I will not rehearse in detail the arguments I have advanced elsewhere for including (1) as a sufficient ground for international legal acknowledgment of a group’s (unilateral) right to secede. Granted the justice-based theory of political legitimacy developed in Chapter 5, the central idea is simple: Individuals are morally justified in defending themselves against violations of their most basic human rights. When the only alternative to continuing to suffer these injustices is secession, the right of the victims to defend themselves voids the state’s claim to the territory and this makes it morally permissible for them to join together to secede. This is not surprising, given that the basis of the state’s claim to territory in the first place is the provision of justice, understood primarily as the protection of basic human rights.

States and governments

One clarifying point should be added to this basic argument, however. The Remedial Right Only Theory I am advocating takes seriously the distinction between the state, the government, and the people. The state, as I noted in Chapters 5 and 6, is the persisting structure of institutions through which the people, the ultimate sovereign, exercise their will. The government is composed of persons who occupy certain roles in that structure and whose duty it is to serve as the agents of the people.

Suppose that a state is legitimate according to the justice-based criteria I articulated in Chapter 6. The problem is not that the constitution (written or unwritten) denies the rights of a certain portion of the citizenry. Instead the difficulty lies with the behavior of the government. If a government persists in violating the fundamental rights of a group of citizens living in a portion of the state’s territory, then that group has the right to secede, as a remedy of last resort against these injustices. But this does not mean that the government’s unjust behavior voids the state’s (more accurately the people’s) claim to the rest of its territory.

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18 Buchanan, ‘Theories of Secession’.
19 I am indebted to David Golove for making the importance of this point clearer to me.
This way of understanding the basis of the secessionists' claim to territory is attractive because it avoids the unacceptable implication that a bad government's actions are sufficient to undermine the legitimacy of the state. Such a view is implausible because it would impose an unjust penalty on the people of the state as a whole—especially when they oppose the government's unjust policies.

When a group secedes in circumstance (1), where the government persists in inflicting violations of basic individual human rights upon it, the people as a whole do lose a portion of the territory that had been theirs; but this loss is justified on the grounds that in choosing secession as a last-resort remedy against these injustices the secessionists are exercising a fundamental right of self-defense. The intuitive idea is that it is fairer for the people of a state whose government is persisting in profound injustices toward a subset of the people to lose part of their territory than for the victims to be barred from availing themselves of the only remedy they have for persistent and grave violations of their basic human rights. Yet the right of the injured group to avail themselves of this remedy does not affect the state's claim to the remainder of its territory.

Secession as the recovery of unjustly taken sovereign territory

At first blush the argument for including condition (2) among the sufficient conditions for a group having the (unilateral) right to secede seems even more straightforward. The secessionists are simply taking back what was rightfully theirs, rectifying the injustice of the wrongful taking of what international law recognized as their territory. For this reason many found the secession of the Baltic Republics from the Soviet Union in 1991 to be the paradigm of a just secession, the Soviet Union having unjustly annexed those states in 1940.

Note, however, that from the standpoint of a human rights-based conception of state legitimacy, the case for including unjust annexation as a ground for the unilateral right to secede is not quite so straightforward as that for including massive violations of human rights. Of course unjust annexations usually involve massive

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25 I am grateful to Andrew Valls for pointing this out to me.
violations of basic human rights, as when those whose territory is annexed are killed or suffer violations of their civil and political rights in the process of conquest. But why should unjust annexation in itself be regarded as a ground for acknowledging a unilateral right to secede in international law?

The most obvious answer is that international legal recognition of a right to secede in order to reclaim unjustly annexed territory would serve as a deterrent to unjust annexations and would to that extent reinforce the existing international legal restrictions on the aggressive use of force by states. And there are a number of considerations that speak in favor of limiting the aggressive use of force.

One has already been noted: Aggression typically involves violations of basic human rights. In addition, at least in a system in which the existence of states is taken as a provisional given, the citizens of legitimate states ought to be regarded, at least with a very strong presumption, as being entitled to govern themselves. Hence international law should protect them against violations of their right to self-government. One way to do this is to acknowledge an international legal right to secede to reclaim unjustly annexed territory, both to deter violations of their right of self-government and to empower the remedy of self-help when that right is violated.

Condition (2) becomes more problematic, or at least more complicated, when two questions are considered. First, was the sovereignty of the entity in question disputable at the time it was forcibly annexed? If so, then the claim of the secessionists that they are simply taking back what was theirs is to that extent also disputable. This problem is exacerbated if there is no authoritative international court with compulsory jurisdiction to settle such disputes. Thus to be fully effective an international legal principle recognizing unjust annexation as a sufficient condition for a group coming to have the right to secede would need to be accompanied by an authoritative procedure for adjudicating disputes about whether the territory taken belonged to a legitimate state. Here we have only one example of a more general point: Proposals for legal reform should include not only proposals for principles, but also for the institutions needed to make them practicable. Admireable principles, if they lack appropriate institutional support, may be ineffective or even counter-productive.

Second, do legitimate interests in the stability of the state system argue for a statute of limitations on unjust takings of territory?
Some international legal theorists have suggested, for example, that since aggressive war, including wars of territorial conquest, was not unambiguously prohibited by international law until 1945 (some would say 1928), it would be reasonable to treat unjust annexations before and after that date differently. Both stability and the principle of avoiding retroactive laws would speak in favor of some such statute of limitations.

Here it is important to note that the only alternatives are not an open-ended principle that might justify secession by present-day descendants of peoples whose territories were forcibly annexed hundreds of years ago or utterly ignoring all claims against unjust annexations that occur before some particular recent date such as 1945, including those that occurred just before that date. A third, more reasonable alternative is a principle that recognizes a statute of limitations (perhaps taking 1945 as a presumptive cut-off point for claims) but allows principled exceptions to it, to be identified by an appropriately constituted international legal body.

Violations of intrastate autonomy as a ground for secession

I now wish to expand the Remedial Right Only Theory to include a third set of conditions under which international law ought to recognize a (unilateral) right to secede: (3) serious and persisting violations of intrastate autonomy agreements by the state, as determined by a suitable international monitoring inquiry. Condition (3) is suggested by reflections on the case of Chechnya, but many other similar cases as well. Consider the brutal secessionist conflicts that have occurred in Sudan, Eritrea, the Kurdish region of northern Iraq, and Kosovo. What these otherwise disparate cases have in common is the following sequence of events: Pressures from a minority group eventually result in the state agreeing to an intrastate autonomy arrangement; the state breaks the agreement; in response to the broken autonomy agreement autonomists become secessionists; and then the state violently attempts to suppress the secession.

The response of the international community to this familiar pattern has been sorely inadequate. Only when the breakdown of an

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21 See the Kellogg-Briand Treaty [Internet, http://www.yale.edu/lawweb/avalon/int/kbpact.htm]
autonomy agreement has already occurred, and the dynamic of secessionist and counter-secessionist violence has produced massive violations of human rights, have there been serious attempts to intervene, and then to intervene militarily.

The time is ripe for serious consideration of a more proactive approach. As a key element of what I have called the “isolate and proliferate” strategy, the international community should (1) help broker intrastate autonomy agreements as an alternative to secession, (2) monitor both parties’ compliance with such agreements, (3) support the agreements’ viability by holding both parties accountable for fulfilling their obligations, and (4) provide an impartial tribunal for adjudicating disputes over whether either or both parties have failed to fulfill their obligations.

The case of Kosovo dramatically illustrates the relevance of the fourth condition. There is no doubt that Serbia, under Milošević’s leadership, unilaterally revoked Kosovo’s autonomy in 1989. But there is dispute about who violated the terms of the autonomy agreement first. According to those who supported the revocation of autonomy, the Kosovar Albanians had abused their right of autonomy, by using the Kosovar Communist Party as a corrupt patronage system that excluded Serbs and by engaging in violent attacks on Serbs.

Whether a group that escalates its demands from autonomy to independence, as the Kosovar Albanians did, has a valid claim to attempt to set up its own state is a complex matter. But one factor relevant to the evaluation is whether they sabotaged a legitimate autonomy agreement or were victims of the state’s destruction of it. Unless the international community is willing to press for serious monitoring of intrastate autonomy arrangements, at least in cases where the risk of a breakdown of the agreement is significant, it would be irresponsible to hold states accountable for continuing to recognize a group’s rights of intrastate autonomy regardless of how those rights are being exercised. Furthermore, states are unlikely to enter into autonomy agreements if they believe they will suffer international censure or intervention if they rescind the agreement, regardless of whether the group that is granted rights of self-government violates the terms of the agreement.

I wish to emphasize that I am not recommending that international law should at this time acknowledge a unilateral right to
secede when the state has seriously and persistently violated an intrastate autonomy agreement. I am advocating that such a legal right be recognized if two other conditions are satisfied: There has been a formal international legal determination (1) that the state is responsible for the breakdown of the autonomy arrangement and (2) that secession is the remedy of last resort. At present there is no international institutional mechanism for satisfying either condition, though there may be existing institutional structures, such as the Committee of Twenty-Four of the United Nations, that could be adapted to perform these functions.

Institutionalizing the remedial right to secede

There is much to be said for requiring some such impartial international adjudicative procedure for any exercise of the right to secede on remedial grounds, not just for cases where there has been a serious violation of an intrastate autonomy agreement. Requiring a group to make a convincing case to an impartial international body that the conditions for a remedial right to secede are satisfied would serve several purposes. First, it would reduce the risk of groups attempting unilateral secession when the conditions for their having a remedial right are not in fact satisfied. Second, and of equal importance, by erecting a hurdle that must be cleared before there is international legal recognition of a unilateral right to secede, this procedural requirement would reduce the risk that groups will resort to secession too quickly, instead of making a sincere effort to gain redress for their grievances while remaining within the state.

Suppose, for example, that a minority group G within state S has recently suffered grievances of the sort that ordinarily would justify unilateral secession, but that there has just been a fundamental change of regime in S, so that G now has an opportunity for full participation in governance and good prospects for making its case for redress of its grievances. Under these circumstances, there is a need for some mechanism to give the members of G an incentive to try to work things out—to cooperate to create conditions in which it is no longer true that their only remedy for injustice is secession—rather than to invoke the unilateral right to secede. The requirement of adjudication of grievances by an impartial international body is one such mechanism. Institutionalizing the right to secede in this
way would also help counter the charge that permitting secession undermines deliberative democracy by making exit too easy.

Requiring a minority group to make its case for a remedial right to secede to the state that they view as the author of the injustices they seek to remedy is unreasonable; expecting them to make their case to an impartial international body is not. Even if the unilateral right to secede is to be a "self-help" device, international society has a legitimate interest in imposing some constraints on the recourse to self-help here as elsewhere.

Getting the incentives right

Essential to the "isolate and proliferate" approach, as I have already noted, is the uncoupling of secession from other, less drastic forms of self-determination. States will be reluctant to enter into intrastate autonomy agreements if they fear that by so doing they are implicitly recognizing a right to secede on the part of the group in question. Discontent minority groups will be equally unlikely to find the rather constrained Remedial Right Only approach to unilateral secession acceptable unless they are assured that by forgoing claims to independence except in cases of serious and persistent injustices they will gain meaningful forms of self-determination short of full independence. Thus the "isolate and proliferate" strategy is designed to create the right incentives for both parties, by assuring the state that so long as it avoids major injustices it will retain international support for its full territorial integrity, and by assuring potential secessionists that by relinquishing claims to full independence they will increase their prospects of gaining significant forms of self-determination through a peaceful process in which the international community both facilitates, and protects the integrity of, intrastate autonomy agreements.

The problem of the permanent minority

There is a fourth condition that arguably can justify unilateral secession as a last resort: the situation in which a group finds itself a permanent minority on fundamental issues of value within the proper scope of democratic decision-making.
To clarify the problem, a highly idealized hypothetical situation will be useful. Suppose that state S is thoroughly democratic, indeed more democratic than any existing state, and that the members of minority group G within it do not suffer discrimination or violations of other human rights. Each citizen, including all the citizens of group G, has the right to vote on every major legislative proposal, and each has the right to run for office. Suppose in addition that the members of group G suffer no unjust disadvantages in the distribution of resources for political discourse (access to the media, etc.), and the democratic process is entirely free of fraud and corruption, and that whatever differences there are in wealth in the society do not significantly influence the outcome of elections or legislation.

G, a minority, is free to attempt to change the majority’s mind, enjoying not only rigorous legal protections for free speech but also special accommodations in public forums to ensure that its views are heard. But suppose that nevertheless the members of group G have good reason to believe that they will continue to be outvoted on matters of fundamental importance.

The situation under scrutiny is not one in which the majority is violating the minority’s human rights or reneging on agreements that accord them autonomy within the state. Nonetheless, the minority group has a complaint that is not easily dismissed. They can argue that the same fundamental principle that requires democracy in the first place, the principle that all are to be accorded equal regard, is being violated in their case, because in fact they do not participate as equals in any meaningful sense in the processes for determining the fundamental rules of public order, even if they are formally equal citizens. The fact that the outcome of votes on fundamental issues can be reliably predicted without waiting to count votes shows that they do not in fact have “an equal say.”

It is difficult to evaluate this objection. To be compelling it must be restricted to the case of a permanent minority regarding fundamental issues of value within the proper democratic decision-making. For surely it would be wrong to say that the mere fact that a group is a permanent minority on any issue, no matter how inconsequential, generates a unilateral right to secede.

The difficulty lies in articulating what counts as a fundamental issue—and who is to judge it to be so. Proposals for what counts as
an objective standard of importance are likely to be hotly disputed and it seems equally wrong to allow what counts as fundamental to
be decided by the majority or by the minority. This much seems clear;
however: A minority’s preference for having its own state should not
itself count as a disagreement on fundamental issues of value.

The “isolate and proliferate” approach recommends an initial
response to the problem: Create an intrastate autonomy arrangement
that gives the minority more influence over the fundamental
issues in question. This approach was in fact followed in Canada: In
an effort to block its secession, Canada granted Quebec special
powers of self-government not enjoyed by other provinces. Suppose,
however, that for one reason or another this response is not feasible. What then is the proper response to the complaints of
the permanent minority?

Perhaps the best reply to the permanent minority argument
would run as follows. It is unrealistic to think that democracy can
function in such a way that no group will ever be a permanent
minority on any issue of importance. If democracy operates within
its proper scope—constrained by entrenched individual rights and
in such a way as to honor the terms of intrastate autonomy agree-
ments with minorities—and if special accommodations are made to
provide resources with which minorities can attempt to persuade
the majority to change its mind, then it does not violate the minor-
ity’s rights to expect them either to accept their situation or to limit
their efforts to consensual secession. To think otherwise is to expect
too much of democracy and too little of citizens. This conclusion
is strengthened once it is admitted that secession may create new
permanent minorities.

Some may think this rejection of the permanent minority condi-
tion as a justification for unilateral secession too harsh. Here per-
haps theory can borrow from practice, to mitigate this concern. In
1998 the Canadian Supreme Court issued a “Reference” on the
question of Quebec secession. It concluded that although Quebec
does not have a right to secede (because it does not satisfy the con-
ditions for what I have called a remedial right to secede and does not
have a constitutional right to secede), nevertheless the Canadian
government has an obligation to enter into negotiations over pos-
sible secession, if a “clear” majority in Quebec votes in favor of
secession in response to a “clear” referendum question on secession.
It is true that the Court does not state or imply that Quebecois (or the majority of Quebecois) are a permanent minority on any issue of importance other than that of whether Quebec should be independent. Nevertheless, let us assume *arguendo* that there are fundamental issues other than that of independence on which the majority of Quebecois are a permanent minority within the Canadian state. The virtue of the Court's position is that it enjoys the attractions of a Remedial Right Only Theory by stopping short of according a unilateral right to secede for a permanent minority, but at the same time captures the idea that the majority ought to take seriously the desire of a permanent minority to have its own state. Note that the Canadian Supreme Court held only that the Canadian government had an obligation to enter into negotiations if a clear majority in Quebec voted in favor of secession in response to a clearly worded referendum question, not that the Canadian government had an obligation to allow Quebec secession under those circumstances.

It may well be the case, as the Canadian Court suggested, that a state is morally required to enter into negotiations concerning the possibility of secession in the case of a permanent minority on fundamental issues of value, and that the ultimate ground of this obligation is the same commitment to equality in the political sphere that justifies democratic government. However, it is another question whether the international legal order should recognize a right to unilateral secession for such minorities.

My sense is that the difficulties of forging reasonable agreement on what counts as fundamental issues of value makes the proposal for international legal recognition of such a unilateral right to secede unworkable. Reformist zeal would be better directed toward (1) supporting secessionists who are victims of clear and persisting injustices, by (2) pressuring states to protect the individual rights of members of minority groups to reduce the probability that secession will become an issue, (3) helping to ensure that the views of minority groups are effectively represented in public deliberations, (4) supporting intrastate autonomy regimes, and (5) providing assistance, including non-binding arbitration for a process of consensual secession by permanent minorities. I conclude, then, that the predicament of being a permanent minority should not in itself—in the absence of unambiguous injustices—count in international law as a justification for unilateral secession.