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International Law and Secession

Two features of the contemporary international politics make the topic of secession and its treatment by international law a morally critical one. The first is the large number of secessionist movements currently agitating for the creation of an independent state, including (but hardly limited to) those in Quebec, Scotland, Catalonia, Kashmir, the southern provinces of Thailand, the Berber regions of Morocco and Algeria, and the Kurdish regions of Turkey and Iraq. The second is the fact that the state remains the primary actor within the international legal order, the entity on which it bestows most of the rights to create, apply, and enforce law. With respect to international law, then, nothing is more important to a political community than its recognition as a state. Insofar as secession is presently the primary mechanism whereby new states may emerge, the stance international law takes regarding its permissibility ought to figure centrally in our judgment of the international legal order's moral justifiability.

Our exploration of this topic begins in section I with a brief characterization of secession and its current status in international law. We also distinguish three different questions we can pose regarding the moral justifiability of secession. In sections II and III, we examine competing answers to questions that any theory of state secession must address. First, what sort of actor enjoys a moral right to secede, and in virtue of what features or considerations does that actor do so? Second, on what particular territory is an actor with a right to secede permitted to exercise that right? As these questions indicate, state secession involves the denial of an existing state's rule over both particular people and a particular territory. Hence a moral theory of secession, and of a morally defensible international legal norm governing secession, must include both an agential component and a territorial component. In sections IV and V, we consider arguments for and against several international legal norms we might adopt to regulate secession, drawing on both moral theories of secession and empirically informed conjectures regarding the incentives those norms might create for various international and domestic actors.

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1 SOME PRELIMINARIES

Secession involves, essentially, a claim to sovereign equality. Necessarily, to attempt to secede is to assert both one's independence from the rule of the agent that previously enjoyed jurisdiction over one, and one's enjoyment of the same rights, liberties, powers, and immunities possessed by the agent whose jurisdiction one now contests. Our concern in this chapter is with state secession, meaning the attempt to create a new state within the existing international legal order. Consider, for example, the 2014 referendum on Scottish secession. Participants were asked whether Scotland should become an independent country; that is, whether Scotland should no longer be subject to rule by the government of the United Kingdom, and instead become its own state, one with the same international legal rights, liberties, powers, and immunities enjoyed by the UK and other states.[1]

State secession can be either consensual or unilateral. In the former case, the existing state makes no effort to prevent a portion of those it rules from creating a new state on part of its territory (and, in some cases, may even take positive steps to advance that aim). Since international law places no obligation on states to preserve their territorial integrity or their rule over particular populations, it creates no obstacles to consensual secession. That is not true when it comes to unilateral secession, that is, cases where the existing state does object to any attempt by some of those it rules to create a new state on a portion of its territory. Apart from decolonization, international law does not attribute to any group a right to unilateral secession. While it does not explicitly prohibit such conduct, international law does include norms that disfavor secession, including, most importantly, the right of existing states to use force to maintain their territorial integrity. Moreover, with the exception of Kosovo, the international community has recognized the emergence of a new state only once the original state abandoned its claim to authority over the group attempting to secede (and, more or less, the territory they claim for their new state). Perhaps the best way to characterize international law's current stance toward secession, then, is to say that it creates a presumption against it, but ultimately treats the resolution of secessionist conflicts as a matter of extra-legal politics.[2]

What morally justifies secession? Before we attempt to answer that question, we must be careful to distinguish it from two others with which it may be easily confused. The first of these is what reason(s), if any, morally justifies secession in this particular case? The second is, what reason(s) morally justify the optimal legal norm governing secession; for example, the morally best international legal norm governing secession under current conditions? Suppose, for illustrative purposes,

[1] For a detailed defense of this analysis of secession in general and state secession in particular, see David Lefkowitz, "International Law, Institutional Moral Reasoning, and Secession," *Law and Philosophy* 37, 4 (2018): 387–91.

[2] See Daniel Thurer and Thomas Burri, "Secession," in *The Max Planck Encyclopedia of Public International Law*, ed. Rudiger Wolfrum (Oxford: Oxford University Press, 2009).

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that the advancement of national self-determination provides a reason that morally justifies secession. It does not follow necessarily that a particular nation's attempt to secede here and now is morally justifiable, for there may be other, more weighty, moral considerations that count against secession in this case. Indeed, as we will see it may be that in some contexts the advancement of national self-determination itself counts against secession. Neither does the fact that the advancement of national self-determination provides a reason that morally justifies secession necessarily entail that all nations ought to enjoy an international legal right to secede. Here too competing moral considerations may warrant a legal norm that is sometimes, or even never, responsive to the interest nations have in exercising political self-determination. Alternatively, or perhaps in addition, it may be that at least at present international law will best serve the goal of advancing national self-determination if it does not accord all nations a legal right to secede, but instead grants them other legal rights, or is simply silent on the question of national self-determination. Note that these last claims bear on the design of a specific institution at a particular point in human history, namely, present-day international law. A different conclusion may be warranted at other times and/or in other institutional settings.[3]

Typically, when a theorist argues that some reason R morally justifies secession, he or she describes that reason as a *pro tanto* or defeasible consideration that counts in favor of the moral permissibility of secession. Reason R entails a presumption in favor of secession in any particular case, and in favor of international law according a legal right to secede to any agent who can offer R to defend its secession. But, as we just noted, this presumption can be overridden by other moral considerations, in which case we ought to conclude that, in this particular case, secession is not permissible all things considered, or that, all things considered, international law should not accord a legal right to secede to any agent who can offer reason R to defend its secession. Ultimately, our interest in this chapter is with a particular all-things-considered judgment, namely, the content of the morally best international legal norm governing secession now or in the near future.

Nevertheless, we have several good reasons to begin our investigation by considering arguments that attempt to specify prima facie reasons that count in favor of secession by certain groups. First, absent an account of the moral reasons that favor or count against according specific groups an international legal right to secede, we have no moral basis for selecting among competing candidates for the international legal norm that ought to govern secession.[4] For example, a defense of an

[3] For instance, in the case of a multinational state such as present-day Canada, morality may require that the domestic legal order accord those nations subject to rule by the Canadian government a suitably specified right to secede.

[4] More generally, in order to conduct a moral assessment of international law, in light of which we can then argue for or against specific proposals for its reform, we need an account of the proper goals of a morally defensible international legal order, and the means by which international law may, must, or must not contribute to the realization of those goals. Furthermore, the moral standards that govern how international law should or should not seek to advance its proper goals depend on an assessment of

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international legal norm governing secession might be criticized because it fails to be properly responsive to a reason that counts in favor secession. Alternatively, it may be challenged on the grounds that it relies on a mistaken understanding of the *pro tanto* moral reason(s) that certain groups may invoke to justify secession.

Second, insofar as it purports to be a moral assessment of an existing social practice, a moral account of secession ought to take seriously the arguments put forward by those who participate in that practice; that is, those who assert a moral right to engage in unilateral secession, and who sometimes attempt to exercise that purported right, and those who resist such assertions and attempts at secession. Moreover, some secessionists attempt to advance their goal of political independence by claiming that existing international law accords them a legal right to secede, or that it should do so if it is to more fully realize the self-determination of peoples, a goal to which it purports to be committed.[5] Thus, critical reflection on the nature and value of political self-determination, and what sort of group's have a claim to it, is an unavoidable concomitant of due regard for the actual practice of (global) government.

Third, if philosophy enjoys a comparative advantage over other scholarly communities and practitioners, including international lawyers, legal theorists, and social scientists, it likely takes the form of careful and systematic reflection on value and its implications for right conduct and/or a good life. Given our aim of identifying some of the ways in which philosophy can contribute to our understanding and assessment of international law, we would be remiss if we did not engage with philosophers' accounts of the moral grounds for secession.

Arguably, philosophical reflection on ideas or arguments invoked in international relations, including international legal discourse, may be valuable even if it offers little or no practical guidance for immediate or near-term reform. For example, it provides a useful check on an overly conservative approach to both theory and practice. Even if they are ultimately utopian, engagement with ideal-theoretical arguments compel us to explain exactly why that is so, an exercise that may lead us to identify prospects for moral improvement we might otherwise fail to recognize. Ideal theory can also inspire us, and in doing so propel changes that might otherwise be unattainable. This is a double-edged sword, of course; inspiration can produce morally awful outcomes when it blinds us to the various practical barriers that confront attempts to realize the ideal. Yet the kind of incrementalism, or even stasis, characteristic of approaches that eschew ideal theorizing may not only result in missed opportunities for reform but also fail to speak to many of those moved by

its capabilities; that is, what it can and cannot do to shape the conduct of those actors over whom it enjoys jurisdiction (and possibly other actors as well).

[5] Chapter 1, Article 1, of the Charter of the United Nations identifies among that institutions purposes the development "of friendly relations among nations based on respect for the equal rights and self-determination of peoples." United Nations, *Charter of the United Nations*, October 24, 1945, 1 UNTS XVI.

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(what they perceive to be) their own unjust treatment, or the unjust treatment of others. Successfully advancing a nonideal, incremental, approach to the moral reform of international law, including its stance vis-à-vis secession, may require genuine engagement with ideal theory if only to ensure that there is no void in public debate that is filled by a pernicious actor or a well-intentioned but insufficiently realistic idealist. Finally, we should be careful not to overestimate our ability to predict what will be possible in the future, or to underestimate the rapidity with which political, economic, social, and technological changes can make what was previously infeasible or too risky to pursue neither of these things. When new opportunities present themselves, we may be better prepared to seize them if we have engaged in philosophical reflection on values and norms in a manner that was relatively unconstrained by considerations of what we believed to be, at the time, practical or feasible.

II THE AGENTIAL DIMENSION OF SECESSION

Moral justifications for secession typically take the form of asserting that a particular (type of) actor enjoys a right to political self-determination. Political self-determination involves what Allen Buchanan refers to as "an independent domain of political control."[6] The actor in question has an interest in self-government that is morally important or weighty enough to ground, at a minimum, a claim against others that they not interfere with its attempt to exercise self-rule. However, the matters over which an agent with a right to political self-determination ought to enjoy political control, the extent of the control the agent ought to exercise vis-à-vis those matters, and the (institutional) form the agent's exercise of control ought to take, depend on a number of considerations. These include an account of what makes that agent's exercise of self-government valuable, due regard for other moral rights, and factors involved in operationalizing the right, such as the design of legal institutions that will function more-or-less as intended under suitably specified conditions. In some cases, these considerations may warrant only a limited form of self-government; for example, the legal right of a minority nation within a multinational state to the government's conduct of public affairs in that nation's language, as well as the language spoken by the majority. Such intrastate autonomy arrangements can take many forms, and some philosophers and international legal scholars maintain that both political philosophy and international legal reform would be better served by a focus on such arrangements than on secession. Nevertheless, since even many actors that currently enjoy a good deal of intrastate autonomy continue to press for secession, this chapter focuses on the form of political self-determination separatists demand, namely, the independent domain of political control international law accords to all states.

[6] Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 333.

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In this section, we consider three accounts of what makes the exercise of political self-determination valuable enough to ground a moral right; at a minimum, a claim to noninterference in the exercise of political control. The first points to the contribution the exercise of political self-determination makes to advancing individuals' secure enjoyment of their basic human rights. The second appeals to the flourishing of a collective agent, typically a nation, while the third argues that political self-determination constitutes a facet of the exercise of individual autonomy or self-government. While each of these accounts picks out a different type of actor with a right to secede, it is important to note that a particular group may enjoy a right to secede under two or even all three of them. For example, all three defenses of the right to political self-determination arguably entail that Iraqi Kurds enjoy a *pro tanto* moral right to secede from Iraq.

Political and legal philosophers largely agree that victims of widespread and systematic violations of their basic human rights perpetrated or tolerated by the state that rules them enjoy a moral right to secede from it. This conclusion follows from the claim that a state enjoys a moral right to rule its subjects only if it governs in a manner that exhibits a principled commitment to respect for their basic human rights. When a state fails to meet this condition, it has no claim against those it mistreats that they refrain from creating an independent state on a portion of the predecessor state's territory.[7] In short, secession is morally justifiable in this case because it provides a remedy for the grievous injustice committed or allowed by the state.

Other injustices that some theorists argue may be permissibly remedied via secession include systematic discrimination and exploitation, as well as grave threats to the survival of a group's culture.[8] Many theorists go further, however, and argue that secession can be morally permissible even in some cases where the state commits none of the aforementioned wrongs. The *pro tanto* moral right to secede, they argue, is not merely a secondary right, one that agents acquire only as a result of others' failure to respect their primary rights to bodily integrity, or to nondiscrimination, etc. Rather, it is also a primary right, a claim grounded in the interest certain groups have in the exercise of political self-determination, either because self-government is good in itself or because it is a necessary means to their successful pursuit of morally obligatory ends other than respect for basic human rights.

Arguments for a primary moral right to secede fall into two broad categories: nationalist or ascriptive accounts and plebiscitary or choice accounts. Consider, first, the argument that nations enjoy a *pro tanto* or defeasible claim to political independence; that is, to the exercise of political self-determination in their own

[7] Ibid, pp. 353–4; Margaret Moore, "The Ethics of Secession and a Normative Theory of Nationalism," *Canadian Journal of Law and Jurisprudence* XIII, 2 (July 2000): 227.

[8] Buchanan, *Justice, Legitimacy, and Self-Determination*, pp. 357–9; Wayne Norman, "Ethics of Secession as the Regulation of Secessionist Politics," in *National Self-Determination and Secession*, ed. Margaret Moore (Oxford: Oxford University Press, 1998), p. 41.

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states. Paradigmatically, nations are composed of people who satisfy both objective and subjective conditions for a shared or common identity.[9] The objective conditions typically include a common language, history, and public culture, as well as an attachment to a national homeland. The subjective features of a national identity include members' mutual recognition of each other as co-nationals, and an acknowledgment that they have special obligations to one another in virtue of their shared nationality. Finally, nations are composed of individuals who seek to exercise collective political self-determination; that is, who aim to live under laws and a system of government that protects and promotes their own distinctive national identity. All else equal, then, nationalists maintain that we should pursue a world in which every nation is governed by its own state, and every state governs only one nation.

Philosophical defenders of nationalism offer a number of arguments to support the claim that nations enjoy a *pro tanto* moral right to political self-determination.[10] First, the relationship among co-nationals is sometimes alleged to have intrinsic value analogous to that realized in the relationship among family members. In both cases, the individual's position in the relationship constitutes a core element of his or her identity, and some argue, provides a sui generis source of moral obligations. The exercise of political self-determination provides a vehicle for the fulfillment of these obligations, as well as a means for recognizing the importance to its members of their identity as members of a particular national community.

A second argument in defense of national self-determination holds that individual human beings can only lead flourishing lives when they are embedded in a flourishing national culture. National cultures attach specific meanings or values to the various activities that constitute a life, including work, leisure, education, familial life, and, in many cases, religious practice. Individuals who find themselves living in a social world that fails to reflect their national culture will often feel alienated by it, and by the political order that protects and contributes to the (re)production of that social world. As strangers in a strange land, they will find it difficult to live a life they find meaningful or valuable, a fact that will likely encourage them to pursue a strategy of withdrawal from public life. Secession provides one such strategy, as it involves the creation of a new state that serves to protect and reproduce the national culture of (some of) those who were alienated from the social world sustained by the old state.

Third, some nationalist philosophers endorse John Stuart Mill's claim that (stable, long-term) democratic governance is only possible in a one-nation state.

9 See David Miller, "Nationalism," in *The Oxford Handbook of Political Theory*, eds. John S. Dryzek, Bonnie Honig, and Anne Phillips (Oxford: Oxford University Press, 2008), p. 530; Nenad Miscevic, "Nationalism," Section 1, in *The Stanford Encyclopedia of Philosophy* (Summer 2018 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/sum2018/entries/nationalism/.

10 For summary discussions, see Miller, "Nationalism"; Miscevic, "Nationalism"; and Moore, "Ethics of Secession."

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A shared nationality ensures a baseline of trust that enables losers in political contests to accept their defeat, safe in the knowledge that the winners' exercise of political power will be limited by their recognition of the losers as co-members of the community to whom they have special obligations. In contrast, where politics pits members of one nation against another, with no common overarching identity, losers are likely to be far less willing to accept their defeat, and winners far less likely to constrain their exercise of political power out of respect or concern for the interests of the losers.

Finally, some philosophers argue that a common nationality is a necessary condition for the achievement of social justice. Insofar as the achievement of social justice requires that the state redistribute resources from the advantaged to the disadvantaged, its realization depends on a substantial degree of willing support for such transfers from the former. Some nationalists maintain that this support will be forthcoming only if the advantaged conceive of the individuals who benefit from these transfers as co-nationals to whom they have special obligations, akin to members of a (very) extended family. Conversely, the more those who enjoy economic success in life conceive of the beneficiaries of redistributive policies as members of other nations, differing in their appearance, in their language, in their history, in their culture, and in their ancestral home, the less likely they will be to support these policies.

Each of these defenses of the value of national self-determination may be challenged. For example, the success of multinational states such as Canada and Switzerland at realizing both stable democratic governance and a fair degree of social justice (at least by comparison to most other states) provides a challenge to the last two arguments for a national right to political self-determination canvased above. Nationalists might respond that the challenge is only apparent, on the grounds that Canadians and Swiss constitute nations, albeit ones in which subnational identities figure more prominently than in the case of other nationalities. Arguably, this rejoinder moves nationalism in the direction of constitutional patriotism, since it appears to involve narrowing the common culture and identity that makes people members of a common nation to a shared commitment to certain political principles and practices, and to an emphasis on a community's specifically political history (as opposed to its social, cultural, or religious history). But rather than investigate further whether the arguments for a national right to political self-determination canvased above ultimately succeed, let us instead consider what follows for secession if they do.

Thoughtful nationalists recognize the impossibility of redrawing state borders so that every state encompasses only a single nation. Moreover, liberal-nationalists acknowledge that respect for basic human rights takes priority over the exercise of political self-determination. David Miller argues that these two commitments entail that nationalists should not rely on what he labels the numbers principle to

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determine where political boundaries ought to lie.[11] The numbers principle holds that we should seek to maximize the number of people who live in a state in which their nation forms the majority. The consequences of applying this principle will frequently be dire for the "trapped minority" in both the new state and the remnant state that secession creates. Successful secessionists frequently treat whatever national minority exists within the territory of their new state worse than they were treated by the state that previously ruled them. Moreover, the original state is less likely to make accommodations for members of the seceding nation who continue to live in its territory, since they now make up a smaller percentage of the population, and are likely to be perceived as having the option of relocating to the new state in which their nation is the majority.[12] Given the goal of promoting national flourishing for *all* of a nation's members, and not just those who reside in a state where their nation is the majority, as well as the moral importance of ensuring that all people securely enjoy their basic moral rights, liberal-nationalists themselves will sometimes argue against secession and for the preservation of a multinational state. Likewise, a commitment to the moral importance of national self-determination does not necessarily rule out support for the creation of new multinational states or super-state political orders such as the European Union. With respect to the international law, then, nationalism's concern with promoting national flourishing in a world where nations are inextricably territorially mixed cautions against too quickly inferring from the fact that nations have a *pro tanto* moral right to political self-determination that they ought to enjoy an international legal right to unilateral secession.

The noninstrumental value of self-determination also provides the foundation for choice or plebiscitary defenses of the moral right to secede. Unlike nationalists, however, choice theorists derive the right to secede from individual autonomy, and in particular, each individual's freedom to determine with whom they wish to associate for political purposes. The limiting case of a choice theory of secession treats political association itself as morally optional. Most plebiscitary theorists reject this view, however, on the grounds that membership or participation in a state is a necessary means to, or constitutive of, the minimally just treatment of others. Nevertheless, the constraint that justice imposes on individuals' exercise of their right to freedom of association appears to be consistent with the creation of far more states than exist today. Specifically, choice theorists maintain that a group has a *pro tanto* primary moral right to secede if: (a) it is willing and able to create a new state that satisfies the requirements of minimal justice domestically and internationally (for instance, its subjects secure enjoyment of their basic moral rights), and (b) what

[11] David Miller, "Secession and the Principle of Nationality," in *National Self-Determination and Secession*, ed. Margaret Moore (Oxford: Oxford University Press, 1998), pp. 69–72.

[12] Indeed, in some instances, members of a trapped minority have been forced to relocate to a state in which their nation is the majority.

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remains of the original state after secession also comprises a group of people willing and able to satisfy these same requirements.

Choice theorists often eschew any attempt to defend the claim that (most) human beings have the status of autonomous agents, and that, in virtue of that status, they enjoy a right to freedom of association. Instead, they direct their arguments to those who already accept both of those claims, and then argue that the only morally justifiable grounds for limiting individuals' freedom to choose with whom to associate for political purposes are those imposed by the demands of minimal justice. In this regard, choice theories of secession often reflect a liberal approach to the justification of government, one that begins with a presumption of individual liberty and that places the burden of justification on any agent or institution that seeks to limit that liberty.

Andrew Altman and Christopher Wellman, for example, defend their version of the choice theory of secession by inviting their readers to reflect on a hypothetical case in which the United States forcibly annexes Canada.[13] Suppose the annexation causes no harm to anyone, and that the resulting enlarged United States of America does a better job at protecting the full range of all its citizens' rights. Would the actions of the United States be morally permissible in this case? Altman and Wellman think not, and believe that many (liberals) will agree with them. Just as parents who satisfy a threshold of adequacy in raising their children enjoy a *pro tanto* moral right against others that they not interfere in their performance of that task, even if that interference would be better for both the parents and for the children, so too a group of people who are willing and able to work together to satisfy the demands of minimal justice domestically and internationally have a *pro tanto* moral right against others that they not interfere with their doing so. In both of these cases, the argument takes the form of a judgment or intuition that, above a certain threshold, it is more important that agents decide for themselves what is just or good than that they decide correctly.

While choice theorists concede that oftentimes it will be nations that satisfy the conditions for a moral right to secede, they reject the claim that *only* nations can do so. Moreover, on the choice account it is not the value of national flourishing that justifies a group's right to secede, but the value of each member of the nation exercising self-determination that does so. In some cases, individuals may choose to associate with one another, and only one another, for the purpose of promoting the flourishing of the nation to which they all belong. Yet the choice theorist maintains that we ought not to confuse a moral *justification* for a right to secede with an *explanation* of why actors who possess that right commonly choose to exercise it.

[13] Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009), p. 14.

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To fully appreciate the choice theorist's defense of a moral right to secession, it may be helpful to consider noninternational secessionist movements. Consider, for example, those residents of northern California and southern Oregon who wish to secede from their respective states and create a new one, named Jefferson. Or consider the numerous cases in which portions of a more local jurisdiction, such as a city or county, seek independence from that local jurisdiction. The advantage of reflecting on cases like these is that they typically involve neither an ongoing campaign of widespread human rights violations nor a clash between members of two or more nations. If we conclude that those who wish to secede in these cases have a *pro tanto* moral right to do so, then that is most likely because we accept the choice theorist's claim that people's freedom to associate with one another for political purposes ought to be restricted only when doing so is necessary to adequately protect human rights. It is not obvious why we should not extend this judgment to the question of international political secession, even if at present nations are the only groups that satisfy the choice theorist's conditions for possession of a moral right to secession, or the only groups with such a right that wish to exercise it.

The biggest challenge for the choice theory of a moral right to secession concerns the specification of those individuals who ought to have a vote in whether or not to secede. For example, who should have a say in Scottish secession from the United Kingdom? One possibility is all those who live in Scotland, regardless of their nationality. Another possibility is all and only Scots, regardless of where they happen to reside. A third possibility is all citizens of the United Kingdom. And there are many more possibilities. Absent a morally justifiable means for identifying the people with a right to participate in a plebiscite on secession, the choice theorists' view that the people ought to decide where international borders should be drawn remains incomplete.

Choice theorists argue that a recursive process of referendums provides a satisfactory solution to the problem of identifying who should have a say on secession. This process begins with an initial referendum held in a territory specified by the would-be secessionists. If a majority of those within the territory vote in favor of secession, then the creation of a new state on that territory should move forward. However, if there is any group within the territory specified by the original secessionists who do not wish to be a part of the new state, either because they wish to remain part of the original state or because they wish to create a new state of their own, then they may call for referendum on secession, and specify the part of the territory in which it is to be held. Subject to one condition, choice theorists maintain that this recursive process of voting on where state boundaries ought to be drawn should continue until every state includes only those who choose to associate with one another for political purposes. The condition is that the process of redrawing state borders must always result in states that are willing and able to protect and respect basic human rights. Satisfying this condition will surely impose some limits on how

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international boundaries are drawn, and as a consequence some individuals will likely be unable to realize the ideal of associating only with those with whom they wish to share citizenship. This will not constitute a wrongful setback to these individuals' exercise of self-determination, however, since the duty to respect others' basic human rights limits the domain in which people are morally permitted to live their lives as they choose.[14]

III THE TERRITORIAL DIMENSION OF SECESSION

Secessionists aspire to create a new, independent, state on a portion of the territory ruled by the state from which they wish to secede. But where should the borders of the new state be drawn? On what particular territory should a group with a right to political independence be free to exercise that right? A moral theory of secession must identify and defend specific criteria for delimiting the boundaries between the new state and what remains of the original state. The same is true for a morally defensible international legal norm governing secession.

Consider, first, a case in which a group acquires a right to secede because its members are victims of a systematic campaign of basic human rights violations perpetrated or tolerated by the state that rules them. As we noted in the previous section, most theorists maintain that this group enjoys a remedial right to secession, a moral permission to secede as a last resort means for protecting itself against these attacks. Since it is the protection of basic human rights that grounds the right to secede in this scenario, we might conclude that the borders of the new state ought to be drawn in whatever manner will best serve to advance that aim, both at present and in the future. This answer to the territorial question is consistent with the narrow moral focus of a remedial justification for secession, in that it is responsive only to certain minimal demands of justice, namely, basic human rights, and focused solely on the forward-looking goal of better realizing those minimal demands in the future. It attributes no moral importance to individuals' or group's attachments to particular places, except insofar as they figure in a calculation regarding the borders that will best serve the goal of advancing every person's secure enjoyment of his or her basic human rights.

Yet the moral rationale for a remedial right to secession may not necessitate the adoption of this narrowly focused answer to the territorial question. Recall that on the most common account of a remedial right to secede, it is the state's failure to govern in a manner that exhibits a principled commitment to respect for their basic human rights that entitles members of a targeted group to secede. In other words, the

[14] A comprehensive defense of the choice theory of secession will need to address other objections as well. Consider, for example, the claim that a group can secede only if the remnant state will still be able to protect and respect basic human rights. Why should it be the secessionists who have to limit their freedom of association in order to ensure that those left behind are able to enjoy their basic human rights? Why not maintain that other actors who could bear that burden, such as a moderately well-functioning neighboring state, also have a duty to do so?

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group comes to enjoy a liberty to create its own state as a result of the current state's failure to satisfy the conditions that give it a claim to rule that group. Perhaps, having lost the right to govern this group, the state also loses the right to govern whatever territory belongs to the group, or to its members. To defend this claim, we need to offer a non-statist account of attachment to territory; that is, an argument demonstrating that groups and/or individuals have certain moral claims to territory that, from a justificatory standpoint, exist prior to those of the state. That is, we need to show that a state has a right to rule a particular territory only if that territory "belongs" to (some of) the people the state has a right to rule. The rest of this section considers attempts to do just that. The crucial point here, however, is that if we can give a plausible account of what it is for a particular territory to "belong" to a particular agent, then we can use that account to help determine the borders of the territory on which a group with a remedial right to secede may create an independent state.[15]

In fact, few contemporary political and legal philosophers dispute the claim that a state enjoys a moral right to rule a particular territory T only if it serves as the legitimate representative of people, or a people, with a moral right to that territory. However, they disagree over how we ought to understand all of the key concepts in that claim. This includes the specific rights, liberties, powers, and immunities that together constitute a state's right to rule; the conditions a state must satisfy in order to count as a legitimate representative of a people; whether the moral right to territory is possessed by individuals or by a collective agent, or both; the properties in virtue of which an agent can come to possess a moral right to territory; and the content of the moral right to territory, such as whether it includes a claim to control who enters or settles in it. Since our interest in this section concerns where the borders of a new state created by an act of secession ought to be drawn, in what follows, I largely focus on competing accounts of the agents that can enjoy a right to territory, and why their bearing certain relationships to particular places give them, at a minimum, rights to occupy that territory. A right to occupy territory, as Anna Stilz characterizes it, has two components: (1) "a liberty right to reside permanently in a particular space and to make use of that area for social, cultural, and economic practices," and (2) "a claim-right against others not to move one from that area, to allow one to return to it [if one travels elsewhere], and not to interfere with one's use of that space in ways that undermine the located practices in which one is engaged."[16] While some

[15] The rationale for remedial secession, namely, improved protection of basic human rights, may entail that in some cases the borders of the new state should not encompass all and only the territory that "belongs" to the group, say because an alternative set of borders will provide more defensible boundaries and so make the termination of present hostilities and the prevention of future ones more likely. However, as the following discussion will make clear, the presumption that the new state should rule the territory that "belongs" to it, or to its members, provides an intuitively superior answer to the territorial question than does one that focuses solely on advancing the secure enjoyment of basic human rights.

[16] Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (Oxford: Oxford University Press, 2019), p. 35.

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philosophers of territorial rights defend thicker conceptions of the moral right to territory, for instance, ones that include control over the use of natural resources located within it, the thinner notion of a right of occupancy suffices to address the question of where a group with a right to secede has a *pro tanto* moral claim to create its own, independent, state.

As was the case for the moral right to political self-determination, we can distinguish between those moral theories that attribute the right of occupancy to a collective agent or group, and those that attribute it to individuals. One argument for the former, advanced by David Miller, begins with the following two claims.[17] The first we have already noted, namely, that states exercise rights over territory not on their own behalf but as the legitimate representative of an agent or agents who possess those rights. States are a particular type of institutional arrangement that can facilitate the exercise of moral rights over territory by the agent or agents who possess those rights. Second, states enjoy reasonably stable moral (and legal) rights over territory, in the sense that a state with a justifiable claim to rule territory T continues to enjoy that claim even as the individuals that compose the state's citizenry change over time. Together, these two claims entail that we must attribute moral rights over territory to a trans-historical agent other than the state, where a "trans-historical agent" is one that endures as the same agent across generations. Miller writes that "a group that fits this bill must be one whose identity is such that it can be transmitted across time, with newly arriving members being bound to the existing ones through an inherited understanding of the nature of the group."[18] Specifically, the inherited understanding of the nature of the group must treat membership in it as an essential component of its members' identity, a deep and seemingly inalterable fact about who they are, rather than a feature of their life or identity they can retain or discard more-or-less at will. Not surprisingly, Miller identifies nations (as well as indigenous peoples) as the most plausible candidate for such an agent. Margaret Moore argues along somewhat similar lines that a political people best satisfies the conditions for a non-state trans-historical agent capable of enjoying and exercising moral rights to territory.[19] A political people, as she characterizes it, is a collective agent composed of individuals who understand the nature of their group to be centered around an aspiration "to create or continue to maintain shared rules and procedures together," but who need not share a common national culture (for example, a common language) or take as a primary goal of their political self-determination the protection and promotion of a national culture.[20]

Miller argues that nations acquire a right to occupy a particular territory by interacting with it in ways that materially and symbolically transform it.[21] The

[17] David Miller, "Territorial Rights: Concept and Justification," *Political Studies* 60, 2 (2012): 258.
[18] Ibid.
[19] Margaret Moore, *A Political Theory of Territory* (Oxford: Oxford University Press, 2015), pp. 34–70.
[20] Ibid, p. 54.
[21] Miller, "Territorial Rights," 258–62.

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cultivation of land, including farming, grazing, and forest management, and the construction of infrastructure such as roads, dams, houses, and sports facilities are examples of transformations that add material value to a particular territory. The performance of acts that become central to the nation's historical identity, or the performance of rituals and practices that make specific territorial locations sacred, exemplify the creation of symbolic value. In some cases, the symbolic value a nation attributes to a particular place may explain and justify a prohibition on materially transforming it, as in the case of battlefields that are preserved in a state that approximates their appearance at the time the nation fought on them, or sacred mountains, lakes, or forests that are protected against development for (purely) material gain. These last examples illustrate one way in which a nation can enjoy a right to some place even while doing nothing that counts as changing or "improving" it.[22]

The value a nation creates when it materially and symbolically transforms a given territory is embodied in that place, Miller maintains, and therefore the nation must occupy the territory in question if it is to enjoy that value. This claim seems straightforward in the case of symbolic value. Without access to and control over places of historical or spiritual significance, members of a nation will be hard pressed to engage in the territorially located rituals of remembrance, celebration, or worship that bind them together, both within and across generations, and that reinforce and develop their shared conception of what makes for a valuable way of life. In the case of material value, however, we may wonder whether a nation might be compensated for the full value of its investment, as suggested by the example of one state paying another for the use of the latter's military base. But while this sort of exchange may be possible at the margin, it almost certainly will not be possible for the entirety, or even a sizeable portion, of the territory a nation has transformed. That is because the conduct whereby a nation acquires a right to occupy a given territory involves a two-way interaction between people and place: while the nation shapes the territory to meet its needs and desires, and to reflect its values, the territory also shapes the nation's culture, which is to say, how its members conceive of their needs and desires, and the appropriate ways in which to satisfy them. Membership in a nation involves participation in a distinct way of life, and the distinctiveness of that way of life reflects in part the ways in which the nation's culture has developed in response to its historic homeland. It may be possible in principle to give a nation specific or all-purpose material resources that are equal in value to the material value it has created in its homeland. However, this would not fully compensate the nation in the sense of leaving it no worse off, since making use of the new material resources instead of those in its homeland would almost certainly require radical transformations to the cultural and social practices that constitute the nation as the distinct people that it is.[23]

[22] See also Moore, *Political Theory of Territory*, p. 119.

[23] Relocation of indigenous peoples often fails to offer their members equal material value to that which they had created in their homelands, but even leaving that aside, the changes to the environment in which they can create material value – including farming, or manufacturing goods – are often

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Whereas Miller and, arguably, Moore both treat a collective agent as the primary bearer of a moral right to occupy a particular territory, and derive individuals' rights to do so from their membership in the relevant group, Anna Stilz takes the opposite tack and argues that individuals are the primary bearers of the moral right to occupancy, with groups enjoying rights to territory in virtue of their members having a joint interest in the pursuit of territorially located projects. The right to occupancy, Stilz argues, is grounded in, and serves to protect the interest individuals have in the pursuit of those life plans and projects that contribute to their living valuable lives. She notes that "most complex goals and relationships require us to form [and act on] expectations about our continued use of, and secure access to, a place of residence," one where we have "access to social practices and the physical spaces in which they unfold . . . [including] the workplace, the place of worship, the leisure or recreational facility, the school, [and] the meeting-house."[24] By engaging in projects or joining in social, cultural, and economic practices located in specific workplaces, places of worship, and other areas, actors acquire a right to occupy the space in which their life plans are territorially grounded. Since most people's life plans are in this way territorially located, nonvoluntary displacement from the territory a person occupies will typically inflict a major setback to his or her pursuit of the way of life he or she finds valuable or meaningful.

Stilz adds one crucial caveat to the claim that a person acquires a right to occupy some territory T by forming and pursuing a conception of the good territorially located in it. Only those whose "connection to the territory was established without any wrongdoing on his [or her] part, involving (at a minimum) no expulsion or wrongful interference with prior occupants" may thereby acquire a right to occupy that territory.[25] Those who seize control of a particular territory without a just cause and drive those living there into exile cannot establish a moral title to live their lives in that place, no matter how long they live there and how much their life plans become tied to it. In contrast, the invaders' children who are born and raised in territory T do acquire a moral right to occupy it, because they form and pursue located life plans in T and bear no moral responsibility for the wrongful expulsion of T's prior occupants. Their moral right to occupy T is a *pro tanto* one, however, and it must be balanced against the moral right of return possessed by those wrongly displaced from T and, under certain conditions, also possessed by their descendants. How the balance should be struck will depend on a number of factors the significance of which will likely vary from case to case. These include the current plight of those unjustly driven from T, as well as their descendants; the number of the descendants of the wrongful invaders who have developed life plans territorially

devastating to their ability to sustain their historical culture. See Moore, *Political Theory of Territory*, p. 41.

[24] Stilz, *Territorial Sovereignty*, pp. 41–2.

[25] Ibid, p. 84. Wrongful interference with prior occupants or infringements of others' claims to an equitable distribution of geographical space also preclude the acquisition of an occupancy right.

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grounded in T; the robustness of the relationships the descendants of the wrongful invaders have with the state that bears moral responsibility for the unjust expulsion; and the degree to which support will be forthcoming from that state to help the wrongful invaders' descendants build new lives if they are relocated to its rightful territory.

Stilz and Miller agree that those wrongly displaced from a given territory retain a right to return to it. They part ways, however, when it comes to the persistence of such a right for subsequent generations. Recall that, for Miller, it is nations who possess a right to occupy particular territories, with individuals enjoying a right to do so in virtue of their status as members of the nation. Moreover, Miller maintains that nations persist as a single agent through the changes to their membership that result from the deaths of one generation and the births of a new one. It follows from these two claims that as long as the features that entitle a nation to occupy a given territory persist, that nation retains a *pro tanto* moral right to return to the territory in question, even if none of its current (that is to say, living) members has ever lived there. Insofar as many of the material transformations wrought by a nation's interaction with a given place are likely to persist for quite some time, and certain symbolic transformations may well persist as long as the nation does, Miller's account of occupancy rights entails that several generations of a nation wrongly expelled from its homeland enjoy a moral claim to return to it. Yet as Miller notes, those who have settled in the territory in question will also engage in activities that materially and symbolically transform it, and in doing so acquire a claim to occupy that territory. The claims of both nations (or perhaps three or more nations) will need to be balanced against each other, with "occupancy and use of land over a long period eventually [coming] to trump the territorial claims of the original [rightful] possessors."[26]

For Stilz, individuals have an interest in occupying a particular territory only if their life plans are territorially grounded in it. Since the descendants of those wrongly expelled from territory T have never lived there, and so have not developed life plans located in it, they have no right to reside there. Rather, if these individuals have developed territorially grounded life plans elsewhere, say in the territory to which their parents or grandparents fled, then that is the territory in which they enjoy a moral right of occupancy (and the state that rules that territory is the one in which they ought to enjoy legal citizenship). Contra Miller, then, on Stilz's account the children of those wrongly driven from territory T may lack any moral claim to occupancy of it. In some cases, however, the descendants of those unjustly displaced from a given territory may be unable to develop located life plans elsewhere. This is true for many of those born and raised in refugee camps, for example. These individuals have a moral claim against the state responsible for the expulsion of

[26] David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), p. 220.

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their ancestors to assistance in acquiring permanent territorial residence *somewhere*, but not necessarily in the territory their forebears once occupied. Again, since the people in question have never lived in that territory, and since Stilz treats occupancy as valuable for the contribution it makes to forming and pursuing *some* valuable way of life, but not necessarily the way of life one most desires, her account offers no principled basis for these refugees to demand that they be permanently settled where their ancestors lived. Thus, a state that bears responsibility for the resettlement of second-, third-, or fourth-generation refugees may be able to discharge it by paying another state to take them in and grant them full legal citizenship. In practice, however, such a solution may be unavailable, and in that case the state will be morally required to settle the refugees on the territory it currently rules, or perhaps a portion of it on which the refugees can establish their own independent state.

The issue of a right of return is important in its own right, of course, both as a matter of justice and as a matter of international law. I consider it here, in the context of a discussion of the territorial dimension of a right to secession, because the stark differences between Miller's and Stilz's competing accounts of the right of return clearly illustrate how much turns on whether we endorse one or the other of their accounts of the moral right of occupancy. For either one of these theories, it may be that any plausibility we attribute to it when reflecting on the question of where a group with a right to secede may create an independent state swiftly disappears when we consider what that theory implies for the possession of a moral right of return.

IV SHOULD INTERNATIONAL LAW INCLUDE A PRIMARY RIGHT TO SECESSION?

No political or legal philosopher claims that it follows straightforwardly from the fact that a group has a moral right to secede that it ought to enjoy an international legal right to do so.[27] Rather, there appears to be a widespread consensus that we ought to select among competing proposals for an international legal norm governing secession by considering how well each will contribute to advancing the proper goals of a morally defensible global political order. Of course, in spite of their agreement on this methodological point, we might expect defenders of different moral theories of secession to endorse different international legal norms governing secession, insofar as they disagree over the proper aims of a morally defensible international law. But, in fact, this is not the case. Those who argue against reforming international law to include a primary right to secession need not, and often do not, deny that advancing or respecting the exercise of political self-determination is a proper goal of a morally defensible international law.[28] Rather, they maintain only that at present modifying

[27] Much of the text in this section and the one that follows are reprinted by permission from Springer, *Law and Philosophy*, "International Law, Institutional Moral Reasoning, and Secession," David Lefkowitz, 2018.

[28] Of course, they may argue against *particular accounts* of the value of political self-determination.

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international law so that it includes a primary right to secede will not actually serve this goal, or that it will it also encourage an intolerable increase in violent conflict and the violation of basic human rights.

As we will see, advocates of reforming international law to include a primary right to secede adopt one of two strategies to respond to this line of argument. First, they directly challenge the claim that the reform to international law they champion will lead to an increase in the incidence of basic human rights violations and/or a reduction in the exercise of any form of political self-determination, including not only in newly independent states but also in the form of various intrastate autonomy arrangements. Second, they maintain that we lack the data necessary to draw reliable conclusions regarding the effects that competing rules governing secession will have on the advancement of peace, respect for basic human rights, and the exercise of political self-determination. Therefore, they argue, we ought to refrain from making any claim regarding the international legal norm that, at present, ought to govern secession.[29]

Allen Buchanan contends that the morally optimal international legal norm in a nonideal world like ours permits secession only as a remedy for (a) forcible annexation by another state, or (b) as a last resort response to serious and persistent violations of basic human rights.[30] His case for a remedial right-only norm rests centrally on the claim that it gets the incentives right. For example, Buchanan alleges that such a norm will encourage state officials to respect the basic human rights of their subjects, since the failure to do so will create a legal path to the loss of some of the territory over which they currently rule. A remedial right-only legal norm may also promote greater intrastate autonomy, if its explicit restriction of a unilateral legal right to secede to victims of forcible annexation or gross violations of human rights makes states more willing to devolve political power to regional or local government. Were a remedial right-only legal norm to have such an effect, it might well serve to advance the political self-determination of territorially concentrated groups, and perhaps their secure enjoyment of basic human rights as well. In contrast, Buchanan contends that a primary legal right to secession, whether nationalist or plebiscitary, will likely fare worse at both encouraging peace and respect for basic human rights and fostering political self-determination. With respect to the former, he notes that historically attempts to unilaterally secede are nearly always accompanied by violence, and at least in the case of national or ethnic groups, frequently involve campaigns of ethnic cleansing that can become genocidal. As for

[29] Obviously, these two strategies are incompatible; the first relies on empirical premises the second strategy argues we cannot currently defend. All that follows, however, is that we cannot embrace both strategies.

[30] Buchanan, *Justice, Legitimacy, and Self-Determination*, pp. 353–9. See also Norman, "Ethics of Secession," 41–3; Steven R. Ratner, *The Thin Justice of International Law* (New York: Oxford University Press, 2015), pp. 160–1. Sometimes, Buchanan includes as a separate ground for secession major violations of intrastate autonomy agreements, which suggests an attribution of noninstrumental value to political self-determination.

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political self-determination, Buchanan suggests that the creation of a primary legal right to unilateral secession would likely discourage states from devolving political power to regional governments and/or investing in regions' economic development, or from facilitating internal migration, immigration, or asylum, all out of fear that doing so might eventually lead to secession and so the state's loss of territory and population. In short, a more permissive legal norm governing secession would likely do a worse job of advancing those values a morally defensible international legal order should aim to advance.

Altman and Wellman challenge a number of these arguments.[31] First, they point out that even in the absence of any international legal right many states already refrain from devolving political power to regional governments and/or fostering economic development in those regions because they fear it will lead to secession. It is not obvious, therefore, that the creation of a primary international legal right to secession would lead to an increase in such conduct, and if so, how large the increase would be. Second, they note that the devolution of political power to substate regional governments has sometimes served to pacify separatist desires. It is possible, therefore, that those who aim to preserve the existing state will conclude that they are more likely to realize this end by promoting intrastate autonomy than by persisting with centralized rule. If so, then state officials may elect to devolve political power to regional governments even if international law includes a primary right to secession.[32] Finally, Altman and Wellman suggest that the creation of a primary international legal right to secession may strengthen nationalist or would-be plebiscitary groups' bargaining power vis-à-vis other groups within the state, which may enable them to negotiate domestic political and legal arrangements that better advance their secure enjoyment of basic human rights and/or political self-determination. In other words, contrary to Buchanan's claim, the legal ability to threaten secession might actually facilitate intrastate autonomy.

Elsewhere, Wellman argues that Buchanan fails to build an empirical case strong enough to overcome the presumption that law ought to track morality, and so with respect to secession, that international law ought to accord any group willing and able to perform the functions that justify the state a primary right to secede:

> Even if Buchanan is right that international laws protecting primary rights to secede could generate some perverse incentives, it is not at all clear how much weight to give to this consideration. The fact that some of these incentives will exist whether or not the international legal system protects primary rights and that there would

[31] Altman and Wellman, *Liberal Theory*, pp. 58–65.

[32] However, some empirical work suggests that devolution increases rebellion where there is significant economic inequality between regions, and where territorially concentrated ethnic or national groups are largely excluded from national government (Kristin M. Bakke and Erik Wibbels, "Diversity, Disparity, and Civil Conflict in Federal States," *World Politics* 59, 1 (2006): 1–50). If far more states are characterized by the presence of this kind of economic inequality and political representation than are not, then only rarely will states have good reason to pursue the devolution of political power as a means to head off secession.

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> also be some *positive* side effects of institutionally recognizing these moral rights makes it questionable whether Buchanan's concerns are decisive. However, because moral rights hang in the balance, there are two things about which we can be confident: that the burden of proof to establish the empirical fact of the matter lies squarely on the shoulders of those who would *restrict* these moral rights and that it would not be sufficient to show that there is merely a slight advantage in favor of restricting these rights.[33]

Consider, first, Wellman's claim that because moral rights hang in the balance, those who would restrict the moral right to political self-determination bear the burden of demonstrating that such restrictions are necessary to protect people's basic human rights. Why not adopt the opposite position, namely, that when individuals' rights not to be murdered, raped, tortured, assaulted, and forcibly displaced are at stake, the burden of proof lies with those who advocate for greater institutional protection of the moral right to political self-determination (or secession) to demonstrate that this will not increase the incidence of such morally atrocious behavior? When what is at issue is a tradeoff between individual moral rights and a socially beneficial outcome, such as greater material prosperity, it may well be justifiable to claim that those who would restrict some people's moral rights bear the burden of demonstrating that doing so will produce the socially beneficial outcome they maintain will result. Perhaps the same is true when the tradeoff is between a very weighty right and one that is considerably less important. However, where very weighty rights exist on both sides of the balance, as appears to be true in the case of secession, it is hard to see what could justify placing the evidentiary burden on either side to the dispute.

Buchanan argues that we ought to limit the legal right to secede to a remedial right because a more permissive right will lead to an increase in violent conflict and the violation of basic human rights. Therefore, I interpret Wellman's talk of the "slight advantage" resulting from a restriction on the moral primary right to secede to be an increase in peace and/or the number of people whose basic human rights go unviolated. The question, then, is how great an increase in the incidence of murder, rape, torture, and so on, we should be willing to tolerate in return for an increase in the exercise of political self-determination, either in an independent state or as a result of various types of intrastate autonomy arrangement. Our answer might well depend on how life goes for those denied political self-determination, or as much political self-determination as they desire, as a result of international law not according them a primary right to secede. For example, if all of these individuals enjoy full citizenship in moderately just liberal-democratic states, then we might well conclude that it would be unjust to expose even a few people to rape or assaults they would otherwise not suffer, just so that these individuals could enjoy greater

[33] Christopher Wellman, "The Morality of Secession," in *Secession as an International Phenomenon: From America's Civil War to Contemporary Separatist Movements*, ed. Dan H. Doyle (Athens, GA: University of Georgia Press, 2010), p. 34.

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political self-determination. Even if we begin from the world as it is, some people may still doubt that an increase in the exercise of political self-determination, independent of the contribution it makes to advancing the secure enjoyment of basic human rights, warrants the adoption of a legal norm that will also cause even a very small increase in the violation of basic human rights. But, perhaps more importantly, it is not clear that any answer to a very abstract question regarding acceptable tradeoffs between various rights will be of much use in settling disputes over which actors should enjoy an international legal right to secede, and the conditions under which they should enjoy that right. That is because we might all agree on the answer and yet disagree about what will actually occur if we adopt a particular international legal norm governing secession. For example, we might all agree that the prevention of 100 instances of rape or torture does not suffice to justify the failure to accord to all those groups willing and able to perform the functions that morally justify the state an international legal right to do so. However, we might disagree about how many more cases of rape and torture will actually occur if we reform international law so that it includes a primary international legal right to secede, with some hypothesizing that it will be 100 or fewer, and others hypothesizing that it will be far more than100. In short, the case for a remedial or for a primary legal right to secede, or for that matter against any legal right to secede, can only be made on the basis of empirical arguments regarding the likely consequences of adopting (or keeping) such a law.

In their coauthored discussion of secession, Altman and Wellman acknowledge this point, and so offer a different response to Buchanan's claim that a remedial legal right to secession gets the incentives right, while a primary legal right does not. Both Buchanan's arguments and their own provide plausible hypotheses regarding the effects of adopting one or the other of these international legal rights, and each party can point to some empirical evidence in support of their hypotheses. However, they maintain that the overall quantity and quality of the available data does not warrant any specific conclusions regarding the incentive effects of different international legal norms governing secession.[34] Rather, Altman and Wellman contend that the only defensible view is agnosticism: "[J]udgment should be suspended on any conclusion about a right to secede under international law until those potential consequences are far less uncertain than they are at this stage in the scholarly discussion of secession."[35] Yet while the theorist can rest content with such a conclusion, the political actor cannot; his or her agnosticism does not suspend judgment but leaves intact an international legal order that strongly discourages unilateral secession. Our question then, is this: assuming, arguendo, that Altman and Wellman's agnosticism is well founded, what course of action should be taken by those political actors who could influence reform to, or the preservation of, international law's current stance vis-à-vis secession?

[34] Altman and Wellman, *Liberal Theory*, p. 64.
[35] Ibid, p. 59.

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One possibility is that they should focus their limited resources elsewhere; for example, on efforts to reform international legal norms where we have data that warrants significantly greater confidence that this will lead to an increase in international law's advancement of its proper moral goals.[36] While this strategy should not be dismissed out of hand, it also seems unsatisfactory given the prevalence of secessionist movements, the number of violent conflicts to which they give rise, and the frequency with which secession is mooted as a solution to internal conflicts (regardless of whether they originated in a quest for independent statehood).[37] A second possibility, therefore, is to employ a precautionary approach when arguing for the superiority of a specific international legal norm governing secession over its rivals.

The question of how to formulate a precautionary principle so that it is both precise enough to be action guiding while also compelling as a principle of rational choice is a vexed issue. However, Stephen Gardner finds a plausible candidate for a core precautionary principle in John Rawls' characterization of the conditions under which maximin reasoning is appropriate.[38] Roughly, such reasoning involves focusing exclusively on avoiding certain evils. Gardner (and Rawls) maintain it is rational to employ maximin reasoning when an actor faces a choice under uncertainty, cares little for the potential gains he forgoes relative to the minimum he aims to secure, and views the failure to secure that minimum as unacceptable or catastrophic.[39] Arguably, these three conditions are met when it comes to the selection of a legal norm governing secession. First, if Altman and Wellman correctly maintain that we should have no confidence in predictions regarding the outcomes different legal norms governing secession will produce, then in deciding whether we should retain the existing norm or instead seek to replace it with a more permissive one we choose under uncertainty. Second, there appears to be a fairly widespread consensus (at least among liberal political and legal theorists) that peace and the secure enjoyment of basic human rights enjoy a kind of priority over the noninstrumental value of political self-determination.[40] That priority need not be

[36] The same is true for those who aim to influence the conduct of political actors, including theorists of international law and justice.

[37] A 2003 study found that about half the civil wars since the end of the Cold War involved rebels seeking to secede or gain substantial intrastate autonomy, while a 2001 study found that roughly 70 percent of civil wars since 1945 were ethno-nationalist in nature. See David S. Sirosky, "Explaining Secession," in *The Ashgate Research Companion to Secession*, eds. Aleksander Pavkovic and Peter Radan (Burlington, VT: Ashgate Publishing, 2011), pp. 45–79 for citation to these and others studies that demonstrate the centrality of secession movements to the incidence of armed conflict.

[38] Stephen Gardner, "A Core Precautionary Principle," *Journal of Political Philosophy* 14, 1 (2006): 45–9.

[39] "Uncertainty" here is a technical term denoting the impossibility of attaching probabilities to any of the possible outcomes.

[40] Altman and Wellman, for example, explicitly grant that where realizing peace and human rights is incompatible with a legal right to secession the latter right must give way (Altman and Wellman, *Liberal Theory*, p. 56). Further support for the claim that we care far more about peace and the secure enjoyment of basic human rights than we do about political self-determination can be seen in the large literature arguing for armed responses to aggression and gross violations of human rights, but

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lexical, but we must care relatively little about the advancement of political self-determination in comparison to our concern for setbacks to peace and the secure enjoyment of basic human rights. Third, and finally, the gross violation of basic human rights and, typically, war (or widespread violence) constitute a catastrophic or unacceptable outcome.[41] There is some reason, then, to think that in the present circumstances we ought to adopt a precautionary approach to theorizing secession, and this requires that we exclude from our deliberations any argument for a candidate norm premised on advancing or honoring the noninstrumental value of political self-determination. In other words, the precautionary approach entails that we ought to select among competing candidates for a legal norm-governing secession solely on the basis of which one we believe will best serve to advance peace and the secure enjoyment of basic human rights.

The precautionary approach appears to favor a remedial legal right over both the nationalist and plebiscitary primary legal rights to secession. The former tracks and responds to all and only those goals on the basis of which we ought to assess candidate norms *given our current knowledge*, whereas the attractiveness of the latter rights lies in their serving to advance political self-determination even in cases where doing so is not necessary to secure peace or individuals' basic human rights. But this is precisely the consideration that the precautionary approach requires we exclude from our deliberation. Of course, primary right theorists might respond that their favored legal norm will do better at advancing peace and human rights than will a remedial right to secession. To do so, however, would be to concede that their ideal theoretical accounts of the moral right to secede, which are grounded in the value of political self-determination, contribute nothing to the moral task of evaluating and possibly reforming existing international law. More importantly, it is hard to see why an international legal norm that is not specifically designed to advance the goal of peace and the secure enjoyment of human rights would do better at achieving that end than would a legal norm that is specifically designed to do so.

V SHOULD INTERNATIONAL LAW INCLUDE A REMEDIAL RIGHT TO SECESSION?

Even if a remedial right to secession will better serve the goal of advancing peace and the secure enjoyment of basic human rights than will a primary right, it may still prove inferior in this respect to international law's current stance on unilateral secession, namely, that outside the colonial context no group enjoys a legal right to unilateral secession. Consider, for example, Buchanan's characterization of a remedial right to secession: a territorially concentrated group may unilaterally

hardly any arguments at all for armed intervention in support of political self-determination for groups that have been neither recently forcibly annexed nor subject to gross violations of their human rights.

[41] I say "typically" because war may sometimes be morally permissible, although, arguably, most actual wars are not.

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secede only if it is the victim of (a) forcible annexation by another state, or (b) serious and persistent violations of basic human rights. With regard to the examples Buchanan offers to motivate his case for a remedial right to secession for victims of forcible annexation, there is no need to reform international law to accommodate the intuition that these political communities had a right to statehood.[42] Where one state's forcible annexation of part or all of another state's people and territory goes unrecognized as a matter of international law, the victims retain their preexisting legal right to independent statehood. This was true of the Baltic States, for instance, which were illegally occupied by the Soviet Union between 1940 and 1991. Neither do we need a remedial right to secession to account for new states produced by the dissolution of a state, as in the case of the successor states to the USSR and Yugoslavia. Rather, the original state's loss of sovereignty over people and territory as part of its dissolution creates the necessary legal space in which the new, successor, states can arise.[43] A graver concern with a legal right to unilateral secession for victims of forcible annexation is that if it applies retroactively (that is, to forcible annexations carried out prior to the incorporation of a remedial right to secession into international law), it will invite or exacerbate violent conflict. Few if any borders were established in a manner free from injustice. In theory, this cost might be outweighed by the deterrent effect the remedial right would have on potential future forcible annexations. Yet, as noted above, contemporary international law already precludes the acquisition of sovereignty over territory and people through forcible annexation, and therefore already provides whatever deterrence might be achieved by the creation of a right to unilateral secession for victims of forcible annexation.

We should also be skeptical of a deterrence argument for a remedial right to secession in the case of serious and persistent violations of basic human rights perpetrated or condoned by the state. Presumably, the territorially concentrated victims of such a campaign of human rights violations will do whatever they can to stop it, including the use of force, regardless of whether they have a legal right to secede. Whatever deterrent effect the likelihood of such resistance provides will be unaffected by international law granting the victims a legal right to secede. Third parties, or at least other states, already enjoy a legal permission – indeed, a responsibility – to aid victims of systematic and persistent violations of their basic human rights by their own state, one that some argue includes the provision of military supplies and even armed intervention.[44] Neither should we forget that

[42] See, for example, Allen Buchanan, "Secession," section 2.2, *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/fall2017/entries/secession/.

[43] See the discussion of the Badinter Commission's findings vis-à-vis the new states that emerged on the territory formerly ruled by Yugoslavia in Matthew Craven, "Statehood," in *International Law, 4th Edition*, ed. Malcolm D. Evans (Oxford: Oxford University Press, 2014), p. 231.

[44] On the Responsibility to Protect, see paras. 138–9 of the 2005 World Summit Outcome Document, available at www.globalr2p.org/media/files/wsod_2005.pdf (accessed December 18, 2019).

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international law already sanctions a number of practices that can be used to deter states – or better, government officials – from perpetrating gross violations of (some of) their subjects' basic human rights, including economic sanctions and international criminal charges. Taking all of these considerations into account, it seems highly unlikely that the fact that their conduct would create a legal right to unilateral secession for their victims would make the difference in state officials' decision not to engage in systematic and widespread violations of some of their territorially concentrated subjects' basic human rights.

Moreover, even if we concede *arguendo* that a remedial right to secession would make a small contribution to deterring violations of basic human rights, we must also take into account any incentives for perpetrating such violations this right would create. Donald Horowitz argues that were international law to include a right to remedial secession some would-be separatists would be motivated to provoke the state that rules them into violent crackdowns against their group, in the hope of acquiring a legal right to secede.[45] There is some evidence that exactly this line of thought motivated the Kosovo Liberation Army's conduct in the late 1990s.[46] Nino Kemoklidze argues that the recognition of Kosovo as an independent state by some members of the international community created a moral hazard subsequently realized in the separatist conflict in South Ossetia.[47] Others might add attempts at secession in Abkhazia and Eastern Ukraine. Of course, we must be careful here; actual examples of such conduct will not show that recognition of a legal right to secession would increase their incidence, since they occurred in the absence of such a right. Nevertheless, they do provide evidence that some actors seeking independence are prepared to instigate great violence against the very people whose interests they claim to be seeking to advance. Therefore, we should be wary of legal reforms that might encourage these actors to pursue such a course of action, particularly if we have compelling reasons to doubt those reforms will produce much good.

Perhaps a remedial right to secession can be defended on the grounds that its successful exercise will decrease the occurrence of gross human rights violations perpetrated by states against some subset of their subjects. Where such a campaign has taken place, it might be thought that the likelihood that the perpetrators and the victims will be able to coexist as equal citizens of even a federal state is less than the likelihood that they will be able to coexist as citizens of two, independent, states. Whether this is true depends on a host of factors, however. For example, the division

[45] Donald Horowitz, "A Right to Secede?" in *Secession and Self-Determination*, *NOMOS XLV*, eds. Stephen Macedo and Allen Buchanan (New York: New York University Press, 2003), pp. 50–76.

[46] See Alan J. Kuperman, "The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans," *International Studies Quarterly* 52, 1 (2008): 49–80. For a contrary view, see Alex J. Bellamy and Paul D. Williams, "On the Limits of Moral Hazard: The Responsibility to Protect, Armed Conflict, and Mass Atrocities," *European Journal of International Relations* 18, 3 (2012): 539–71.

[47] Nino Kemoklidze, "The Kosovo Precedent and the 'Moral Hazard' of Secession," *Journal of International Law and International Relations* 5, 2 (2009): 117–40.

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of the original state may give rise to irredentist conflicts, or to systematic persecution of members of one group that remain "trapped" within the territory of the state in which the other group is a majority. Indeed, a recent study concludes that partition does not prevent the recurrence of civil war.[48] More importantly, whether a single- or two-state solution is most likely to reduce the likelihood of conflict in the future depends on a variety of factors that vary from case to case.[49] Perhaps, then, a morally defensible international law ought to give international actors greater flexibility to determine in each case which course of action will best serve to advance peace and the secure enjoyment of basic human rights. By this measure the existing international legal norm governing secession may be superior to one that would create a remedial right. While the current norm recognizes no right to unilateral secession it does permit consensual secession, even in cases where that takes place in conditions that could hardly be described as voluntary. The secession of South Sudan provides a contemporary example; Eritrea is a slightly older one.

Of course, this argument entails that a group whose members have been subject to gross violations of their basic human rights by the state that rules them are largely at the mercy of other states' willingness to pressure their state into holding referendum on secession. Surely, the fate of these victims should not rest on power and interest; rather, they should enjoy an entitlement, a right, to their own state. While understandable, this reaction may prove mistaken for two reasons. First, whether a group ought to enjoy an international legal right to secession depends on the contribution a norm according groups of that type such a right will make to the advancement of peace and the secure enjoyment of human rights. The mere observation that a candidate legal norm will leave certain actors dependent on politics does not suffice to show that the norm is morally indefensible. Despite that fact, the norm may still be the best means to achieving the aforementioned goals, even if, in this context, "best" means only "bad, but not as bad as the feasible alternatives." Second, it may be a mistake to oppose law and politics, and to think that the creation of a legal right to remedial secession offers an alternative to power and interest – to politics – as a means for achieving peace and the secure enjoyment of basic human rights. Law can serve to channel politics, to shape its exercise, but so too power and politics shape the form and exercise of law, as would no doubt be true were international law to incorporate a remedial right to secession. What we must aim for, therefore, is not the replacement of politics with law but the optimal mix of law and politics. The claim here is that at present it is the existing international legal norm governing secession that does so, not a remedial right.

[48] Nicholas Sambanis and Jonah Schulhofer-Wohl, "What's in a Line?" *International Security* 34, 2 (2009): 82–118.

[49] Among myriad factors that Sirosky identifies in his three level analysis of the causes of secession are political grievances, economic inequality, ethno-demography, ethno-geography, the state's institutional capacity and strength, state policies of repression and inclusion, and other states' strategic interests. See Sirosky, "Explaining Secession."

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The foregoing considerations add up to a plausible case for the conclusion that, at least at present and for the foreseeable future, international law will better serve to advance peace and the secure enjoyment of basic human rights if it includes no right to secession than if it includes a remedial one. These arguments are conditional on empirical premises, of course. The complexity of the phenomena in question and the limits on our ability to control the many variables that are plausibly thought to contribute to the incidence of demands for secession, as well as the use of violence to advance or respond to such demands, warrants considerable modesty when drawing a conclusion based on such claims. As we noted earlier, however, we must choose some norm to govern secession, and can only do so on the basis of the best information currently available to us.

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