded demography as undesirable is, of course, purely a normative choice. One might agree or disagree, but in so doing one would have to account for the fact that many states in the existing order that were not formed by secession also exhibit high levels of ethnic homogeneity: the states of northern Europe, for example, despite decades of liberal immigration policies, remain highly homogenous compared with most African states.⁵⁰ And, of course, when those European states first embarked on policies friendly to immigration, they were even more homogenous—a good reminder that there may be no necessary relationship between the incidental demography of a given territory and the liberality of the policies that territory’s population and state might support. Or, indeed, if there is a relationship, it probably runs in the other direction: homogeneity may, ceteris paribus, more likely correlate with decency and lack of conflict.⁵¹

This raises a related question: Are the states we have in fact the best units? All states are diverse, and are so in their own particular ways. Those differences create challenges of internal coordination—diversity is partly a descriptive fact, partly a value, but not a formula for ease of governance. So the demographic qualities of a state are relevant to its prospects for effective internal governance, for civil discourse—some combinations will find Habermas and Rawls easier to apply than

---

⁴⁹ This is not to suggest that new states formed by secession are not heterogeneous. But, as cases such as Yugoslavia, Ireland, Czechoslovakia, the Soviet Union, and India and Pakistan demonstrate, division of a state will often lead to the creation of new states, each of which has a relatively more homogenous population than did the predecessor state. When a secession occurs along ethnic lines, this proposition is almost axiomatic.

⁵⁰ Cf. Max Fisher, A Revealing Map of the World’s Most and Least Ethnically Diverse Countries, WASH. POST (May 16, 2013), http://www.washingtonpost.com/blogs/worldviews/wp/2013/05/16/a-revealing-map-of-the-worlds-most-and-least-ethnically-diverse-countries/ (showing the greatest preponderance of ethnically homogenous countries in Europe and highest heterogeneity in sub-Saharan Africa, though also showing high homogeneity in Russia, China, and Egypt, among others).

others—and even for the likelihood of violent conflict. And since we know human identities are fluid and demographics are changeable, why would we assume that rigid political units are the proper medium to contain those identities? Yet that is precisely the assumption that the current model makes.

D. A FOURTH ASSUMPTION—THAT THIS IS THE BEST POSSIBLE RULE

Finally, we might also consider an assumption implicit in the point just raised above: namely that the states we happen to have are satisfactory because the limited avenues afforded by the current rule for creating new states are in fact sufficient—that we already have the right rule. After all, since the end of the Cold War, a large number of states have come into existence outside the decolonization process. Moreover, some recent developments—moves towards internal democracy and remedial secession, for example—are expressly intended to ameliorate the harsher effects of rigid borders. Secessions do occasionally occur, so perhaps the system is already responsive enough?

I think the answer is no. First, the secessions that do occur have generally come after great violence and long delays—think of Kosovo, South Sudan, or East Timor. Second, the favored tools of international law are self-limiting: human rights approaches, for example, are not only often ineffective, but reactive, designed to respond to a logic of violation that creates perverse incentives for secessionist groups to demonstrate they have suffered enough to deserve protection. Indeed the whole project of remedial secession is fatally self-limiting in this way—guided by a harm threshold logic that contemplates secession only as a last resort in the most extreme situations. By design, remedial and ameliorative approaches are not responsive to the idea of secession as a right or claim.

---

52 All these points, apart from the link to Habermas and Rawls (and even that is implicit), are raised in id. I have not found data about the relationship of state size to violence, but obviously any normative design that would make it easier to create more, smaller states must be interested in this question—as would any objection to that design.
55 This does not mean we should give up on human rights—they are a project of inherent value, and can practically improve the lives of people in real ways—but we should not assume that they will provide sufficient aid to groups that desire to alter their states. Rights operate within the context
The most promising line of development, the move towards internal democracy, can prove deeply destabilizing, especially in multiethnic states. Elections are easy to organize, but a democratic culture takes time to develop. That lag can be dangerous, encouraging a contest for all-or-nothing control of a state from which there is no exit and in which elections are simply a means to vindicate demographic dominance.56

Perhaps we should note one more feature—a fact accessible to us despite the untestable nature of global norms: the current rule evidently leaves many people living under the domination of some state other than one they might prefer. We know this, since they frequently try to form new states and often are killed in the process. Surely this is not the best of all possible rules.

IV. CONSTRUCTING AN UNSATISFACTORY ALTERNATIVE TO AN IMPOSSIBLE TEST

All of these are merely indirect indications—intuitions—that we might have reason to question the easy assumptions surrounding our territorial norm; they are not tests in their own right. If we find the rule both intuitively unsatisfying and annoyingly untestable, we should consider how we might nonetheless take its measure.

One way, of course, would be to do what was not effectively done in 1945; to make a discrete change in the rule without altering other parts of the system, and then examine the effects longitudinally. Is the future more or less violent, more or less stable? Are there more or fewer people living in societies constructed on lines they themselves prefer? Obviously this is politically impractical, as is the alternative of subjecting, say, only one hemisphere to a different rule.

Instead, we might try a kind of thought experiment; elaborating the contours of a discretely different rule, and modeling the plausible outcomes, perhaps through game theory models, perhaps through large-scale role-playing exercises. An entirely unsatisfactory method, to be sure, but considering the alternative, perhaps the best we might do. That is the larger project in which I am presently engaged. There might be

56 See generally Jack Snyder, From Voting to Violence: Democratization and Nationalist Conflict (2000); Paul Collier, Wars, Guns and Votes: Democracy in Dangerous Places (2009).
many alternative models—in fact, the whole point of the exercise requires one to try out a variety, to see what different effects they might have. In cursory form, here is the one I am currently developing:

**Alternative Rule 1.0—A Right of Secession**

1. The existing protections for states’ territorial integrity are maintained, with one change: the assumption of territorial integrity can be defeated by internal claims by a self-defined community constituting a local territorial majority in part of one state.

2. Such communities vindicate their claims exclusively through a series of internationally monitored or supervised plebiscites, which give rise to a process of negotiations.
   a. The self-defining community itself determines the plebiscitary territory, subject only to these limits:
      i. some minimum population,
      ii. some minimum contiguity of the territory, and
      iii. no plebiscitary territory may cross an existing international frontier.
   b. Other communities within the territory can make counter-claims, in a cascading plebiscite process.

3. To claim for a new state, a community must win a clear majority or super-majority among all those living in, or having long-standing ties to, the plebiscitary territory.
   a. Historical claims are given no or almost no weight.

4. In addition to winning its plebiscite, a secessionist community must:
   a. accept all residents of the territory or others with legitimate ties to it as full citizens of the new state,
   b. undertake to respect all relevant human rights provisions, and
   c. subject itself to ongoing international supervision.

5. The mother state would be under an obligation to:
   a. allow and facilitate the plebiscite, and
   b. in the event the plebiscite succeeds, to negotiate in good faith the seceding community’s departure.

6. The right is iterative with respect to any territory or population.
7. All other commitments within the international state system (human rights, non-aggression, succession rules, etc.) are unaffected.

There are many factors to consider, but let me note its major feature. Under this rule, territorial integrity would hold just as it does today, especially against cross-border aggression, with one key exception: for internal, democratic claims made by local territorial majorities. As much as possible, other elements of the present global system are held constant. Thus it is a single, small change, leaving the basic framework of the state system in place—in many respects this a very conservative proposal—but of course it is also a radical shift, and, perhaps, a break from the logic that has governed that whole system for the better part of a century.

There are plenty of potential benefits to this rule, and plenty of objections, but for now I will leave those to the reader to consider. In a sense, working out what they are is the point: deciding why this alternative might or might not work better, or identifying yet another, superior alternative, requires us to articulate and then interrogate—if possible, even test—the assumptions underpinning our current rule. The same is true for defending the existing model: saying this or any given alternative is inferior, and explaining why, requires a rigorous analysis of what the model might do, measured against what we know about the current rule, or at least about the world in which the current rule exists.

But here I would like to note just one objection, which is the charge that this whole proposal is an exercise in impractical idealism. In a way, it’s a fair cop—after all, if actually changing the rule is impractical, as I acknowledge, then what’s the point of engaging in a fantasy project proposing to do exactly that? I don’t have a good answer, except to say that one has to start somewhere. And perhaps this: that there is another impossibly unrealistic project, which is the belief that borders can and should last forever; that whatever problems arise, however unimaginable the community and however difficult its disputes, it is always better to lock people in, and expect, with glowing, fervent belief in our higher humanity, that it will all work out. Which is to say, to believe in our present, untested rule.