Conscientious Secession

So far I have suggested that there are three types of injustices that international law should regard as grounds for recognizing a unilateral right to secede: (1) large-scale, persistent violations of basic human rights, (2) unjust annexation of the territory of a legitimate state, and (3) states' persistent, serious, and unprovoked violations of intrastate autonomy agreements. I have taken a more cautious view as to whether international law should recognize a unilateral right to secede for permanent minorities.

Two cases, one historical, one contemporary, suggest that there is yet another type of injustice worth considering as a ground for unilateral secession. In the second decade of the nineteenth century a faction of the American abolitionist movement, the Garrisonians, endorsed the slogan "No union with slavery." They believed slavery to be such a great evil that it was morally wrong to remain within a political entity that recognized its legality and actively supported the institution by enforcing the rights of slaveholders. Instead of arguing that they had the right to secede because they were the victims of injustices, the abolitionist secessionists argued that they had the right to secede to avoid complicity in gross injustices committed against others. Call this "conscientious secession." 22

Consider next a possible contemporary example of conscientious secession. Some Montenegrins expressed dismay at the policies of Slobodan Milošević. Enthusiasm for Montenegrin secession from Yugoslavia may have been based primarily on prudential considerations—in particular, the fact that Montenegrins were suffering from sanctions imposed on Yugoslavia as a result of Milošević's actions. But it is not inconceivable that a significant number of Montenegrins wanted to separate for more principled reasons.

At least at the time of this writing, the impetus for Montenegrin secession appears to have been diminished by the removal of Milošević from power and the negotiation of a looser association between Serbia and Montenegro. However, suppose that Milošević...

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22 The idea that the Northern states should secede also had strategic appeal to those who wished to extinguish slavery, because it was believed that the institution would be undermined by massive flights of slaves from Southern states across the new international border to an independent state that would not recognize the rights of their masters to recover them.
had not capitulated in the face of the NATO bombing campaign in
the spring of 1999 and that NATO's intervention had escalated to
include a ground war. Suppose that at that point Montenegro had
seceded. Or suppose that at an earlier point, in moral revulsion to
Serbian ethnic cleansing of Kosovar Albanians, Montenegro had
seceded. In either case, it seems that Montenegrins would have had
a strong moral case for unilateral secession from Yugoslavia on the
grounds that the latter was engaged in a persistent pattern of gross
human rights violations in which they refused to be complicitous.

This additional type of justification for a right to secede, "conscientious
secession," has considerable moral appeal. It represents an
expansion of the Remedial Right Only Theory I have hitherto
endorsed. However, it is very much in the spirit of the Remedial
Theory and of the justice-based theory of legitimacy upon which the
latter rests. What "conscientious secession" has in common with
secession as a remedy of last resort against persistent large-scale viola-
tions of the human rights of the secessionists and against the unjust
taking of territory is the idea that by violating important rights a gov-
ernment can lose legitimacy and weaken the claims of the state to a
part of its territory.

Should a morally enlightened international legal order recognize
a right to "conscientious secession"? One might argue that the
appeal to such a right is more likely to be abused than in the case of
a remedial right that is restricted to the first two types of injustices
(persistent large-scale violations of the basic human rights of seces-
sionists and unjust annexation of the territory of legitimate states).
The worry is that some group within a state might use the pretext
of violations of the rights of others as a cover for secession that
really was undertaken for altogether different reasons. There is also
the concern that a group might be too ready to secede on the
grounds that the government was oppressing another group rather
than investing in attempting to change the government's policy.

Whether or not international law ought to recognize a unilateral
right to "conscientious secession" is a difficult issue. Even if the
answer is negative, one can still imagine cases where a morally sensi-
tive international community would in effect make an exception to
the law and not penalize a unilateral secession that was under-
taken as a last-resort strategy for a group to dissociate itself from an
evil state.
In other words, the reasonable approach might be for the international community to recognize a liberty-right, but not a claim-right to conscientious secession, either formally through a modification of the international law of secession or informally, by simply not supporting the state’s claim to preserve its territorial integrity. My inclination is to conclude that this approach is preferable to attempting to create an international legal right to conscientious secession.

Failed states and sauve qui peut separation

I now want to introduce a distinction that I and many others have tended to neglect: the distinction between separation from a functioning state and the attempt to form a new state in a situation of state breakdown, where there is no functioning state.

The contrast between the secession of Slovenia and Croatia from Yugoslavia and the possible secession of Quebec from Canada illustrates the distinction. At the time Slovenia and Croatia declared their independence, the constitutional order in Yugoslavia was already dissolving—Yugoslavia broke down before it broke up. Key constitutional processes, including the rotation of the Federal Presidency, had ceased to function. Increasingly there was good reason to believe that the delicate system of checks and balances to reduce the threat of discrimination against minorities was no longer reliable.

In short, the breakdown of the constitutional order created a situation of radical insecurity in which people understandably feared that their most basic rights, as individuals and as members of ethno-national groups, were imperiled. In these circumstances, secession by Slovenia and Croatia could perhaps be seen as an act of self-defense—what I shall call *sauve qui peut* separatism.²⁴

Some might argue, however, that Yugoslavia was still a functioning state—though an impaired one—when Croatia and Slovenia declared their independence. (In fact some argue that Slovenia deliberately took actions aimed at undermining Yugoslavia’s ability to function.)

²³ I am grateful to Russell Shaffer-Landau for clarifying this option.
²⁴ The next paragraphs draw on Buchanan, ‘Secession, State Break-Down, and Intervention’.
If the examples of Croatia and Slovenia seem less than fully persuasive, consider the current state breakdown in the Democratic Republic of Congo. *Sauve qui peut* separation may well prove to be a reasonable last-resort exercise of the right of self-defense for any of several regions in this failed, violently chaotic state.

I choose the term 'separatism' here to signal that the attempt to form a new political entity capable of protecting one's rights under conditions in which one can no longer rely on the previous political order is quite different—normatively speaking—from what ordinarily goes under the heading of 'secession'. The latter term is usually employed to characterize breaking away from a functioning state.

In an international system in which no third party can be relied on to shore up the disintegrating state in a way that gives credible assurance that basic rights will be protected, attempting to form a new state in a portion of the territory may be a reasonable strategy. Morally speaking, self-defense or *sauve qui peut* secession seems justifiable under conditions of state breakdown in an international legal system that is still to a large extent better able to authorize self-help than to provide aid to failing states.

In contrast, consider the possible secession of Quebec. Canada is a functioning state, and one that does an exemplary job of protecting individual and minority rights. Here, unlike the Yugoslav case, it would be implausible to appeal to self-defense as a justification for separation.

With only minor modification, a Remedial Right Only Theory can properly recognize the normative force of the distinction between secession from a functioning state and *sauve qui peut* separation under conditions of state breakdown. According to the Remedial Right Only Theory, secession from a basic rights-protecting state is not justified (absent agreement or constitutional process), but is justified as a remedy of last resort for violations of basic rights. Such a theory can be extended to justify *sauve qui peut* separation by adding the principle that where there is no functioning state, and a situation of radical uncertainty exists in which basic rights are seriously at risk, groups are justified in attempting to form their own states in order to protect their basic human rights. This addendum coheres with the fundamental idea of a Remedial Right Only Theory: that unilateral secession from a rights-respecting state is not permissible and that
only the need to protect basic rights can justify something so radical as unilateral secession.

Elaborating this addendum would require articulating an account of the scope and limits of the right of self-defense. Presumably a group’s right to form its own state as a means of self-defense is a limited right, just as the individual’s right of self-defense is. (For example, generally speaking, I am not permitted to infringe the basic rights of innocent persons in order to defend myself from attacks by others. Similarly, I cannot claim that I acted in self-defense in killing another person if I provoked him to attack me.) Here I can only issue a promissory note that such elaboration could be successfully achieved, but the central point is this: the fact that determining the limits of the right of self-defense is a complex and disputed matter does not show that there is no right of self-defense, either for individuals or for groups. It only shows that the right is qualified.

I have just argued that there is a strong moral case for saying that a group can be morally justified in trying to set up a new state in a portion of the territory of a failed state. But whether, and if so under what conditions, a group’s right to attempt to set up a new state in the portion of the territory of a failed state should be recognized in international law is a vexing question.

One difficulty is that recognizing such a right would provide an incentive for a scramble to capture resources. To revert to the example of Congo again: the best prospects for establishing a viable state would presumably lie in the portion of that country that holds the greatest mineral wealth. International support for a new state in that territory presumably would make it even more difficult for a regime of law and order to emerge in the portion of the state that remained.

Even worse, those in a richer portion of the state might help create state failure in order to have a legally recognized justification for what is really a secession of the haves from the have-nots. (In fact some Serbs accuse Slovenian leaders of doing precisely that.) In Chapter 4 I emphasized that in a world in which the only thing approaching an effective agent of distributive justice is the individual state, international legal rules regarding separation should not generate incentives that undermine what little distributive justice there is.

There is, then, a dilemma. On the one hand, under conditions of violent anarchy it seems justifiable for those living in a portion of
the territory of a failed state to seek to establish a haven in which their basic human rights are respected; so it seems excessive to demand that they choose instead the much more risky or even impossible task of creating a rights-respecting regime in the full extent of the failed state’s territory. On the other hand, international legal recognition of a right of sauve qui peut separation runs the risk of worsening the problems of state failure, both by encouraging the sabotage of functioning states by people in resource-rich regions who prefer not to share the wealth and by allowing groups who happen to be in wealthier regions to deprive their fellow citizens of resources that are needed to rebuild failed states.

The problem of sauve qui peut separatism deserves more extensive consideration as only one element of a principled approach to a wider range of problems that arise when states fail. In particular, there is the need for an examination of the morality and feasibility of the long-term interventions that would be needed to help rebuild shattered states, and this would require a moral theory of international legal stewardship regimes.

Any attempt to draw even the broad outlines of such a theory lies beyond the scope of this book. Here I can only suggest that as in the case of conscientious secession the options are not limited to either recognizing a claim-right or condemning. For now, in the absence of anything approaching an adequate international response to state failure, the most reasonable course may be to stop short of recognizing an international legal claim-right to sauve qui peut separation, while remaining open to the possibility that in some cases the international legal community should tacitly endorse efforts to make new states from fragments of states by turning a deaf ear to the governments of failed states when they claim a right of territorial integrity that can no longer reasonably be ascribed to them.

Strengths of the Remedial Right Only approach

Now that the main outlines of the Remedial Right Only approach have been drawn, its attractions can be reviewed. Perhaps the most obvious virtue of the Remedial Right Only Theory is that it accords with the intuition that unilateral secession, like revolution, is a very serious matter, requiring the most weighty justification. Given the tendency of secession to provoke massive violence and cause severe
political instability, the strength of the Remedial Right Only approach is that it recognizes the gravity of the matter by placing a significant constraint on unilateral secession: The international legal system should recognize a unilateral right to secede only when independence is the remedy of last resort against serious, persisting injustices.

A second and at least equally important virtue of the Remedial Right Only approach is that it provides a straightforward and compelling account of the claim to territory that is essential to secessionist demands. According to the justice-based theory of legitimacy on which the Remedial Right Only Theory is grounded, a state's claim to territory can be voided by a persisting pattern of serious injustices, because it is the provision of justice that justifies state power in the first place.

Third, the Remedial Right Only Theory gets the incentives right. On the one hand, states that protect basic human rights and honor autonomy agreements are immune to legally sanctioned unilateral secession and entitled to international support for maintaining the full extent of their territorial integrity. On the other hand, if, as the theory prescribes, international law recognizes a unilateral right to secede as a remedy for serious and persisting injustices, states will have an incentive to act more justly. The incentives for just behavior will be strongest if the remedial right to secede is understood to coexist with a right to recognition on condition that the normative criteria for legitimacy are satisfied—in other words, if recognition is not left, as it now is, to the discretion of states.

The Remedial Right Only Theory also appears to score high on the desiderata of moral progressivity, progressive conservatism, and moral accessibility. Its incorporation into international law would reduce the risk that responses to secessionist crises would exhibit the vacillation and inconsistency that characterized the international community's response to the dissolution of Yugoslavia, and this would surely count as moral progress. And, as I have already noted, the incentives its institutionalization would create would exert pressure on states to improve their behavior. So the theory has the virtue of moral progressiveness.

Although institutionalizing the theory would require changes in international law, they would be changes that build on the most progressive constituent of the existing system, the evolving law of
human rights. Tying recognitional legitimacy and the right to territorial integrity to the protection of human rights would strengthen the system's commitment to the latter. To that extent the Remedial Right Only Theory exhibits the virtue of progressive conservatism as well.

The Remedial Right Only approach also scores high on the desideratum of moral accessibility. Unlike Primary Right Theories, and especially the nationalist version of Ascriptive Theory, incorporating the Remedial Right Only Theory into international law would not pose a risk of large-scale violence and instability. The force of this last point will become clearer below, when we explore Primary Right Theories in detail.

Finally, the Remedial Right Only approach to the unilateral right of secession exhibits the virtue of moral convergence. A wide range of moral views support the commitment to human rights, recognize the right to take back unjustly taken sovereign territory, and acknowledge the importance of the keeping of agreements, including autonomy agreements. In contrast, Primary Right Theories appear to depend upon much more controversial moral assumptions about what can generate a valid claim to territory, whether it is the existence of an ascriptive group (the idea that all nations have a right to their own state) or the mere will to have an independent state (in the case of Plebiscitary Theories). From the standpoint of providing an explanation of the validity of the secessionists' claim to territory, Remedial Right Only Theory seems to require less morally controversial assumptions than its rivals.

The statist bias objection

Some critics have complained that my presentation of the Remedial Right Only Theory in Secession (1991) assumed a bias in favor of the status (i.e., statist) quo by requiring secessionists to bear the burden of argument by establishing a grievance against the state. Why, they asked, should the burden of argument fall on the secessionists? Surely—as I myself explicitly conceded—a liberal political theory must accord a presumption to the free choice of individuals regarding what polity they wish to belong to.

I believe I have convincingly answered this objection in Part Two of this book, where I articulated the main outlines of a theory of the legitimacy of states. There I argued for a justice-based conception of
legitimacy, according to which only states that meet or exceed a minimal justice standard with respect to their internal and external actions have a valid claim to their territory. Against the background of this conception of legitimacy, the Remedial Right Only Theory does not embody an arbitrary bias in favor of the status quo. On the contrary, the Remedial Right Only view is founded on a theory of what gives a state a valid claim to territory, a theory that is a natural fit with the Remedial Right Only view's position that by persisting in serious injustices a state can void its claim to a part of its territory. Furthermore, those who raised the status quo objection did not distinguish between unilateral and consensual secession and therefore overlooked the fact that the Remedial Right Only Theory (which applies only to the former) can allow for secession without requiring that the secessionist prove that they are victims of injustice.

The irrelevance objection

Other critics have complained that the Remedial Right Only Theory is disturbingly irrelevant to the concerns of most groups seeking self-determination, because in most cases it is nationalism that fuels the quest for self-determination, not grievances of injustice that can be stated independently of nationalist claims. I have two replies to this objection. First, because national minorities are frequently the targets of the state's worst human rights abuses, in many cases the Remedial Right Only Theory will ascribe the right to secede to national groups. The Remedial Right Only theorist does not reject claims to independence on the part of nations, but only the stronger—and in my view unjustified—claim that nations as such (in the absence of serious injustices) have a unilateral right to secede.

Second, and more important, the Remedial Right Only Theory I am endorsing in the chapter is only a theory of the unilateral right to secede, not a comprehensive theory of self-determination. Consequently, it must be evaluated as an element of a larger theory that takes the value of self-determination—or rather the plurality of values that self-determination serves—very seriously.

Recall that secession is only the most extreme form of self-determination. Short of independent statehood there is a broad range of self-determination arrangements, with varying degrees and dimensions of autonomy within the state. In the end, the plausibility of the Remedial Right Only Theory of the unilateral right to secede depends upon the credibility of the overarching theory of self-determination of which it forms a part, and in particular upon whether the latter gives legitimate nationalist aspirations their due.

The most promising way to achieve the needed theoretical integration is to embed the Remedial Right Only Theory of the unilateral right to secede within what I have called the "isolate and proliferate" strategy. The only alternatives, in other words, are not recognizing a unilateral right to secede for nations (as Ascriptive Right Theory would have it) or ignoring the phenomenon of nationalism. If international law decisively uncouples secession from other forms of self-determination, it can support a variety of intrastate autonomy arrangements, including those tailored to the needs of national minorities, without embracing the disastrously destabilizing and normatively unsupported notion that every nation has a right to a state of its own. In the next chapter I explore the ways in which the international legal order should support self-determination for groups within states.

**Plebiscitary (Primary Right) Theories of secession**

The initial appeal of the Plebiscitary variant of Primary Right Theory is that it appears to make the determination of boundaries a matter of choice or, more accurately, majority rule. Thus Plebiscitary Theorists attempt to support their views by appeals to the value of liberty and that of democracy.

However, this is extremely misleading. The liberty in question turns out to be exclusively the liberty of those who happen, at a given time, to be the majority in a portion of the state's territory unilaterally to sever it from the state and unilaterally to change the citizenship of those residing in that region who do not wish to be

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26 This section draws on Buchanan and Golev, 'Philosophy of International Law', 929-16.
part of a new state. Thus the “majority rule” involved in the exercise of the putative Plebiscitary unilateral right to secede is not the rule of the majority of the citizens of the state, but rather the rule of the present majority within a portion of the state’s territory to override the rights of the citizenry as a whole to the entire territory of the state.

Recall that according to the doctrine of popular sovereignty, which lies at the core of liberal political theory, the state’s territory is more accurately described as the people’s territory, the point being that it is the territory of the people as a whole, not just a collection of parcels of territory each owned by those who at a particular time happen to reside in them.

In other words, according to the doctrine of popular sovereignty, the people as a whole stand in a special relationship to the whole territory of the state. It is their territory in two distinct senses. The laws that are applied there are (1) supposed to give priority to their benefit and (2) it is they who ultimately are to determine who makes, applies, and administers those laws. Granted this view of the relationship between the people of the state and state territory, it makes no sense to say, as the Plebiscitary Theory does, that a subset of the people, those who happen to reside in a portion of the territory at a particular time have the right to lop it off and set up a new, independent jurisdiction there, simply because a majority of them wish to do so. Were they to attempt to do this, all the other citizens of the state would have a just grievance against them. So a plebiscitary unilateral right to secede is incompatible with the rights that are included in popular sovereignty.

As the Remedial Right Only Theory stresses, the right of the people as a whole to the whole territory of the state is unconditional. Persistent violations of human rights can undermine the claim to territory and thereby justify secession where secession is the remedy of last resort for these injustices. The Plebiscitary Theory, in contrast, repudiates the rights associated with popular sovereignty to cut up, even in the case of fully legitimate and even perfectly just states.

The Remedial Right Only view I am advancing endorses the commonsense understanding of popular sovereignty while explaining what makes it plausible. According to the Remedial Right Only view, there is no right of unilateral secession against a legitimate
state because a legitimate state has a valid claim to its territory. The Remedial Right Only Theory I am proposing is to be understood as being embedded in the larger moral framework for international law I have developed in earlier chapters. On the assumption that the international legal system is to be regarded provisionally as a state system, it makes sense to hold that the people of a legitimate state, which on my view is one that is at least minimally democratic and does a credible job of protecting basic human rights, are entitled to exercise jurisdiction over the territory of their state. But this means that no portion of the citizenry, simply because it decides to create its own state, has a unilateral right to take away part of that territory to create a new jurisdiction.

It is no doubt true that at bottom there is something morally arbitrary about assuming that even the people of a democratic, human rights-respecting state are entitled to exclusive control over the territory that happens to be within the borders of their state and all the resources it contains. Democratic states, like other states, now enjoy near complete dominion over the resources within their borders and an almost unlimited ability to prevent noncitizens from enjoying them by immigrating there, and this surely contributes to distributive injustices.

As I argued in Chapter 4, as international institutional capacity for determining and implementing principles of distributive justice improves, it is to be hoped that various elements of the bundle of rights now lumped together under the sovereignty of the people will be unpacked and limited in the name of the basic moral equality of all persons. But from the fact that the control over resources that the citizens of particular states presently enjoy is problematic from the standpoint of justice, it does not follow that there is much of anything to be said for instituting an international legal rule that allows a majority of persons in a portion of such a state unilaterally to create a new state there!

At least as long as we are operating in a system in which states play a significant role, there are two reasons to deny that a plebiscite in a portion of a legitimate state should suffice to sever the territory. First, from the standpoint of a fundamental concern about justice, there is much to be said for having international legal rules that protect from dismemberment states that have done a decent job of protecting human rights within their borders. After all, in a world
like ours, even the local achievement of minimal democracy and the protection of basic rights is a rare accomplishment, and most likely a rather fragile one. Second, again taking justice as the primary value, it seems much more plausible to say that the provision of justice grounds the claim to territory than the mere desire of the majority of persons who happen to reside there to have a state there.

The most serious and obvious weakness of the Plebiscitary Theory of the unilateral right to secede, then, is its account of what grounds the secessionists' right to the territory on which they seek to establish a new state. Just how deficient this account is becomes fully apparent when one recalls that, according to the Plebiscitary Theory, the state from which unilateral secession occurs can be a perfectly just one. As a general account of what grounds valid claims to territory, the Plebiscitary Theory looks dubious indeed: valid claims to territory come and go as majorities in favor of independence in a region wax and wane. Plebiscitary Theory thus makes state boundaries liable to extraordinary instability and hence can hardly be regarded as a progressive proposal for changing international law. (And this is quite apart from the fact that such a view is unfeasible due to the fact that it is very unlikely ever to be incorporated into a system in which states currently play a major role in determining what the law is to be.)

My objection that Plebiscitary Theory is committed to a very implausible account of what gives a group a valid claim to territory (namely, their mere presence in the territory coupled with a desire for independence) of course assumes a different theory of political legitimacy as a basis for the claim on the part of the whole citizenry to the state's whole territory. I have delineated the main contours of that theory in Part Two. The Plebiscitary Theory of the unilateral right to secede can be understood as assuming its own theory of political legitimacy; but it is a very deficient one. For to make sense of the Plebiscitary Theory one must assume some version of the Consent Theory of political legitimacy or authority and then argue that unless unilateral secession by a majority in a portion of the state is permitted, it cannot be said that all the citizens consent to government. 27

I have already argued in Chapter 5 that the notion of political authority is irrelevant to the question of political legitimacy and also rehearsed there the all-too-familiar objections to the consent theory of political legitimacy. Here I will only add one more. If consent of all the citizens is necessary for political legitimacy (for the state to be justified in making, applying, and enforcing laws), then how could a majority vote of only those in a portion of the state’s territory, as opposed to a unanimous vote, establish a new legitimate political entity?

The problem can be stated as a dilemma. If the consent of all really is necessary for political legitimacy, then a unilateral right to secede by plebiscite is a dead letter, because there are virtually no cases in which everyone in a region of the state will wish to secede. But if the consent of all is not necessary, then why should the will of those who happen to be a majority in a particular portion of the state, rather than the will of the majority of the citizens as a whole, determine whether the state’s territory shall remain intact or be divided?

In addition, the Plebiscitary Theory of the unilateral right to secede scores poorly on the desideratum of incentive compatibility. As Donald Horowitz and I have both observed, incorporation of a Plebiscitary Right to unilateral secession in international law would most likely undermine strategies for increasing governmental efficiency, increasing local self-determination, and reducing intrastate conflicts through decentralization, including various forms of federalism and consociationalism. If state leaders know that unilateral secession will be considered a right under international law for any group that can muster a majority in favor of it in any portion of their state, they will not be receptive to proposals for decentralization. They will view decentralization as a first step toward secession, because creation of internal political units will provide the basis for future secessions by plebiscite.

International recognition of a plebiscitary unilateral right to secede would also create perverse incentives regarding both immigration

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and economic development. States that did not wish to risk losing part of their territory (which includes virtually all of them) would have a strong reason for limiting immigration (or internal migration) that might result in the formation of a pro-secession majority in a portion of the state's territory. And to deter secession by existing internal political units, the state might even seek to prevent them from becoming sufficiently developed to be economically viable. (The Soviet Union's policy of dispersing major industries among the Republics was very likely motivated at least in part by precisely this consideration.)

I observed earlier that although some proponents of Plebiscitary Theory tout it as following from the principle of democracy, in fact this theory arbitrarily confers a unilateral democratic right to change state boundaries on those who happen to reside in a portion of the state's territory, thereby ignoring the democratic rights of the citizenry as a whole, in effect repudiating the principle of popular sovereignty. Elsewhere I have explored in considerable detail the relationship between democracy and secession. That analysis reinforces the conclusion that it is an error to try to justify the Plebiscitary Right to unilateral secession by invoking the principle of democracy. Here I will only indicate some of the reasons why this is so.

It is a mistake to think that the commitment to democracy requires recognition of a plebiscitary unilateral right to secede, because the chief justifications for democratic governance within given political boundaries do not support the thesis that boundaries may be redrawn by majority vote. One chief justification for democracy contends that it is required, as a matter of equal regard for persons, that they should have an equal say or participate as equals in the decisions that determine the fundamental character of the polity in which they live. Yet clearly this justification for democracy does not imply that the decision whether to change boundaries should be made unilaterally by a majority in favor of secession in a portion of an existing polity rather than being determined by a majority of all the citizens.

In other words, the first justification for democracy tells us that all who live within the jurisdiction of a system of rules that determine the fundamental character of social life should participate as equals or have an equal say in deciding what those rules are. But this does not tell us what the boundaries of the polity should be, since in order to implement the principle of democracy we must have already fixed the boundaries of the polity.

The second, or instrumental, justification for democracy holds that democratic governance is the most reliable protector of basic human rights. Here, too, the force of the justification for democracy depends upon the assumption that what is being justified is a decision-making process for a polity, the whole polity. The key idea is that where all citizens have a voice in the process, basic human rights will be more likely to be protected. But if so, then this argument clearly cannot support the claim that only some citizens (namely, those in a particular portion of the polity) ought to be able unilaterally to decide a matter that will affect all citizens. So the instrumental argument for democracy cannot support a plebiscitary unilateral right to secede either. Moreover, in the real world the exercise of a plebiscitary right would make the human rights of minorities vulnerable to violation because it would enable a majority in a region of the state to create its own ethnically exclusive state and then cheerfully go about the business of persecuting minorities within it. For all of these reasons, the first type of nonremedial or Primary Right Theory of the unilateral right to secede, the Plebiscitary Right Theory, ought to be rejected as a basis for reforming international law on secession.

Ascriptive (Nationalist) Theories

This type of Primary Right Theory confers a right to secede on ascriptive groups, variously referred to as peoples, distinct peoples, encompassing cultures, or, more commonly, nations. In its dominant form, this normative approach to unilateral secession has a long pedigree, reaching back at least to nineteenth-century nationalists such as Mazzini, who proclaimed that every nation should have its own state.

Before proceeding we must fix on a definition of ‘nation’ that is at least roughly serviceable for present purposes. Doing so is not
without risk, considering the multitude of definitions that have been proposed. Nevertheless, we can begin with a useful characterization proposed by Margalit and Raz, according to which nations are “encompassing cultural groups” defined as large-scale, anonymous (rather than face-to-face) groups that have a common culture and character that encompasses many important aspects of life and which marks the character of the life of its members, where membership in the group is in part a matter of mutual recognition, is important for one’s self-identification, and is a matter of belonging, not achievement.\textsuperscript{52}

In addition, like most theorists of nationalism, Margalit and Raz emphasize that the identity of the encompassing cultural group includes a historical attachment to a particular territory, a homeland. This last element is significant. Without it the distinction between nations and non-national, for example, ethnic or religious groups that sometimes have the other features of encompassing cultural groups would be lost. Furthermore, any conception of nations that omits this crucial connection with a homeland, a particular piece of land, runs the risk of sliding over one of the most troubling features of the alleged right of national self-determination—the fact that in virtually every case more than one nation claims the same piece of territory. Thus as Jacob Levy has observed, Yael Tamir makes her project of reconciling nationalism with liberalism—and with international stability—seem much easier than it is by omitting the territorial aspect of nationalist aspirations.\textsuperscript{53}

What is still lacking in this characterization of nationalism, even if the connection to a homeland is added, but which is emphasized in the preponderance of scholarly writing on nationalism, is that among the members of the group there is an aspiration for some form of self-government for the group. As David Miller aptly puts it, nations are inherently political in their aspirations.\textsuperscript{54}

\textsuperscript{52} Margalit and Raz, "National Self-Determination."
\textsuperscript{54} Miller, On Nationality, II. For brevity we could then say that nations are encompassing cultural groups that associate themselves with a homeland and in which there is substantial (though not necessarily unanimous) aspiration for self-government of some kind (though not necessarily full independence) in that homeland.