There is a more serious flaw with this conception of nations, however. As Brian Barry, Margaret Moore, and others have noted, not all groups that identify themselves as nations and seek political self-determination using the discourse of nationalism are distinct cultural groups in any significant sense. For example, there is such a thing as Scottish Nationalism, but those who seek political independence for Scotland are not united by anything that could reasonably be called a distinct Scottish culture. Similarly, nationalism in Northern Ireland is not based on a distinct Catholic or Irish cultural identity. In the context of the conflict in Northern Ireland, the terms ‘Catholic’ and ‘Protestant’ do not refer to distinct cultural groups, much less “encompassing cultures” in Margalit and Raz’s sense. Of course, entrepreneurs of nationalist identity often attempt to foster the illusion that their group is a distinct culture, but that is a different matter.

For the purposes of this chapter, I will not harp on what I take to be the mistaken assumption that national groups, as such, are cultural groups in any interesting sense. My criticisms of the nationalist ascriptiveivist view will not rely on the premise that nations are sometimes not cultures. Instead I will attempt to assess various justifications for the claim that nations have a right of self-determination, including a right to secede, focusing on assertions about the normative significance of cultural identity where appropriate.

However, I will note that if Moore and Barry are correct in holding that not all national groups are distinct cultural groups in any significant sense, the case for a right of self-determination for nations is even more difficult to make. For as will become clear from what follows, attempts to show that nations are entitled to their own states or at least to some significant sphere of self-government typically depend upon the assumption that members of nations are connected with one another in something very much like the way in which participants in a culture, or at least an “encompassing culture,” are related to one another.

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The infeasibility objection

Critics of the Ascriptive Primary Right Theory have argued that it would legitimize virtually unlimited unilateral, forcible border changes because it confers an entitlement to its own state on every nation, and virtually every state contains more than one nation. Proponents of the theory quickly reply that it does not require every nation to exercise its unilateral right to secede and conjecture that were the theory incorporated into international law not every nation would in fact choose to secede. Nevertheless, given the horrific historical record of ethno-nationalist conflict, the worry remains that institutionalizing the principle that every nation is entitled to its own state could only exacerbate ethno-national violence, along with the human rights violations that it inevitably entails. Thus the moral costs of incorporating the Ascriptive version of Primary Right Theory into international law appear prohibitive—at least if there are less risky ways to accommodate the legitimate interests of nations, such as better compliance with existing human rights norms, including those that prohibit discrimination on the basis of nationality, and recourse to intrastate autonomy arrangements that provide meaningful self-government short of independent statehood. The greater the extent to which these measures can satisfy the needs of national minorities, the more dubious the nationalist version of Primary Right Theory looks from the standpoint of the desideratum of moral accessibility explained earlier.

Weakening the nationalist thesis

Variants of nationalist Primary Right Theory typically attempt to allay the worry that acceptance of the theory would add fuel to the fires of ethno-national conflict by qualifying the unilateral right of secession for nations in various ways. For example, the theory may hold that there is a *presumption* in favor of each nation having a right to its own state or a prima facie unilateral right to secede, rather than a right to secede, but that the international community is justified in requiring some groups to settle for intrastate autonomy rather than full independence, in order to avoid dangerous instability or to accommodate similar claims by other groups to the same territory.
This way of responding to the worry about fueling ethno-national conflict comes at a price, however. What was originally billed as a unilateral right of every nation to its own state now turns out to be a highly defeasible presumption in favor of independence. In particular, if the strength of a nation’s claim to statehood depends upon the compatibility of satisfying that claim with satisfying the similar claims of other nations within the same state, then this will in effect render the Ascriptiveist right practically inconsequential, for the simple reason that in the vast majority of cases there will be more than one nation advancing a claim to statehood in the same territory. If one nation’s claim to statehood is only to be satisfied when doing so is compatible with other nations’ equally valid claims being satisfied, then nationalist claims to statehood will rarely be valid. And unless a fairly concrete account of the realistic conditions under which the presumption is not defeated is provided, it is hard to know what the practical implications of this qualified view are, or to know exactly what changes in international law would count as implementing it.

**Two types of nationalist arguments**

Earlier I noted that critics of nationalist (Ascriptiveist) Primary Right Theories tend to focus on the potential costs of implementing this view in terms of ethno-national conflict. Proponents of nationalist Primary Right Theory would reply that it is not enough to note the potential costs; it is also necessary to appreciate the expected benefits of having a system in which the right of nations to their own states is acknowledged. David Miller, in his thoughtful and provocative book *On Nationality*, has usefully distinguished between two ways in which nationalist Primary Right Theories can be supported: by arguments to show that nations need their own states and by arguments to show that states need to be mononational.34

The first type of justification has two variants: One can argue that nations need to have their own states either (1) in order to be able to protect themselves from destruction or from forces that would damage their distinctive character, or (2) in order for co-nationals to

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34 Miller, *On Nationality*, 82.
have the institutional resources required for fulfilling the special obligations they owe to one another as members of the "ethical community" that a nation constitutes.

Notice that (1) appears to assume, mistakenly, that nations are cultural groups, since it bases the case for national self-determination on the need to protect the distinctive character of the group. It is hard to understand why the preservation of a distinctive character should be so important unless this refers to the survival of important cultural goods.

In contrast, the notion of an ethical community employed in (2) need not be that of a cultural group. All that is necessary is that the members of the group be related in ways that generate substantial special obligations among them.

Accommodating nationalist interests within the state

Both of these considerations ((1) and (2)) can, under certain circumstances, weigh in favor of some form of political independence for nations, but neither is sufficient to ground a general unilateral right of all nations to full independence and hence a unilateral right to secede for nations as such. Miller recognizes this point, drawing only the weaker conclusion that nations have a "strong claim" to self-determination, by which he may mean something like a presumption of a right or prima facie right. In fact, Miller does not even propose that international law should recognize such a presumptive or prima facie right. However, since my concern is with international law, I will consider the merits of this proposal.

There are two serious problems with the idea of incorporating into international law even a presumptive or prima facie right to unilateral secession for nations as such. First, nationalist Primary Right theorists have generally failed to take seriously the possibility that the legitimate interests of nations in most cases can be sufficiently realized by intrastate autonomy arrangements (combined with better enforcement of the human right against discrimination on grounds of ethnicity or nationality). Instead, they have tended to proceed as if the only alternatives are full independence for nations or the absence of any significant forms of self-government. This may be a consequence of the tenacious grip of statist thinking, in particular the tendency to think of states as both highly centralized
and unitary and as the only sort of political unit worth having. Once one understands that the attributes of sovereignty can be unbundled, the idea that nations need their own states becomes much less plausible.

Second, how important it is for a nation to have its own state will depend upon two factors: (1) how important states are and (2) how effective institutions of transnational justice are in ensuring that human rights and rights conferred by intrastate autonomy agreements are respected. In a world in which there are manifold forms of self-determination, and in which effective international institutions pierce the veil of sovereignty to help ensure that states respect the rights of all their citizens and honor intrastate autonomy arrangements, the distinction between having and not having one’s own state would not only be less significant, but difficult to draw.

Of course the fact that there is a wide range of possible forms of autonomy for nations within states does not by itself show that nations will be adequately protected without having their own states. This will depend upon whether the international community effectively supports meaningful intrastate autonomy arrangements for nations and, perhaps even more important, whether it comes to do a better job of ensuring that states respect the human rights of all their citizens, including those who belong to national minorities. But as the efficacy of transnational justice grows, the case for statehood for all nations, which is already problematic for all the reasons I have already adduced, becomes weaker still.

Earlier in this chapter I argued for incorporating into international law a Remedial Right Only account of the unilateral right to secede that recognizes serious and persisting violations of intrastate autonomy arrangements as a justification for secession under certain conditions. Implementing this principle would go a long way toward providing support for intrastate autonomy arrangements, and in some instances a strong case can be made for providing national minorities with intrastate autonomy. To that extent, my rejection of proposals for incorporating a unilateral right to secede for nations as such in international law is grounded in a more comprehensive moral theory of international law that nonetheless does take the aspirations of national minorities seriously. In the next chapter I begin to develop an account of when intrastate autonomy should receive international support.
There is another reason to challenge the assumption that nations need their own states: it is simply not the case that having its own state always contributes to a nation's security. In some cases, the insistence of smaller nations on sovereignty may work to their disadvantage, simply because they do not have the economic or military capacity to make a success of independence. The difficulty with Margalit and Raz's assumption that nations need their own states to protect their interests and ultimately the interests of their individual members is that it is an overgeneralization from a limited historical sample. " Stateless peoples"—including perhaps most prominently the Jews—have sometimes suffered because they lacked their own state. But there are also many cases in which less powerful nations fell prey to domination or annexation because they insisted on maintaining their independence rather than coalescing into a larger, more defensible political unit. Thus it is not surprising that the dominant opinion in many indigenous groups seems to be that intrastate autonomy rather than independence is necessary for the survival and flourishing of these nations.

Clearly then, whether nations need to have their own states will vary with circumstances. What I find surprising is that most proponents of nationalist Primary Right Theory tend to proceed as if the strength of the case for national independence does not depend upon circumstances and in particular upon how effectively the international legal system supports the legitimate interests of national minorities. Instead, they seem to operate within a very conservative framework that assumes that states are unitary, rather than containing autonomy regimes within them, and that in effect dismisses any significant role for institutions of transnational justice working on the assumption that having their own state is the only way for nations to achieve adequate protection. To assume uncritically such a framing assumption is yet another example of the common failure to distinguish between ideal and nonideal theory and the failure to take a diachronic view of the international system that allows for the possibility that unitary states may not continue to be as important as they have been.

The nationalist Primary Right theorist would no doubt reply that the existing system is and is likely to continue to be statist for a long time. Institutions of transnational justice that would protect the interests of national minorities within states are not well developed.
and are not likely to be for some time, if ever. So at least from the standpoint of a nonideal theory that is relevant to the realities of our world, independence is the only reliable way for nations to be secure and to have the institutional resources needed for their members to fulfill their special obligations to one another.

The problem with this reply is that it tacitly assumes something that is almost certainly false, namely, that implementing a unilateral right to secede for all nations is currently more feasible than building more effective institutions of transnational justice and facilitating intrastate autonomy arrangements in order to help ensure that the legitimate interests of nations are accommodated within states. This assumption is extremely dubious because the international institutional system lacks, and is never likely to develop, effective mechanisms for sorting out the conflicting claims of various nations to the same territories and providing a relatively peaceful implementation of the prescription that every nation that wants its own state is entitled to one.

In addition, states are more likely to agree to a Remedial Right Only approach than to a principle of nationalist secession because the former allows them to continue to exist intact, so long as they meet minimal standards of justice, while the latter condemns many of them to disintegration no matter what they do. So even if it were the case that for the present the best way for a nation to protect its interests is to have its own state, it does not follow that the international legal order should recognize a right of nations to have their own states and hence to secede unilaterally from states in which they find themselves.

Do states need to be nation-states?

The second type of justification for the view that nations should be recognized as having a unilateral right to secede comes in two variants. The first holds that nation-states are required for democracy; the second makes a parallel claim about distributive justice. Both claims are ambiguous. Is the assertion that democracy can only function or deliberative justice only be achieved in a nation-state or that democracy and distributive justice are best served in a nation-state (leaving open the possibility that multinational states can achieve acceptable levels of democracy and distributive justice)?
The stronger claim, I shall argue, is very dubious. The weaker claim, though less implausible, is far from well supported. But even if it is true that a nation-state best serves democracy or distributive justice or both, it would not follow that nations as such should be recognized as having a unilateral right to secede or even a presumptive right, simply because maximizing democracy or distributive justice are not the only values that bear on whether international law should recognize a nationalist unilateral right to secede.

In an earlier essay I criticized in detail the assertion that nation-states uniquely further democracy or distributive justice. Here I will only sketch the major points of that discussion and bolster them with some further thoughts.

Democracy, distributive justice, and nationalism

Consider first the very strong claim, advanced by J. S. Mill, that democracy can function only where the nationalist principle that every nation ought to have its own state is satisfied. Before we go any further, we need to be very clear about what it means for a nation to “have its own state,” what it is for a state to be a nation-state properly speaking. There appear to be only two sensible ways in which this latter phrase can be understood. It means either that (1) no one who is not a member of the nation is allowed to be a citizen, with full civil and political rights, or that (2) even if non-nationals have full citizenship rights, being a member of the nation is the dominant form of political identity, with nationality providing the frame for politics, in the sense that the state is viewed at least primarily as a resource for expressing the distinctive character and pursuing the goals (or destiny) of one national group among others within the state.

Given that virtually every state includes more than one nation and that there is not a ghost of a chance for changing this without

genocide or ethnic cleansing, (1) is so repugnant that it requires no explicit refutation. Where states contain more than one nation, one nation “having its own state” in sense (1) means that all those who are not members of that favored nationality do not have equal rights and are not within the scope of democracy. Whites in apartheid South Africa had their own state in this sense.

Suppose instead that (2) is the proper interpretation of the idea of the nation-state as it occurs in the claims about the connection between democracy or distributive justice and the nation-state. Is it true that where the dominant form of political identity is nationality and public institutions embody the idea that the state is uniquely a resource for the life of one national group, this is likely to be especially conducive to democracy and/or distributive justice, much less indispensable for them?

Consider first the claim about democracy. If (which is never the case in our world) every citizen were a member of the same national group, this might in fact promote the spirit of common enterprise that facilitates the well-functioning of democratic institutions. But even in this fictional case, whatever benefits a single shared nationality might bring to the democratic process might well be offset by other, less fortunate concomitants of operating on the assumption that the state is in some fundamental way a resource for the nation. For example, political discourse may be distorted by the tendency of those seeking political power to claim that they are the authentic voice of the nation, with the result that those who disagree with them are traitors to the nation. The danger is that what are or should be disagreements over principles or how best to apply principles become debates over loyalty to the nation. (Consider the allegation that certain policies or attitudes are “Un-American”.)

In the real world, where there are hardly any states that contain only members of one nation, using national identity to frame politics—treating the state primarily as a resource for furthering the life of one nation only—is a recipe for discrimination, exclusion, and marginalization of all who are not part of the nation. “Nation-building”—which involves nation-destroying so far as other groups are concerned—has proved to be one of the major sources of ethnic conflict in the past several decades.

Similarly, if a state contained only members of one nation, then that common nationality might help motivate the better-off citizens
to cooperate in the distribution of wealth to the worse off, other things being equal. But recall that there are virtually no mononational states. To the extent that distributive justice has anything at all to do with fairness and impartiality in the distribution of resources, it is hardly likely that those who are not members of the favored nation—the nation whose well-being is supposed to occupy a privileged position in politics—will receive their due. So on the face of it the claim that making the state a nation-state will promote distributive justice for all citizens is far-fetched.

In addition, there is ample historical evidence that nationalism and a commitment to redistributing wealth within the national group often do not go hand in hand. (As Marxists have strongly observed, appeals to nationalism are often made to block redistributive efforts within a state.) Whether the ascendance of the idea of the nation in politics will serve the cause of distributive justice even within the national group or impede it will depend upon the character of the nationalist identity—or, more accurately, upon who succeeds in being recognized as the arbiter of what counts as the "authentic" national identity.37

Premature pessimism about multinational democracy38

Consider now Mill's assertion that democratic institutions cannot function in multinational states. Interestingly enough, Mill stops short of the conclusion that nations as such have a right of self-determination, including a right to an independent state, even though his argument seems to require it. Perhaps he did not think that every nation was entitled to a state—only the 'great' ones. Members of lesser nations (including Bretons and Basques), he tells us, should be content (indeed grateful) to be absorbed into the great nations.39

This latter view, redolent with national chauvinism as it is, is no easier to square with the liberal principle of equal regard for persons

38 This section is drawn from Buchanan, 'What's So Special about Nations?', 304–5.
than would be the claim that members of minority religious sects should throw in their lot with large, well-organized religions. But it would probably be a mistake to assume that Mill thought members of lesser nations ought to assimilate into great nations. Instead it is more likely that he believed that it was inevitable that the lesser nations would disappear. His point is that this is not to be lamented, even from the standpoint of the members of the lesser nations, for they will gain by being assimilated into great nations.

Assuming that only a relatively few great nations among all the nations of the earth will require their own state is wonderfully convenient for the proponent of rights of national self-determination. This assumption takes much of the sting out of the Infeasibility Objection encountered earlier. If members of lesser nations will bow to the inevitable and assimilate willingly into the great nations, then perhaps there will eventually be a harmonious world in which every nation has its own state, and democracy can flourish.

However, if we do not assume that the disappearance of minority nations is historically inevitable (or that their deliberate destruction is morally justifiable), the matter is not so neat and simple. We are faced with a painful dilemma if we accept Mill's view of the connection between democracy and mononationality: either we must acknowledge that some nationalities will not have their own states, but instead will be sacrificed to create mononational states so that democracy can flourish, or we must forgo progress toward democracy in the name of equal consideration for nations by recognizing the multinational character of most existing states.

The painfulness of this dilemma should lead us to question its premise more closely than Mill and his contemporary followers have done. Is it in fact true that democratic institutions cannot flourish where the state contains more than one nation?

Those who doubt this generalization can point to apparent exceptions: Canada, Belgium, and perhaps Switzerland (depending on whether one thinks the latter is multinational or merely multiethnic). One might also add the United States, since a number of American Indian tribes have a legal status that approaches that of independent statehood and at least approximate the definition of nations as encompassing cultures associated with a particular territory.

Of course, modern-day proponents of the Millian view might be quick to point out that the continued unity of Belgium and Canada
is very much in doubt. (Actually, at present the prospects of Quebec seceding look slim.) They might also argue that the circumstances of American Indians are so anomalous as not to constitute a serious exception to the generalization that democracy cannot flourish in multinational states.

The best reply to the Millian argument, however, is not only to cite these apparent exceptions to its premise, but to point out that it is simply too early to tell whether the politically acknowledged presence of more than one nationality within the borders of the state undermines democratic institutions. The lamentable fact is that until very recently there have been almost no serious attempts to develop democratic states that recognize a plurality of nations within them—that is, that do not discriminate against minority nations and treat them as equal citizens. (Here one is reminded of Chou En Lai's reply to a journalist who asked him what he thought the most important effect of the French Revolution was: "It's too soon to tell."

Given that we can no longer console ourselves, as Mill may have done, with the belief that the number of nations will conveniently diminish to the point at which it will be feasible to have only one nation per state, and given that general acceptance of the presumption that each nation must have its own state is therefore likely to perpetuate if not inflame existing conflicts, we had better have very good reason to believe Mill's generalization. Since we do not, the responsible course is to explore the possibilities for multinational democratic states more fully than has been done before.

Before scrapping the idea of multinational democracies as unworkable, much more should be done to eliminate the more obvious sources of discontent among national minorities within states. This means working harder to eradicate legal and extra-legal discrimination against minorities in education, employment, health care, and access to the benefits of the legal system. It also means reducing, as far as possible, the culturally exclusive aspects of state policy and public life (enabling the use of minority languages in legal proceedings and legislative processes, and the removal of culturally exclusive symbols from public spaces, etc.). Such reforms are not novel, but their cumulative effects may be great.

The central point is that efforts to eliminate discrimination against minorities and to reduce the exclusive cultural content of state policy and public spaces are preferable to the alternative of
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trying to create separate political states for every "encompassing culture" or nation. Not least among the difficulties with this latter strategy is that instead of solving the problem of cultural or national minorities who are disadvantaged by a state apparatus that excludes them and devalues their culture, it replicates the problem.

If one is concerned with the effects of states on cultural or national minorities, the solution is not to give those minorities their own states, since in virtually every case this will result in a new version of the original problem: The formerly disempowered minority will simply become the disempowering majority. For example, if Quebec were to secede from Canada to achieve the full political empowerment of Francophone culture, this would come at the price of creating a new political unit that systematically disempowers all other cultures and nationalities, including those of immigrants and of Native Peoples.

**Summing up: the weakness of the case for nations as such having a right to secede**

There are two main types of argument for the thesis that nations (as such, independently of remedial reasons) have a right to secede or at least a presumptive or prima facie right to unilateral secession. The first, perhaps best exemplified in the work of Margalit and Raz, is based on the premise that the security and flourishing of a nation is best insured by its having its own state, and that individuals have fundamental interests in the flourishing of the nation to which they belong. The second, which in its most cogent form is advanced by David Miller, is based on the premise that when citizens are co-nationals they will be better motivated to make democracy work and to achieve distributive justice.

These types of arguments do show that, under some circumstances, there are important advantages to nations (or rather, their members) in being self-governing. However, they fall far short of establishing that nations as such, independently of remedial reasons, have a moral right to their own states and hence to unilateral secession when they find themselves within a state that is not "their own." Nor is either type of argument capable of showing that international law ought to incorporate a unilateral right or even a presumptive or prima facie unilateral right of nations to secede.
This completes my criticism of the two rivals to the Remedial Right Only Theory of the unilateral right to secede. Having shown the attractions of the Remedial Right Only Theory, rebutted criticisms of it, and explained the deficits of the Plebiscitary and Ascriptive nationalist versions of the rival Primary Right Theory, I will now show how my account of the unilateral right to secede connects with my view on recognitional legitimacy.

IV. Recognition and the Right to Secede

In Chapter 6 I offered the main outlines of a normative theory of recognitional legitimacy, grounding a proposal for improving existing international legal doctrine and practice regarding the admission of new entities into the society of legitimate states. According to that theory, a new entity’s claim to legitimate statehood ought to be accepted by existing states only if the former offers credible commitments to internal and external justice, understood respectively as respect for the basic human rights of its citizens and of the citizens of other states.

In this chapter I have argued that groups should be accorded the right to secede under international law only if secession is a remedy of last resort for three types of grave injustices: (1) unjust taking of the territory of a legitimate state, (2) large-scale and persistent violations of the human rights of members of the seceding group, or (3) major and persistent violations of intrastate autonomy agreements by the state, when a suitable formal international legal inquiry has determined that the state is responsible for the violations and when secession is the remedy of last resort. (I took a somewhat skeptical stance on whether international law should acknowledge a unilateral right to secession by a group that is a permanent minority on issues of fundamental values and/or “conscientious secession,” whereby a group secedes from a state because of its persistent violations of the basic human rights of others, either within or outside the state.)

I now wish to link more explicitly the theory of recognitional legitimacy and the Remedial Right Only Theory of unilateral secession. On the view I am proposing, international law should accord the unilateral right to secede (i.e., to attempt to form an independent state in a portion of the territory of an existing state and seek
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Remedial actions should be critical in the right to secede. According to the theory of self-determination, citizens who have been compelled to violate their rights of existence, self-determination, and freedom of association, should have access to a remedy of last resort for one or more of the three specified injustices (violations of human rights, unjust annexation of a legitimate state's territory, or serious and persisting violations of an intrastate autonomy agreement). International law should recognize as legitimate states only those secessionist entities that (1) have a unilateral right to secede and (2) make credible commitments to internal and external justice. Furthermore, international law should unambiguously hold that (i) when these conditions for a unilateral right to secede are satisfied and a group exercises the right, all states are legally obligated to recognize the new entity as a legitimate state and (ii) all states are legally obligated not to recognize secessionist entities (in cases of unilateral secession) as legitimate states unless these conditions are satisfied.

Incorporation of this proposal into international law would constitute a significant change in two key respects. First, it would expand the right to secede beyond the context of classic decolonization recognized in various international legal documents under the heading of "the right of self-determination," thereby eliminating the arbitrary restriction of the right to secede, a limitation that has been rightly criticized for ignoring the fact that injustices as grave as those of classic, "saltwater" colonialism can be perpetrated on subgroups within the state.

My proposal for reforming the international law of secession would eliminate this arbitrariness without creating an over-expansive right of self-determination, because it would recognize only a remedial right of unilateral secession. As part of an "isolate and proliferate" strategy that would uncouple the right to secede from legitimate interests that groups have in various forms of intrastate autonomy, international legal acknowledgement of a remedial right of unilateral secession would avoid the dangerously open-ended rhetoric of a "right of self-determination of all peoples," while at the same time clearing the way for a more permissible and supportive stance toward intrastate autonomy. It would also uncouple self-determination from nationality, by making it clear that nations as such do not have a right to self-determination or to secession.

Second, by making recognition (and nonrecognition) obligatory, not discretionary, this proposal represents a significant erosion of state sovereignty. However, it should be remembered that the most
laudable reforms of international law of this century—including preeminently the prohibition of genocide, slavery, and aggressive war and the protection of human rights generally—have required erusions of state power. Moreover, the justification for limiting the discretion of states to recognize entities created through unilateral secession is the most compelling possible: constraining states in this way is a vital element of a system that acknowledges both that the state's claim to territory can be voided by serious and persisting injustices and that state-breaking is a high-risk enterprise that itself can endanger human rights.

Having clarified the connection between my accounts of secession and of recognition, I now want to show how they can accommodate the conclusions I drew about the place of distributive justice in international law in Chapter 4.

V. Secession and Distributive Justice

In Chapter 4 I defined principles of transnational distributive justice as those that specify a distribution of important social and economic resources and opportunities that the international legal system ought to require states to satisfy in their internal relations. I then argued that transnational distributive justice can at present only play a relatively minor or at least a largely indirect role in international law, chiefly because the international legal system currently lacks the institutional capacity to determine comprehensive, substantive standards of transnational justice and to monitor states' compliance with them, let alone enforce them. I also argued that it is a mistake to infer Deep Distributive Pluralism from current disagreement on standards of distributive justice and thereby exclude distributive justice from any significant role in the ideal moral theory of international law. Finally, I argued that if greater international consensus on such standards develops in the future, transnational distributive justice could come to play a larger role in international law.

These conclusions were grounded in the assumption that at present it is the individual state that is the only entity capable of being the principal arbiter and enforcer of distributive justice. This assumption also has an important implication for proposals to reform international law regarding secession. International law
should handle the problem of secession in such a way as to avoid encouraging the “haves” to secede from the “have-nots,” since this would undermine the redistributive function of the state in conditions under which, with all its imperfections, the state is the only entity capable of discharging this function.

Sometimes secessionist movements appeal to the idea of distributive justice to justify their attempt to exit the state. Basque secessionists and members of Italy’s Northern League proclaim that state policy systematically works to the economic disadvantage of their respective groups and in ways that are morally arbitrary and discriminatory. And if there was a sound justification for the secession of the American colonies from the British Empire it was at least in part that Britain’s mercantile policy constituted discriminatory redistribution.

Discriminatory redistribution, at least in its more egregious forms, is a grave injustice. By pursuing policies that systematically discriminate against a group in the distribution of wealth, the state is violating a fundamental condition of its legitimacy, failing to function as an institutional structure for mutual benefit under the requirement of equal regard for persons. It would seem, therefore, that in addition to the three types of injustices articulated earlier in this chapter (persistent violations of basic human rights, unjust annexation, persistent and major violations of autonomy agreements), we should add discriminatory redistribution to the list of grievances that can morally justify unilateral secession according to the Remedial Right Only Theory.

In *Secession* (1991) I included discriminatory redistribution among the grievances that justify unilateral secession. I now take a more nuanced view, chiefly because I am more clearly focused in the present work on articulating principles that could be effectively incorporated into international law in the near to medium term and because I am now more appreciative of the international legal system’s current lack of capacity to formulate, monitor, and enforce authoritative comprehensive, substantive standards of transnational distributive justice.

Under these conditions of institutional incapacity, an international law concerning secession that recognized a right to unilateral secession on grounds of discriminatory redistribution would not be feasible, unless it were interpreted narrowly to count as discriminatory
redistribution only extremely egregious economic discrimination that would be regarded as such under a wide range of differing views on distributive justice. Failure to meet such a minimal standard of distributive justice would fit under the first grievance included in the Remedial Right Only Theory I am advancing, because it would count as a violation of basic human rights—specifically the right to subsistence and the right against discrimination.

Going beyond this, to include discriminatory redistribution as an additional, distinct ground for an international legal unilateral right to secede at the present time, would probably be unwise for two reasons. First, it would embroil international legal agencies in controversies about the substantive content of transnational distributive justice that they are not presently equipped to resolve in any principled and legitimate way. Second, it might encourage groups to claim that they are subject to discriminatory redistribution and are therefore justified in seceding when in fact they desire to have their own state simply in order to better their own economic situation at the expense of their fellow citizens. In brief, it would encourage secession of the “haves” from the “have-nots”.

Even if international law presently cannot determine substantive principles of transnational distributive justice much beyond the requirement that all citizens of every state have a right to the material requisites of a decent life and a right against discrimination, it can at least support the role of the state in meeting this minimal standard. An international law of secession that facilitated the secession of the better-off groups of citizens would enable the latter to escape their distributive obligations to their worse-off fellow citizens and thereby dismantle the redistributive state. Thus there is yet another advantage of the Remedial Right Only Theory I am proposing: (1) it bars secession by a local majority who are simply trying to avoid sharing their wealth with their fellow citizens, and thereby (2) reduces the risk that members of a better-off group will try to divest themselves of redistributive obligations under the cover of an allegation that they are suffering discriminatory redistribution.

In contrast, the Plebiscitary version of Primary Right Theory, if incorporated into international law, would provide a dangerous vehicle for secession of the better off from the worse off and hence for undermining the only effective agent for distributive justice we
currently have, the redistributive state. Similarly, incorporating into international law the view that nations (as such, apart from any valid remedial claims) have a right or a presumptive right to secede would provide an opportunity for better-off national minorities to press for secession when their main concern was really economic self-interest rather than any lofty vision of the nation as an entity entitled to political independence.\textsuperscript{30}

My suggestion then is that for the foreseeable future efforts to develop a more just and responsive international law concerning unilateral secession should not include discriminatory redistribution as a distinct justifying ground for secession. Instead, it should include a conception of the violation of human rights as a justifying ground that is comprehensive enough to include extremely (and relatively uncontroversial) discriminatory distributive policies. This proposal seems all the more attractive if it is combined with vigorous international support for democracy and the indirect approach to mitigating the worst distributive injustices discussed in Chapter 4.

The importance of democracy for distributive justice should not be underestimated. As Sen and others have argued, democratic governments are much less likely to engage in or at least persist in disastrous economic policies, and where democratic government is augmented by intrastate autonomy rights for especially vulnerable minorities the risk of at least the more extreme forms of discriminatory redistribution is appreciably lessened. In the next chapter I take up the matter of intrastate autonomy rights.

In addition, as Franck emphasizes, indirect support for transnational distributive justice can be achieved by building on current efforts in the areas of more humane international labor standards, trade agreements designed in part to mitigate the disadvantages of poorer countries, policies regarding donations and favorable loan terms for developing countries designed to ensure that the benefits are spread among all citizens, international laws that distribute the

\textsuperscript{30} The Northern League in Italy is perhaps a good illustration of (perceived) economic self-interest clothed in an ensemble of nationalist terror and grievances of discriminatory redistribution. The rhetoric of the League claims both that northern Italians are victims of unjust economic policies and are an ethnically or even "racially" distinct people of Celtic origins. Those of a more cynical or less gullible cast of mind regard the movement as a tax revolt utilizing secessionist rhetoric with an undeniable odor of racist nationalism.
burden of environmental protection fairly, rather than penalizing developing countries, and by creating an international intellectual property rights regime that encourages the wider distribution of biotechnologies that contribute to human health. These measures, taken together with international support for the state-building that is a prerequisite for economic improvement, along with efforts to overcome educational and economic discrimination against women, will do much to eliminate the need for international recognition of discriminatory redistribution as a distinct ground for justified unilateral secession.

VI. Conclusions

In this chapter I have drawn the broad outlines of a theory of how international law should deal with issues of secession and self-determination, developing and refining the views I first advanced in an earlier book and a number of articles. The core idea of my approach is to ground a Remedial Right Only Theory of the right of unilateral secession in a justice-based conception of legitimacy, to uncouple the unilateral right to secede from other, less drastic modes of self-determination and from issues of consensual or negotiated secession, to uncouple self-determination from nationality, and to advocate a vigorous role for international legal institutions in negotiating and supporting intrastate autonomy agreements as an alternative to secession. To make the case for the approach to secession I advocate, I have articulated criteria for evaluating rival theories of the unilateral right to secede and applied them to the comparative evaluation of the main types of theories of the unilateral right to secede.

In the next chapter I consider further the role international legal institutions should play in promoting intrastate autonomy as an alternative to secession, filling out the “proliferate” part of the “isolate and proliferate” strategy for responding to demands for self-determination. There I argue that the domain of transnational justice should include not only international support for individual human rights, but also for intrastate autonomy agreements.